SHORT ANALYSIS ON SENTENCING POLICIES ON TORTURE

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RIGHT TO LIFE
HUMAN RIGHTS CENTRE

SHORT ANALYSIS ON SENTENCING POLICIES ON TORTURE

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1. SUMMARY:

The research provides a short-analysis of sentencing policies on Torture in Sri Lanka, specifically the violation of Article 11 of the constitution of Sri Lanka. In the process of analyzing cases from 1981-2019 we have collected and analysed 100 judgements from the Supreme Court only. We have included Article 12(1), 13(1) and 13(2), as most often these articles were considered by the Petitioner when filing for breach of Article 11.

It was observed that whilst the Supreme Court provided compensation for the violation of Article 11, 12(1), 13(1) and 13(2), Compensation was either private compensation, state compensation or a mix of both private and state compensation.

The judges evaluated each of the 100 cases subjectively on a case by case basis based on the evidence put forth by the Petitioner and the Respondents. Judges took into consideration the following:

- Medical evidence
- Time Bar
- Informing of authorized persons
- Witness statements of both parties

Whilst the way in which the judiciary came to a conclusion in their judgements cannot be faulted per say, it was observed that there were discrepancies on how the amount of compensation was determined, as the amount and the ratio of compensation shared between the private individual and the state is determined at the discretion of the Judges.

It was observed that over the years the number of cases had increased. Between the years 1981-1989 there were a total of only 8 judgements. However, between 2010-2019 there was a total of 42 judgements. Perhaps due to the increase in the number of cases the duration of cases had increased to more than 5 years over time. This would create an adverse impact on a Petitioner that would be required to visit the Courts frequently over the years to receive justice. This may also overtime discourage future applications to seek redress against violations of Article 11.

It was further observed that behavior of the police, a law enforcement authority was abhorrent. Over the years the police have caused irreparable damage to the wellbeing of the Petitioner due to the torture, both physically and mentally, fabricated evidence and false cases against the Petitioner, Petitioners were subject to public shaming and at times assaulted even by third parties.

However, despite the Courts having called for disciplinary action even as far back as 1988, and the Inspector General of Police informing police stations of the way in which an individual must be treated when in custody, torture and fundamental right violations have continued by law enforcement officials.

In addition to analyzing the above 100 cases, **<u>10 judgements under the Torture Act, No. 22 of 1994</u>** ("TA") were also selected for the purpose of this research. These 10 judgements were selected at random with no specific selection criteria. All 10 cases were directly related to official attached to police stations.

Unlike the violation of a fundamental right, if a person was found guilty under the Torture Act, the person would be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding

fifty thousand rupees. Thus, the manner in which the TA was interpreted was far different to that of a violation of a fundamental right.

It was observed that Courts strictly interpreted the evidence placed before them to a point that it may be difficult for an individual to prove Torture. The courts strict interpretation could be due to the fact that if an individual was found guilty, a verdict would entail an imprisonment between seven to ten years.

When evaluating a sentence under the Torture Act it was observed that judges would evaluate the following:

- Medical evidence
- Witness statements
- Identification parades

There was an instance when the Judge also evaluated the number of years of service of the accused, and the impact it would have on the dependents.

Due to the heavy emphasis upon the victim to prove a case beyond doubt, many perpetrators may get away with torture under the Torture Act.

Thus, based on the research on 100 judgements from the Supreme Court on Article 11, 12, 13(1) and 13(2) and the 10 judgements examined under the Torture Act a few of our key recommendations have been provided below:

a. A transparent formula for compensation must be introduced so that disparities are reduced when awarding compensation.

b. Magistrates must be trained to evaluate and ascertain if an individual produced before Court has suffered torture or has been denied any of his rights (especially the right to an Attorney).

c. Amendment of the Torture Act, No. 22 of 1994. The mandatory sentence between seven to ten years must be re-evaluated. The Punishment must vary according to the abuse metered out and therefore a minimum sentencing period of 1 year should be introduced.

d. An independent authority must be established to investigate allegations of police abuse. Abusers of Power investigating abusers of power will not result in any vital change. Thus, a completely different body comprising of expertise in the field must be established to:

- Conduct regular, unannounced checks of the police stations; and
- Investigate allegations and complaints.

