CHAPTER - VIII

Liability and Compensation

As much as a violation of international law entails consequences for the State which committed an international offence or connived in the commission, and possibly for the wrongdoer too who may be held personally liable, a violation of the fundamental right relating to freedom from torture, or cruel inhuman treatment or degrading punishment enshrined in Article 11 of the Constitution of Sri Lanka invariably entails consequences for the State and also in certain circumstances it entails personal or individual responsibility for the person or agent of the state who actually committed such violation. This position which can apply to violation of any fundamental right enshrined in the Constitution is clearly exemplified by authoritative judicial pronouncements in respect of the fundamental right relative to the freedom from torture, or cruel inhuman treatment or degrading punishment.

The basis on which liabilities are imputed to the State responsible for the violation of the article and to the individual who actually committed it is unclear under International Law, as it is under the Constitution of Sri Lanka. Liability of the State however attaches to the State on the basis of strict liability for a contravention of fundamental rights. The juridical nature and dimension of the liability of the State has come up for consideration in a number of cases in Sri Lanka. The basis of the liability of the state in a case of violation of this fundamental right has given rise to divergent views among judges. His Lordship Justice Fernando in the case of ***Saman v Leeladasa***[1] adopting a vicarious liability approach to the question determined the juridical basis of the liability by reference to statutory or common law of tort. His Lordship Justice Amerasinghe however, in the same, case, preferred to treat the violation of the fundamental right as something *sui genesis* created by the constitution and not as a delict.[2]

His Lordship Justice Wanasundera expressing similar sentiments in the case of ***Velmurugu v. AG and others*** observed, "we are here dealing with the liability of the State under public law, which is a new liability imposed directly on the state by the constitutional provisions. While the decisions relating to the vicarious liability of a master for the acts of his servant may be useful to the extent that all cases where the master can be liable in tort would undoubtedly impose liability on the state under constitutional provisions, the converse need not be true unless we give restricted interpretation to constitutional provisions. The common law test of tortuous liability therefore cannot provide a sufficient test and we have to look elsewhere for the appropriate principles"[3]. In the same case, His Lordship Sharvananda discarding a vicarious liability approach of the law of tort determined that it is liability of the state itself. He proceeded to ascribe to the State[4] the act of the perpetrator who committed violation of this fundamental right. His Lordship Justice Soza too emphasizing liability of the State in ***Vivienne Gunawardena v. Hector Perera and others*** observed "Public authorities clothed by law with executive and administrative power are organs of the State and (an officer) using the coercive ... power vested in him by law acts as an organ of the State. As much as the State is served when he enforces the law the State is liable for the transgressions of fundamental rights he commits when he enforces the law"[5]. On another occasion his Lordship Justice Amerasinghe in the case of ***Samantileka v. Ernest Perera*** and other stated that "The state necessarily acts through its servants, agencies, institutions. But it is the liability of the state and not that of his servants, agents or institutions that is in issue. It is not a question of vicarious liability. It is the liability of the state itself"[6].

The examination of Indian authorities also shows that liability for infraction of fundamental rights has been imposed primarily on the state. Justice J.S. Verma in the case of ***Nilabati Behara v. State of Orissa*** commented "The liability of the State of Orissa in the present case to pay compensation cannot be doubted. Rightly it was not

disputed by the learned Additional Solicitor General. It would however be appropriate to spell out the principle on which the liability of the state arises in such cases for payment of compensation, and the distinction between this and liability in private law for payment of compensation in an action of tort. It may be mentioned straightaway that an award of compensation in a proceeding under article 32 by this court or by High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law and in an action based on tort.

"...the distinction between the two remedies needs to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings[7]".

Justice Dr. A.S. Anand in his concurring judgment expressing his views in regard to the nature of liability attached to the state, in cases of violation of fundamental rights stated thus. "The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basis and indefensible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 of 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by penalizing the wrongdoer and fixing liability for the public

wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen.[8]"

Although there is no juridical consensus as regards the basis of liability, majority of judges in Sri Lanka have approached the issue of liability as *sui genesis* under public law, while a minority has considered the liability delictal in nature. Nevertheless, no decision has been handed down declaring either expressly or impliedly that no liability is attached to an actual wrongdoer who committed violation. Regardless of juridical basis of liability, the court has been granting relief against the state as well as the offending public officer in respect of transgressions committed by executive or administrative action for violation of Article 17 of the Constitution making the delinquent officer also contribute towards compensation awarded. Therefore in certain circumstances offending officials have also been directed to make amends by ordering them to contribute a part of the compensation awarded personally, as exemplified in the case of ***Saman v. Leeladasa.***[9]

In an application made in respect a violation of a fundamental right relating to freedom from torture, inhuman treatment and degrading punishment under Article 126(4) of the Constitution of Sri Lanka, the Supreme Court has power to grant such relief or make such direction as it may deem just and equitable in the event of the infraction of the fundamental right being established to satisfaction of court. The particular article however does not explicitly state as to what such remedy may consist of. The right to an effective remedy in a violation of a basic human right is not only a fundamental principle of international law but also a pillar of the rule of law. Most global, regional human rights instruments and treaties and national constitutions provide in express and explicit terms the right to an effective remedy in the event of a violation being established to the satisfaction of court or other tribunal. In most of the cases under international law, the remedy may consist of both a procedural safeguard such as the right to a fair

hearing before an independent judiciary or other tribunal vested with authority to review complaints of violation and a substantive right to reparation which may take either the form of restitution or compensation or both. Besides these reliefs, in appropriate circumstances, where the court or tribunal, vested with authority to inquire into a complaint so determines, it may insist on formal acknowledgement and expression of regret, or other preventive measures to deter the recurrence of the violation which the state is found to have committed under international law. Therefore the awarding of compensation by way of relief in appropriate cases for infringement of fundamental rights is not only an accepted proposition in most jurisdictions, but also a right which can be enforced. Paradoxically, the ICCPR which have explicit provisions for compensation in case of violation of rights such as unlawful arrest, detention and punishment as a result of miscarriage of justice, have no similar provisions for compensation in respect of non-derogable rights relating to freedom from torture, inhuman treatment and degrading punishment. That this has not precluded a state from granting compensation in appropriate circumstances is exemplified by the case of **Miguel Angel Estrelleg.**[10] Even where such awarding of compensation as expressly permitted in respect of an injury caused to an individual, the wrongful act which gives right to liability is conceived of as an act committed by one state to the detriment of another state. It was to the claimant state, normally, that reparation is made.

The relief that the Sri Lankan Supreme Court is empowered to grant under Article 126(4) of Constitution takes the form of one or more of the following. Although the Article does not specifically refer to pecuniary compensation, payment of compensation is perhaps one of the important ways of redressing an infraction of a fundamental right guaranteed by the Constitution. A declaration of the infringement of one or more fundamental rights in respect of which the petitioner or the victim claims relief, compensation or/and cost, is another way. In addition to the above mentioned relief, a petitioner may in certain

circumstances ask for a specific direction from court quashing or setting aside a decision or order made by the respondent in contravention of the fundamental right consequent to which the petitioner has been subjected to torture, inhuman treatment or degrading punishment. The court also may, in appropriate cases, issue directions like mandatory orders compelling the respondent to perform a specific act or insist on compliance with specific orders such as producing the victim subjected to torture before a judicial officer, or releasing from unlawful custody. The court in certain circumstances can also direct a person subjected to torture to be examined by a medical officer, or direct the respondent to produce relevant documents for judicial scrutiny.

The right to compensation has also been unreservedly and explicitly recognized by the Indian judicial authorities although the Government of India at the time of ratification of ICCPR in 1979 made a specific reservation that the Indian legal system does not recognize a right to compensation to victims of unlawful arrest or detention. However this reservation has lost its significance now in the context of decisions made by the Indian Supreme Court under the Indian constitution awarding compensation for infringements of fundamental rights to life of citizens. For example, although there is no express provision in the Constitution of India to grant compensation in cases of violations of the fundamental right to life, the court has, by a process of judicial interpretation, evolved a right to compensation in cases where the constitutional right relating to personal liberty and life have been violated. The authoritative pronouncements made by Judges in the case of ***Nilabeli Behra v. Union of India***[11], of ***Rudul Shah v. State of Bihar***[12] and of ***Sebastian M. Hongray v. Union of India***[13], amply exemplify this position.

Article 126(4) of the Sri Lanka Constitution confers extensive powers on the Supreme Court. His Lordship Justice Wanasundera making reference to the article has observed in the case of

Thedchanamoorthy v. A.G. in the following terms: "We have no doubt whatever that our jurisdiction in this regard is most extensive"[14]. Nevertheless, it cannot be assumed that the Supreme Court has been conferred unfettered powers in respect of the relief that it may grant in the event of a violation of the fundamental right relating to freedom from torture. Relief granted should be just and equitable, in its opinion, having regard to circumstances. Although the phrase 'just and equitable' has not been judicially analyzed, interpretation given to the phrase in another context would be useful to get an idea. His Lordship T.S. Fernando in ***Richard Peiris & Company v Wijesiriwardena*** analyzing the concept of just and equitable in regard to powers of tribunals dealing with settlement of industrial disputes has observed "Justice and equity should be measured not according to the urgings of a kind heart but only within framework of the law."[15] Therefore it appears that powers conferred on the court in regard to relief that it may grant in the event of a violation being established is not unlimited, but extensive. It is believed that the sole objective of the provisions of Article 126(4) is to grant relief to victims as expeditiously as possible.

The payment of compensation does not preclude the victim from claiming other remedies for torture inflicted by the transgressor of a fundamental right, and relief granted by way of compensation under Article 126(4) of the Constitution does not act as an impediment on a victim derogating other rights available to him. Where compensation has not been sought, or has been waived, during proceedings, the court may refrain from awarding compensation. Where a mere declaration of a violation of a right has been considered an adequate remedy for the damage suffered by a victim of torture, and also where circumstances and evidence warrant, the court has confined itself to a sole declaration of the violation of the fundamental right relating to freedom from torture without making an order for the awarding of compensation. Cases relating to fundamental right violations reveal that personal liability has been imposed mainly in actions involving violation of fundamental rights relating to freedom from torture, and in

case of violations of other fundamental rights it is very rarely that personal liability has been imposed. Where the actual wrongdoer cannot be identified, or doubt has arisen as to the actual wrongdoer who committed an act of torture, but still the transgression of the right can be established, the State is called upon to bear the cost of compensation on the basis of primary responsibility. The conduct of a private person can also attract liability if such conduct amounts to an executive act in terms of administrative or executive action according to Article 17 of the Constitution. It is on this basis that a certain Member of Parliament and a Provincial Councilor were held personally liable for injuries sustained by a petitioner who complained of illegal arrest and assault by police. Justice Fernando in ***Fais v. A.G.***[16] held that an act of a private person would become executive if the act is done with the authority of the executive. Similarly, in the case of ***Sumith Jayantha Dias v. Reggie Ranatunga***[17] it was observed that what would have been purely private action of the first to third respondents transformed into an executive action by reason of the approval, connivance, acquiescence and inaction of the fifth respondent and other police officers. The case of ***Ratnapala v. Dharmasiri, HQI***[18] also furnishes a situation where the HQI and another police officer were held liable for serious injuries sustained by the petitioner in permitting the other respondents to commit an act of torture by their deliberate encouragement, acquiescence, connivance and inaction. Generally in such cases the court granted a declaration of the violation of fundamental rights along with compensation to victims. Only in a few instances have specific directions to release torture victims from unlawful custody or to produce them before a judicial officer been issued. Again, only on a few occasions, directions that the victim be medically examined have been issued by court.