2. METHODOLOGY:

This report is the result of analyzing 100 Supreme Court Judgements specifically focused on Article 11, and 13(1) and 13(2). The report mainly examines the manner in which judges evaluate and interpret the above articles and what they've taken into consideration when attempting to identify torture and to provide recommendations.

Thus, Right to Life organization collected 100 cases from 1981-2019 to create a foundation for future research related to Torture.

A combination of Case records and Cases from Sri Lanka Law Reports were evaluated to assess violation of Article 11, 13(1) and 13(2) of the Constitution.

10 cases were selected at random under the Torture Act No. 22 of 1994 for evaluation as well.

Tables depicting the 100 cases under Article 11, 13(1) and 13(2) of the Constitution and 10 cases under the Torture Act have also been annexed herewith as table A and B for reference.

In Instances where case numbers have been used instead of the case name, such cases can be found within the annexed tables herein.

Where applicable a summary for Article 12(1) and 13(4) has been included within this research. This was mainly due to the fact that at the point of Leave to Proceed Article 12(1) was considered as well, and we were of the view that a general understanding of interpretation would assist future research.

In any case as judgements are read as a whole and not in selective parts, and therefore in the interest of the public Articles apart from Article 11 were considered in this research.

The template below was used to document the 100 Supreme Court Judgements:

No.	SC Application No.	Leave to Proceed	Duration of case	Number of Petitioners	Gender of Petitioners	Respondents	Type of Incident	Compensation	Judgement by Court	Names of Judges

** As the Attorney Generals Department was considered a Respondent in all cases, it was not included as a Respondent in the table*

Further, the template below was used to document 10 judgments under the Torture Act:

Case No.	නීතිපති අංකය	Defendant	Defendant's Occupation	Incident	නඩුව පැවරූ දිනය	Date of Judgement	Judgement	Reasoning behind judgement	Name of Judge

Abbreviations used (In this analysis and its annexures):

AG: Attorney General
CID: Criminal Investigation Department
CAT: convention Against Torture
FR: fundamental right
PTA: Prevention of Terrorism Act
J: Judge
JMO: Judicial Medical Officer
R: Respondent
M: Magistrate
SC: Supreme Court
OIC: Officer in charge

Research Limitations:

- Petitions dismissed at the preliminary stage was not taken into consideration.

- The entire procedure from filing of Petition to date of Judgement was not taken into consideration, only judgements were evaluated.

- The total number of complaints received by the Human Rights Commission have not been evaluated to compare the number of judgements metered out through out the years

- Professions of Petitioners were difficult to analyse due to there being a mix of case records and reports. However, at no point did a judge mention the significance of occupation of a Petitioner in the material available to us as an important factor when assessing infringement.

- More judgements under the TA should be evaluated for a better understanding of the sentencing policy in relation to this Act.

- Cases related to torture under the PTA and any other law were not evaluated

3. BACKGROUND

Right to Life Human Rights Centre (R2L), Katunayake, is a civil society organization established in 2003 that focuses on areas such as advocacy, provision of legal aid and networking with similar organisations. The founding members of R2L have a long history of empowering individuals who were deprived of their rights beginning in the 1980's and have continued their work on empowering individuals and addressing issues related to human rights violations such as torture and disappearances. Thus, the organization has extensively worked to uplift the community by means of education, assistance and awareness.

R2L to this day continues to provide legal counselling services for victims of torture and other human right violations through the establishment of several Human Rights First Aid Centres.

Therefore, R2L hopes that research would be the base document that would further encourage future research on torture and connected fundamental rights violations, it aims to flag issues or patterns where possible and to provide a general overview on how judges have analysed alleged infringement of the corresponding rights.

4. Introduction

There is something to be said for the creativity found in the human's ability to be cruel all throughout history; globally. Despite attempts to curtail this, we find ourselves constantly at the point of debate on torture.

Therefore, even though modern democracies are parties to the Convention against Torture, time and time again we see member states faltering. This could be due to the following number of reasons, especially in the context of Sri Lanka:

- **National Security:** JVP insurgency, three decades of war, Easter attacks, Sri Lanka is on the map for the need of constant counter terrorism initiatives. The Human Rights watch Report 2015 indicated widespread police torture, whilst the UN Special Rapporteur on Torture indicted widespread use of torture as part and parcel of police investigations.

- **Civil Obedience** and deterrence against illegal activities: for the purpose of keeping citizens in line, or to ensure any such illegal activity or behavior is not repeated, torture would be used to discipline such individuals.