From a scrutiny of cases, the lack of a rational approach to awarding compensation to the victims of violations of fundamental rights guaranteed under Article 11 of the Constitution becomes evident. Vast differences, discrepancies and disparities in the assessment of

compensation and in the quantum of compensation paid to victims of torture is also evident from case to case, from person to person, from judge to judge, and the discrepancies cannot be explained on any rational basis. The law in the area of compensation is largely judge made with occasional promptings from substantive principles of law. The judicial approach to compensation and the quantum of compensation awarded to victims of torture, as seen from the perspective of cases brought before court, presents a picture of a lack of coherence and consistency. The law has evidently developed in a piecemeal pattern with the promulgation of the present Constitution in the year 1978. Most rules governing assessment or quantification of compensation give rise to an impression that it is a matter left to the whims and vagaries of the judiciary. Victims who have suffered injuries less grave have been compensated more than victims who have suffered graver injuries. Only in a few cases has an attempt been made to grant compensation under different headings where several violations of fundamental rights have occurred.

It would be appropriate to examine a few representative cases which indicate how inconsistency and incoherence of the Supreme Court in the assessment of compensation to victims of torture have caused confusion.

The cases of ***Nihal v. Police Sgt. Kotalawala***[19] and ***Saman v. Leeladasa***[20] exemplify situations of this nature. In the former case a victim who suffered fracture of both arms owing to police assault was granted a negligible sum of Rs 5,500/- by way of compensation and cost, while the victim in the latter case who had suffered only one fracture has been awarded a larger sum as compensation and cost. Similarly, where almost identical methods of torture had been used, the act complained of has been categorized as torture in one instance but, in another instance it has been referred to only as inhuman treatment and degrading punishment without a reasoned basis. Lack of formal reasoned findings on which an award of compensation has been made

is also evident from that in certain circumstances payment of compensation has been ordered to be borne by the state while in other circumstances it has been ordered to be borne by the offending officer. Again, in certain instances, payment of compensation has been ordered while in some other cases the court has confined itself to an award of cost only.

The case of ***Kodituwakkuge Nihal v. P.S. Kotalawela and others***[21] illustrates a situation where court determined that five respondents who participated in inflicting injuries on a petitioner violated his fundamental right under Article 11 of the Constitution. The five respondents who were found liable for the violation of the right were ordered to pay a sum of Rs 2000/- each as compensation and Rs 500/- each as costs, to the petitioner, amounting to a total of Rs 10,000/- and Rs 2,500/- as compensation and costs. Neither compensation nor cost was ordered against the state. This case could be contrasted with that of ***Refaideen v. S.I. Jayalath.***[22] Here the Court, holding that the respondent had violated the petitioner's fundamental right to freedom from torture under Article 11 of the Constitution, directed the respondent to pay Rs 20,000/- as compensation. The state was directed to pay another Rs 20,000/- also as compensation amounting to Rs. 40,000/-, overall. The comparison of both these cases alone demonstrates the disparity and diversity of approach exhibited by Court in the award of compensation. In both cases, the violation complained of was of Article 11 of the Constitution, and the determination was also in respect of the similar violations. In the case referred to earlier, five respondents were directed to pay only a nominal sum of Rs 2000/- each as compensation and a sum of Rs 500/- each as costs making a total of Rs 12,500/-. But in the latter case one respondent was ordered to pay Rs 20,000/- personally and the State ordered to pay another Rs 20,000/- making up Rs 40,000/, representing a vast disparity in the quantum of compensation paid to victims. It is incomprehensible as to why in one case respondents were directed to bear the whole amount ordered as compensation,

when it was said that primary responsibility for violation of fundamental rights lies on the state, while in the latter case both the respondent and the state were ordered to pay compensation. Again, in the earlier case while costs were levied from the respondents, no such costs on either the state or the respondent was ordered in the matter. Again, in ***Amal Sudath Silva v. Kodituwakku***,[23] although no specific finding as to who committed violation could be made, the state was ordered to pay a sum of Rs .10,000/- as compensation to the petitioner and another Rs 1,000/- as cost. The case of ***Ratnapala v. Dharmasiri HQI Ratnapura, and others***[24] too exemplifies a situation where court determined that four respondents (3rd, 5th, 6th and 7th) brutally assaulted and tortured the petitioner over a period of three weeks when he was in police custody. Nevertheless different sums of money were awarded as compensation and cost in the same case against the different respondents. In this case, the court determined that all four respondents participated in acts of torture, but it is difficult to comprehend what motivated the court to adopt different stances in respect of different respondents. It is equally incomprehensible as to why the 1st and 2nd respondents, the HQI, and the officer in charge respectively, were ordered to pay an amount different from what was ordered to be paid by other respondents, by way of compensation and cost for having connived, tolerated and acquiesced in acts of torture when according to the law an abettor of an offence qualifies to be liable like the actual perpetrator. The abettor and actual wrongdoer hence should have to be treated on equal footing. In this case a total sum of Rs 130,000/- was awarded as compensation and cost, while in the case of ***Dissanayake Attorney at Law on behalf of K.M. Lal v. Sujeewa, S.I. Police, Meetiyagoda and others***,[25] one respondent who was found liable for infraction of several Articles of the Constitution was ordered to pay only a sum of Rs 60,000/= as compensation and cost. When the facts in the Ratnapala case were compared with those of Dissanayake's[26] case, the award of compensation is open to criticism in other respects too. Injuries sustained by victims in both cases are of a serious and of an irreparable nature. In the case of

Ratnapala v. Dharmasiri[27] one of the lungs of the victim had to be surgically removed because of torture committed on him. In the latter case, the victim lost consciousness and suffered paralysis on the right side and there also were other physical problems associated with the assault. He too had to undergo surgery for extra-dural hemorrhage in the left parietal area of his head. The injury was normally fatal had not surgery been performed in time. The victims in both cases have no doubt suffered almost like serious injuries. It is hence difficult to comprehend why in one case a sum of Rs 130,000/- with cost was awarded against several respondents while in the other case only a sum of Rs 60,000/- was awarded by way of compensation and cost. Further, in the Dharmasiri case, the state was directed to pay a sum of Rs 75,000/- as compensation and the 6 respondents were ordered to pay personally Rs 32,000/- as compensation and cost, while in the Dissanayake case the state was ordered to pay Rs 50,000/- but the respondents' personal contribution amounted to only Rs 5000/-. Again, in the case of ***Harendra Shasika Kumara v. D.I.G.***[28], the court having determined that the violation of fundamental right relating to freedom from torture had occurred, ordered Rs 50,000/- as compensation and cost of which Rs 25,000/- was to be paid by the 3rd respondent personally and ordered Rs 3,000/- each to be paid by the other five respondents. Here too it is difficult to understand why 6 respondents were ordered to bear only Rs 40,000/- while in the case of Lal Rs 60,000/- was ordered.

The case of ***Sujeewa Arjuna Serasinghe v. Gamini Karunatillake and others***[29] provides yet another example where comparatively an enormous amount was awarded to a victim of torture. Perhaps this was the first case in which such a large sum was awarded in a fundamental rights case. The court awarded Rs 200,000/- for the infringement of Article 11 and Rs 10,000/- for the infraction of Articles 13(1) and 14 (1)(h) of the Constitution together with cost in a sum of Rs 25,000/- amounting to Rs 235,000/-. The respondent S.S.P. was personally ordered to contribute Rs 20,000/- out of the awarded

compensation. In a recent case referred to in The Sunday Times of May 25, 2003, an Attorney-at-Law referred to the inordinately heavy compensation of Rupees Eight Lakhs ordered to be borne by the defendant in a fundamental rights violation. Torture had been perpetrated by the Head of the Wattala Police on a person wrongly arrested because of mistaken identity. Police admitted to theuse of minimum force while the wrong person was detained. But medical evidence confirmed serious injuries such as acute renal failure, loss of power of both shoulders and inability to use fingers. This decision of the Supreme Court in April 2003 illustrated the grave concern of the judiciary about police action impacting on life and liberty. The Court did not stop with finding a violation of conventional rights as from arbitrary arrest, detention and torture. It found that the number of credible complaints of torture and cruel, inhuman and degrading treatment in police custody showed no decline. Hence it faulted the Head of the Police for neglecting duty imposed by Article 4(d) to respect, secure and advance fundamental rights, including freedom from torture. The Head of Police had failed to do this and his failure to visit and inspect police stations provoked an inference of acquiescence and condonation or even approval and authorization of the brutal treatment. Out of 8 lakhs of rupees police had to bear a fair amount. This was an admonitory and salutary judgment and the exceptionally high compensation was needed and justifiable.

The sudden upsurge in the amount of compensation paid to the victims of torture when compared with payments made in similar circumstances in fundamental rights applications is incomprehensible on any rational basis, and the court has done it without expressly considering or distinguishing similar factual scenarios addressed in its earlier judgments. If the sudden increase in the amount is attributable to the serious nature of the injuries the question crops up as to why victims who suffered similar serious injuries were not compensated or treated on an equal footing with the victim of this case. Therefore it seems that the court's approach in regard to the liability of the State

has also been inconsistent and incoherent. Another case exemplifies where the court imposed sanctions only against the actual wrongdoer by ordering compensation against him although the court had acted on the premise that primary responsibility for violation of fundamental rights lies on the state independent of the delinquent conduct of a public officer. Where the respondent has violated fundamental rights under several articles, but compensation has been awarded as a quantified amount is illustrated by the case. Then again there are decisions that have held both the state and the delinquent officers are to be liable jointly and severally for the violations. Generally, in most of such cases, courts have imposed the primary liability on the state and secondary liability alone on the wrongdoer. Although it is the view of the majority of judges that the claim for redress under Article 126 of the Constitution in respect of an infraction of a fundamental right is a claim against the state itself, as what had been committed is deemed to be in the exercise of state executive power, there have been occasions when the whole of the compensation has been ordered to be paid by the delinquent officer, acting on a fictional premise that liability of the state in such instances is purely conceptual. This is evident from the case of ***Jayathiram v A.G.***[30]

If, in the assessment of compensation awarded to victims of torture, the court has been acting on the premise that the formula or the phraseology used in Article 11 of the Constitution refers to separate and different types of ill treatment warranting different approaches to compensation as enunciated in the case of ***Ireland v. U.K.***[31] and ***the Greek***[32] case, or differences and disparities in amounts of compensation stem from a variation in the intensity of suffering or methods of torture, the different and varying amounts paid to victims could be justifiably defended. But, strangely, the practice of the court has been to speak of violation of Article 11 generally without distinguishing differences of the formula, and what treatment constituted torture or inhuman and degrading treatment.