- **State Perception:** Sri Lanka for example is currently in the midst of a national debate on capital punishment. Hence, those that hold high political positions can influence the public at large that torture is necessary or needed for good governance despite the obvious human rights violations. Thus, if the Public is convinced, then the State would be excused when human rights violations or torture occurs as the public is not in disagreement to such violations.

Thus, in the midst of a three-decade war, in 1994 Sri Lanka ratified the United Nations Convention Against Torture (CAT). Yet despite ratification, compliance in practice shows that there is a disparity in practice. As per the CAT definition, Torture means "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*"

Even before the ratification of this Act by introducing the Torture Act No. 22 of 1994 (TA), Sri Lanka had introduced fundamental rights in order to safeguard its citizens. Yet, despite constitutional protection, torture is prevalent, and the State continues to falter. Whilst it may be difficult to comprehend how state organs individually work against torture the research herein hopes to identify any patterns in the Supreme Court Judgements in order to better the system.

This Research would separately analyse each of the Articles and there after analyse direct and indirect issues of the Supreme Court Judgments in order to examine any patterns and provide recommendations. 10 judgements under the Torture Act have also been included to understand and evaluate the sentencing policies of the TA.

5. Analysis of Articles 11, 12(1) 13(1), 13(2) and 13(4)

5.1 Article 11 of the Constitution:

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"

Courts have taken a view herein that torture can be both physical and psychological. However, it was observed that this expansion of interpretation was adopted over the course of time. In the case of Sarjun V Kamaldeen and two others (SC FR 559/03) *Fundamental rights in Sri Lanka by Dr. Wickremaratne* was used to analyze Article 11, and the Court accepted the following notion:

"the Freedom from torture is declared in Article 11 as an absolute right and entrenched by Article 83 which bars inconsistent legislation without a two third majority in parliament and approved by the people at a referendum and should be given its ordinary meaning as prohibiting any act by which severe pain or suffering whether physical or mental that is intentionally inflicted without any requirement of proof of purpose. This guarantee safeguards human dignity which is a material element in the concept of law."

Even in the case of Adhikary and another V Amarasinghe and others (SC FR 251/2002), a similar approach was observed. The Courts thereto was of the view that 'torture, cruel, inhuman, degrading treatment or punishment would take many forms of injuries which could be broadly categorized as physical and psychological and would embrace countless situations that could be faced by the victims. The courts also quoted Amerasinghe J in his separate judgment in Silva V Chairman, Fertilizer Corporation (1989). Analyzing the concept of inhuman treatment Amerasinghe J observed

"The treatment contemplated by Article 11 wasn't confined to the realm of physical violence. It would rather embrace the sphere of the soul or mind as well."

In relation to a deceased that had passed away due to torture, e.g. Sriyani Silva V Iddamalgoda (SC FR 471/2000) the Courts quoted Article 14.1 of the Convention against Torture:

"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."

Thus, in this case the Court interpreted that the right to compensation accrues to or devolves on the deceased's lawful heirs and/or dependents brings the law in line with and in conformity with international obligations.

The Court further recognized a right not to deprive life under Article 11 (read with Article 13(4)); by way of punishment or otherwise and by necessary implication, a right to life. The Court in the case above further went on to state that this right must be interpreted broadly, and the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to protect those rights effectively.

However, it must be noted that Courts when evaluating an infringement have also looked into the **circumstances** of each case and its nature.

In the case of **Sisira Kumara V Sergeant Perera and others (1998)** the Court had taken the view that the use of force does not per say amount to cruel, inhuman or degrading treatment and in particular a minimum level of severity should be established to sustain a charge of torture. Further, the Burden of proof was explained in the case of **Channa Peiris and others V Attorney General (1994);** a land mark case where it was stressed that the gravity of the matter in issue a high degree of certainty is required before the balance of probability might be said to tilt in favour of any petitioner seeking to discharge his burden of proving that he was subject to torture, or to cruel, inhuman, degrading treatment or punishment. **Accordingly, the responsibility is on the Petitioner to adduce sufficient evidence to Court.**

Therefore, it is observed that Article 11 does cover both physical and mental torture, and whilst Courts do interpret and accept this, the burden of proof is upon the Petitioner to prove such torture. In a space where the State has the power to hide evidence and intimidate, a Petitioner may find it difficult to prove allegations of torture.