In the ***Irish case***[33], the Irish Government complained against the U.K. Government in respect of certain violations of fundamental rights by a British army officer in the course of duties in the suppression of IRA activities in Northern Ireland Certain IRA personnel arrested by the British army had been submitted to a form of "interrogation in depth," which involved combined application of five techniques which are called disorientation or "sensory deprivation" techniques. *They include the following:*

a) ***Wally standing:*** *forcing detainees to remain for a period of hours in a "stress position", described by those who underwent such torture as being 'spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the toes'.*

b) ***Hooding:*** *putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation.*

c) ***Subjection to noise:*** *pending interrogation, holding detainees in a room exposed to continuous loud and hissing noise.*

d) ***Deprivation of sleep:*** *pending interrogations depriving detainees of sleep;*

e) ***Deprivation of food and drink:*** *subjecting detainees to a meager diet during stay at the centre and pending interrogation.*

It is apparent from observations of the judges who formed the majority opinion that in the phraseology used in Article 3 of the Convention, the notion of inhuman treatment encompasses factors such as confinement purposelessly for long duration, intense physical

and mental suffering, acute psychological distress. The notion of degrading treatment encapsulates a feeling of fear, anguish and undignified humiliation and debasing and breaking down of moral and physical resistance. Although according to the courts' interpretation, torture is simply inhuman and degrading treatment which is more intense in respect to suffering and the definition of torture lacks coherent and independent content, there is an overlapping of all three categories of ill treatment. It thus appears that the court has made a serious concerted effort to analyse the gravity of the tortuous act complained of by dividing it into component parts.

The ***Irish case*** illustrates the tendency on the part of the European Court of Human Rights to assume that Article 3 of the European Convention on Human Rights, which is almost identical in phraseology with Article 11 in the Sri Lanka Constitution except for the word 'cruel', prohibits three distinct categories of conduct, namely torture, inhuman treatment and degrading punishment. According to the Greek case, for torture to occur a scale of criteria has to be met. First the conduct complained of degrading treatment, secondly inhuman and the inhuman treatment should be inflicted in aggravated form for a certain purpose. The ***Greek***[34] case provides an example of the first and most elaborately reasoned formal finding by the European Commission of Human Rights. It shed some light on the meaning of Article 3 of the European Convention on Human Rights. It is mainly significant for the painstaking efforts made to analyse Article 3 of the Convention into component parts, in the light of the facts of the case. In this case the European Commission on Human Rights having examined allegations of a variety of forms of ill-treatment such as falanga or bastinado, electric shocks, mock executions, threatening to kill and other forms of ill-treatment, determined that the practice of torture and other ill-treatment had been committed by the Athens Security Police on persons arrested for political reasons.

In the vast majority of cases dealing with violations of freedom from torture, inhuman treatment and degrading punishment, no serious attempt has been made to divide the description into its component parts and specify whether a given act amounts to torture, inhuman treatment or degrading punishment as enunciated in the ***Irish*** and the ***Greek*** cases. Even in the few cases where attempts have been made to distinguish between different types of ill treatment, lack of reasoned formal finding or in depth analysis is evident.

The European Court of Human Rights however has made a concerted effort to analyse whether any given conduct constitutes torture, inhuman treatment of degrading punishment although it was not the intention of the U.D.H.R. to divide its formula into its component parts. In most cases decided by Sri Lankan Court there has been no serious attempt at such division of the formula into component parts and to specify whether a given conduct amounts to torture, inhuman treatment or degrading punishment as enunciated in the ***Greek*** case. If the lack of uniformity and consistency in assessment of compensation can be attributed to the differences between torture and other types of ill treatment inherent in the formula, the present procedure of awarding different and varying amounts of compensation is defensible on a rational basis. But it has been the practice of the court to take into account the totality of ill treatment suffered by a victim as falling within the scope of the prohibition set out in Article 11 of the Constitution. If the Court considers the totality of ill treatment falls within the prohibition set out in Article 11, the court cannot display such vast disparities and discrepancies in the assessment of compensation paid to the victims.

The juridical consequences of classifying the given conduct as one of torture or another form of ill-treatment would be relatively unimportant or irrelevant in the context of fundamental rights applications. But the distinction between different limbs of the formula "torture or cruel, inhuman or degrading treatment or punishment" which

is used in many international and regional human rights instruments prohibiting torture, does have important legal consequences in the context of the International Convention of 10th December 1984, against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, to which Sri Lanka acceded on 3rd January 1994.

At the time of accession, Sri Lanka, exercising its option under the Convention, did not declare that it did not recognize the competence of the Committee established for the purpose of inquiring into information received in respect of systematically practised torture in the territory of the state party. Accordingly, the Committee is empowered to inquire into only acts of torture practised in this country. As it can inquire into acts of torture only, it will be necessary for the Committee to distinguish whether a particular conduct amounts to torture or falls within the concept of cruel, inhuman or degrading treatment or punishment. Article 16 of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, clearly makes a distinction between torture and other ill treatment. Torture has been given a clear definition in Article 1 of the Convention and the differences in the various limbs of the formula affect the extent of obligations assumed by state parties. The state parties are expected to assume a general obligation by taking steps to prevent both torture and cruel, inhuman or degrading treatment or punishment in the territory. It entails also a number of specific obligations and there are also a number of important obligations relating to torture only.

After acceding to the International Convention on torture Sri Lanka passed on 25 November 1994 enabling legislation to give effect to obligation under the said Convention. The Cruel, Inhuman or Degrading Treatment or Punishment, Act No. 22 of 1994, strengthened considerably the existing legal framework in which torture was prohibited. The CAT designates and defines torture as a specific crime and vests in the High Court jurisdiction over offences of torture

committed in and outside Sri Lanka. Therefore, although it is clear that an analysis of the different limbs of the formula enshrined in Article 11 of the Constitution may not be strictly relevant or important in the context of local fundamental rights applications, it may turn out to be an important exercise in another context.

The case of ***Jayasinghe v. Samarawickrema***[35] affords an example of how on the totality of the treatment meted out to the victim the court found the violation of Article 11 without drawing any distinction between various acts to inflict injuries or without any reference to acts of torture. The Court in this instance, as it has done in numerous other cases, has not specified whether all, or any, or some of the acts constitute torture, inhuman treatment or degrading punishment. Justice Kulatunga determining violation has only observed on the grounds of aforesaid findings; "I determine that the petitioner's rights under Articles 11 and 13 (2) have been infringed and grant him a declaration accordingly". Similarly, in the case of ***Premalal de Silva v. I.P. Rodrigo***,[36] Justice Kulatunga determined that an infraction of the constitutional right under Article 11 had taken place and observed in the following terms, but without an in-depth analysis to demonstrate that the acts of torture to which the petitioner was subjected to was torture, inhuman treatment or degrading punishment. His Lordship observed: "I determine that the arrest of the petitioner is violative of his rights under Article 13(1) and his detention is violative of his rights under Article 13(2) and 13(4), and I also determine that the petitioner was whilst in police custody, subjected to torture, and inhuman treatment in breach of Article 11 of the Constitution and the 2nd and 3rd respondents and the State, are jointly and severally liable to compensate the petitioner." The case of ***Priyankara v. P.C. Sisira Kumara, Police station, Puttalam***[37], and others supply another instance where the Court has merely found the act of the respondent violative of Articles 11, 13(1) and 13(2) of the Constitution by three respondents without elaborating whether the acts complained of constituted torture, inhuman treatment or degrading punishment. The

findings in the case of ***Gamlath v. Neville Silva***[38] and others were to similar effect. Here too there was no specific determination whether the acts of ill treatment the petitioner suffered came under one or other segment of the formula used in the Constitution. The case of ***Abeysinghe Banda v. S.I. Gunaratne and others***[39] affords yet another example where the Court has simply determined, on the facts complained against, violation of fundamental rights relating to Article 11 without reference to the separate sections traceable in the Article and Justice Kulatunga ruled: "Accordingly I grant a declaration that the rights of the petitioner under Articles 11, 13(1) and 13(2) have been infringed by executive and administrative action".

Justice Amarasinghe too in the same case found to an infraction of fundamental rights of the petitioner and said "I therefore declare that the petitioner's fundamental rights guaranteed by Article 11 were violated by the first respondent"[40]. Here too, there was is no analysis of the type of ill treatment meted out to the petitioner by the respondent. As in other cases cited, a survey of cases dealing with violations of fundamental rights relating to Article 11 of the Constitution demonstrates that the vast majority of cases are silent on this aspect. As a result it is problematic to say whether there occurred torture, inhuman treatment, or degrading punishment as enunciated in the corpus of international jurisprudence.

Kumarage v Sub Inspector Sriyantha[41] is one of the few cases in which the court sought to draw some kind of distinction between "cruel and inhuman treatment and degrading treatment" by examining the severity of the offence. In this case a young girl was detained at the police station for several hours. Some officers on the invitation of the arresting officer touched her body, squeezed her breasts, punched her buttocks, addressed her as a "love bird" and asked her whether she was wearing any underwear and invited her to come out with them. His Lordship Justice Amerasinghe commenting on the conduct of the police officers observed: "In the circumstances of

the case the suffering occasioned was of an aggravated kind and attained the level of severity to be taken cognizance of as a violation of Article 11 of the Constitution. The words and actions taken together would have aroused intense feelings of anguish that were capable of humiliating the petitioner. I therefore declare that Article 11 of the Constitution was violated by the subjection of the petitioner to degrading treatment".

In a few cases, where there has been reference to component parts of the formula in identifying the nature of the act committed it has been superficial and lacked an analysis. As already mentioned where almost identical methods of torture had been employed in one instance the act complained of has been categorized as torture in onre and in another it has been referred to only as inhuman treatment, without rational basis. Therefore if lack of uniformity and consistency in assessment of compensation cannot be attributed to differences between torture and other ill-treatment, the present procedure of awarding varying amounts of compensation stands open to criticism. If the practice of the Court is to take the totality of ill treatment suffered by a victim as falling within the scope of the prohibition set out in Article 11, the Court should not display such vast disparities in assessment of compensation.

The European Commission of Human Rights in the Irish case and in several other cases, has made an attempt to specify whether each, altogether, or some of the acts mentioned above constitute torture, inhuman treatment or degrading punishment. Perhaps it was the only organ of the European Convention on Human Rights which has made a concerted effort to conceptualize and articulate the difference between the various limbs of the formula contained in Article 3 of the European Convention, and specify whether the given conduct constitutes torture, inhuman treatment or degrading punishment, in certain cases, although on a number of occasions, it has simply left the issue open. The Human Rights Committee under ICCPR too has

similarly made findings using a general terminology such as "Violation of Article 7 of the ICCPR[42]" without coming to a definite conclusion whether the given conduct amounts to torture or other ill treatment. Perhaps, it may not be absolutely necessary or important to draw a sharp distinction between various limbs of the formula contained in Article 11 of the Constitution as the organs of European Convention and the Human Rights Committee have done in some of their findings. On the contrary, Sri Lankan Courts, unlike the organs of the European Convention and the Human Rights Committee under the ICCPR have done in some of their findings, confined to mere declaration of the violation of Article 11 of the Constitution, without specifying whether the given conduct is tortuous, inhuman or degrading. This practice is defensible provided in all cases of violations of Article 11 it displays no such vast disparities and differences in assessment of compensation. It is true, there may be cases where the borderline between torture, inhuman treatment and degrading punishment cannot be precisely drawn as the intensity of suffering a victim has undergone in a given situation is not susceptible to precise description or gradation.

If vast differences and disparities in compensation awarded to victims stem from a difference in intensity of suffering inflicted or the methods used for causing such suffering or if the Court has been acting on the premise that the formula and phraseology used in Article 11 refer to separate and different types of ill treatments as explained in ***UK v. Ireland***[43], differences in amounts of compensation paid to victims may be justifiably defended.

It has been held that punitive element should not enter in the assessment of compensation to be paid to a victim of torture. In ***Saman v. Leeladasa***, Justice Amerasinghe commenting on the punitive aspect of compensation observed; "I am unable to agree that deterrence is a relevant element in assessment of compensation in a fundamental rights action. Being as they are, actions of the state, an attempt by this Court to punish the state would, I think be imprudently

venturesome. To attempt to deter it would be hopelessly futile, for the state, in truth, I believe, has a long pocket, the depth of which we should know, if we are to make a meaningful, punitive award. It is extremely unlikely that we shall ever know the deepness of the treasury pocket. It is therefore hardly likely that we would be placed so as to make a proper assessment of punitive damages. It behoves us to be mindful of the fact that large awards will only increase the burden of the taxpayer and that of the ordinary man, to whom the burden of the taxpayer will, lamentably, be passed eventually. Therefore we need to act with restraint in awarding compensations in these matters".[44]

In most cases of breaches of fundamental rights compensation is awarded as a solatium for the victims' injuries and suffering. Similarly in the case of ***Dissanayake v. Superintendent, Mahara Prisons***, His Lordship remarked in regard to punitive consideration "It would be ironical if the public themselves have to pay for the infringement of their rights on such a scale."[45] But these considerations have not deterred the Court from granting compensation against the state whenever circumstances warranted. It is exemplified by the observations made by Justice Kulatunga in the case of ***Gamlath v. Neville Silva***, "Such infractions make the state primarily liable. In awarding just and equitable relief, we are mindful that the state has to pay compensation out of public funds, but this Court cannot on that ground resile from making an appropriate order. The state has to pay in view of the principle of state responsibility for executive and administrative action. If payment of compensation in default is a burden on public funds, it cannot be helped".[46] Although Court had been acting on the premise that punitive considerations should not influence assessment of compensation payable to a victim of torture, as the primary responsibility for violation of a fundamental right is that of the state, in actual practice it appears the punitive element has played a substantial role in assessment of compensation. This is evident from examination of cases, where the Court has not only ordered compensation against the state and the actual wrongdoer, but

also by examining cases where the Court has imposed liability on the wrongdoer and ordered him to pay the whole of the compensation.

Considerations which militate against granting of exemplary and enhanced damages in the context of civil action should not necessarily apply in the case of state condoned violation of fundamental rights that harms individuals. The court should be conscious of the fact that the amount of compensation awarded in cases of infraction of fundamental rights play an important role in punishing errant officers and encouraging of future adherence to the laws of the land. Among the arsenal of remedies available under the Constitution of Sri Lanka, it should be realized that enhanced and punitive compensation and damages should be the only viable method of dealing with the officers who act in violation of fundamental rights. In this connection the following observations made in the case of ***R v. Collins***[47] in the context of unconstitutionally obtained evidence would be a useful guide whenever the Court is called upon to determine the question of compensation in the event of violation of fundamental rights relating to freedom from torture, inhuman treatment and degrading punishment.

> "Misconduct by the police in the investigatory process often has some effect on the repute of the administration of police but as section 24(2) is not a remedy for police misconduct requiring the exclusion of evidence, if because of this misconduct the administration of justice was brought into disrepute, damages is the only viable method of meaningfully **characterize** unconstitutional conduct. It is very necessary to bring home to the state that every conceivable caution must be exercised when the rights and liberties are affected."

Therefore, where particularly the same facts support both an application for breach of fundamental rights and civil law cause of action, enhanced or exemplary damages available in respect of the civil action may be subsumed in the quantum of damages granted in the fundamental rights application.

Time and again, judges had the opportunity to comment on the sudden upsurge in incidents of torture. They have condemned the brutal and inhuman acts committed on helpless victims of torture, in their judgments. Jurisprudence relating to fundamental rights is replete with judicial condemnation and denunciation in vehement terms. How strong judicial condemnation has been is evident from the observations made in the following cases:

In the case of ***Amal Sudath Silva v. Kodituwakku I.P. and others***[48]

> "Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion. This court cannot, in the discharge of its constitutional duty, countenance any attempt by any police officer however high or low, to conceal or distort the truth induced, perhaps, by a false sense of police solidarity. The

facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity, particularly at the present time when every endeavour is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution."

Again in ***Ratnapala v. Dharmasiri HQI and others***[49] His Lordship Justice Kulatunga commenting on the torture inflicted on the petitioner observed:

"In considering the relief to be granted to the petitioner I consider it appropriate to reiterate the repeated condemnation of torture contained in the pronouncements of this Court in *Amal Sudath Silva v. Kodituwakku*; *Geekiyanage Premalal Silva v. Rodrigo*; *Jayaratne v. Tennakoon*; *Gamalath v. Neville Silva*; *Wimal Vidyamani v. Lt. Col. Jayatilleke*; *Ratnasiri v. Devasurendra*; and *Weerakoon v. Weeraratne*. The judgment in the last-mentioned case, stated that it was the worst case of torture which came before this Court since the decision in A*mal Sudath Silva's* case; but the instant case surpasses that case in that the injuries sustained by the petitioner are irreparable,

particularly in view of the fact that one of his lungs had to be surgically removed in treating his injuries. So it seems to me that despite so many decisions, torture at police stations continues unabated, in utter contempt of fundamental rights guaranteed by the Constitution. In granting relief this Court must necessarily have regard to this development."

Similarly, in ***Nalika Kumudini Attorney-at-Law (on behalf of Malsha Kumari) v. Nihal Mahinda OIC Hungama and others***,[50] it was said:

"In many cases in the past this Court has observed that there was a need for the Inspector-General of Police to take action to prevent infringements of fundamental rights by Police Officers, and where such infringements nevertheless occur, the Court has sometimes directed that disciplinary proceedings be taken. The response has not inspired confidence in the efficacy of such observations and directions, and persuades me that in this case compensation is the appropriate remedy."

The case of ***Abasin Banda v. Gunaratne***[51] exemplify another situation where Court has unreservedly condemned the torture of the respondent.

"I wish to add that infringements of fundamental rights by the police continue unabated even after nearly 18 years from the promulgation of the 1978 Constitution and despite the numerous decisions of this Court which have condemned such infringements. As the Court had observed in previous judgments, this situation exists because police officers continue to enjoy an immunity from appropriate departmental sanctions on account of such conduct. It is hoped that the authorities will take remedial action to end this situation."

The observation made by his Lordship the chief Justice Basnayake in the case of ***Queen v Appuhamy***[52] is also of great significance.

> "Before we part with this judgment we must refer to the most disturbing feature of this case. The appellant and Weerasekera were arrested by Inspector Miskin in the premises of the District Court of Chilaw at about 10.30 a.m. on 12th July, within 20 or 30 yards of the Magistrate's Court, at a time when the Magistrate was on the Bench. But they were taken to the Police Station and produced in court only the next day at about 1 p.m. This is a studied disregard of the provisions of sections 36 and 37 of the Criminal Procedure Code (which the Police undoubtedly knew) – provisions which are designed to protect the citizen against detention in custody without a judicial order in that behalf".

Blatant violations of fundamental rights of egregious nature continue to occur, in spite of strong judicial condemnation.

In this connection it would be important to remember that violations of fundamental rights are committed not by abstract or fictional entities, such as states, but by individuals.

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1 [1989] 1 SLR 1 citing Peter Leo Fernando v AG [1985] 2 SLR 341: Jayasinghe v Mahendra [1987) 1 SLR 206: Dayananda v Weerasinghe [1983] 27 RD 292, 1983 2 SLR 84; Velmurugu v AG. [1871] 17RD 180, [1981] 15

2 ibid n1

3 ibid n1

4 Velmurugu v AG ibid n1

5 [1873] 27 RD 426 SC

6 [1990] 1 SLR 318 (SC)

7 [1993] 2 SCR 581 [1993] 2SCC 746 AIR 1993 SC 1960

8 ibid n7

9 ibid n1

[10] Estrella v Uruguay (74/1980) Report of the Human Rights Committee

[11] ibid

[12] [1983] 3 SCR 508, AIR 1983 SC1086

[13] [1984] 1 SCR 904, AIR 1984 SC 571 (1) [1984] 3SCR 544, AIR 1984 SC 1026 (11)

[14] [1980] 1 FRD 129 SC

[15] [1961] 62 NLR 233 SC

[16] SC 89 91, SCM 19/11/93

[17] [1999] 2 SLR 8

[18] SC 162/91, SCM 28/4/93

[19] SC 126/94, SCM 6/10/94

[20] ibid n1

[21] ibid n19

[22] [1998] 2 SLR 253

[23] [1987] 2 SLR 119

[24] ibid n 18

[25] [1998] 2 SLR 413

[26] ibid 25

[27] ibid n 18

[28] SC No. 462/2001 FR

[29] SC No. 431/2001 FR

[30] S/C 192/91 SCM 17/9/92

[31] Ireland v U.K. January 18, 1978 (European Human Rights Commission)

[32] 12 year book of the European Convention on Human Rights Nigel Rodley The treatment of prisoners under international law Clarenden Press, Oxford.

[33] Ibid n 31

[34] ibid n 32

[35] SC 57 91 SCM 21/1/94, [1997] 3 SLR 18

[36] [1991] 2 SLR 307

[37] [1998] 2 SLR 267

[38] S/C 78 90, SCM 16/7/91, [1991] 2 – SLR 267

[39] [1995] 1SLR 244

[40] ibid n 39

[41] Kumarage v S.I. Sriyantha SC 257/93, S/C minutes 23/5/94

[42] Estrella v Uruguay (74/1980) Report of the Human Rights Committee.ibid n 10

[43] ibid n 31

[44] ibis n 1

[45] SC 6 90. SCM 28/3/91, [1991]. 2 SLR 247

[46] [1991] 2 SLR 267, ibid 38

[47] R.V. Collins [1987] 1 SCR 265

[48] [1987] 2 SLR 119, ibid n 23

[49] ibid n 18

[50] [1997] 3 SLR 331

[51] ibid n 39

[52] 60 NLR 313