In SC FR No 244/2010, the Court stated the following ***"Respondents did not leave any marks of torture. That is the very reason they have used such an unusual kind of torture which the medical experts could not trace"***

This further provides reason why the burden of proof imposed completely upon the Petitioner would be problematic as State organs such as the police force would find new innovative methods of torture that would leave fewer physical marks on the body that shows less proof of torture. As the infringement of Article 11 would be subjective and specific to each case it would be harder for a Petitioner to prove a violation if Respondents such as the Police find new ways to inflict torture without leaving physical evidence for a Judicial Medical Officer to trace. Therefore, Courts must perhaps take precaution that these new methods of inflicting torture don't go unnoticed when justice is metered out.

5.2 Article 12(1) of the Constitution:

"All persons are equal before the law and are entitled to the equal protection of the law"

It was difficult to ascertain the cases that were taken into consideration when assessing Article 12(1) as most often judges would ascertain facts pertaining to Article 11 and 12(1) together, as opposed to two separate infringements. However, the authenticity of the medical reports submitted, any other court proceedings related to the case, the version submitted by the Respondents and the Petitioner were evaluated. Further the inaction by law enforcement authorities were also taken into consideration when assessing infringement under Article 12(1). Most often Article 12(1) was filed together with Article 11 because the Petitioner was of the opinion that his right to receive equal protection under the law was infringed alongside the violation of Article 11.

In SC FR Case No. 241/14 (Karuwalagaswewa Vidanelage Swarna Manjula and Nawarathna Henalage Rosaliya Vs. 1. C.I.V.P.J. Pushpakumara OIC Police Station Kekirawa and others), the Petitioners who were Jehovah's Witnesses were arrested for forcibly attempting to convert persons for monetary gain. The Courts upon analyzing the facts of the matter found the respondents guilty of violating Article 12(1). The Courts considered the case of **Muttusamy V Kannangara** where it was stated that with regard to "*the powers of police officers to arrest without a warrant, that the courts must be vigilant to ensure that the powers given to police officers are not abused through inexperience, excess of zeal, or insolence of office*". The Courts also considered the case of **Joseph Perera V the Attorney General**;

"one of the basic values of a free society to which we are pledged under our constitution is founded on the conviction that there must be freedom not only for the thought we cherish but also for the thought we hate"

Thus, it was observed that Article 12(1) was not in essence a standalone provision considered by itself but mostly as an infringement that may occur due to the violation of Article 11, and the circumstances of each situation. Therefore, very little information was available to ascertain the manner in which these cases were evaluated.

In SC FR Case No. 56/2012 (Suppiah Sivakumar Vs OIC Police Station Theldeniya and others), it was observed that if disciplinary action had already been taken against the accused then it was considered as a ground to mitigate the violation of Article 12(1). This may be due to the fact that the Petitioners complaint was investigated and therefore implies that he was treated as an equal before the law.

5.3 Article 13(1) of the Constitution:

"*No person shall be arrested except according to procedure established by law. Any person arrested shall be informed for the reason for his arrest"*

In SC FR Case No 241/14 (Karuwalagaswewa Vidanelage Swarna Manjula and Nawarathna Henalage Rosaliya Vs. 1. C.I.V.P.J. Pushpakumara OIC Police Station Kekirawa and others), the Courts first evaluated if there was in fact "**an arrest"**. Thus, cases such as Piyasiri V Fernando (1988) and Namasivayam V Gunawardena (1989) state that when a person is required or directed by a police officer to go to a police station and he is thereby compelled by the nature of that requirement or direction to go to the police station against his wishes that person has been arrested.

In the case of Namasivayam V Gunawardena (1989) Sharvanada CJ stated "in my view when the 3rd Respondent required the Petitioner to accompany him to the police station, the Petitioner was in law arrested by the 3rd Respondent. The Petitioner was prevented by the action of the 3rd Respondent from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; threat of force used to procure the Petitioners submission was sufficient…"

A similar stance was taken in the case of Sirisena V Perera (1991) Fernando J states "whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases"

SC FR Case No 241/14 also evaluated if the arrest was as per the procedure of the law as well. In relation to when a police officer arrests an individual section 32 (1) of the Code of the Criminal Procedure Act must be evaluated as it empowers a police officer to arrest a person without a warrant only in one of the instances enumerated in sub sections (a) to (i) of Section 32(1).

Thus, Prasanna Jayawardena J states, "*time and time again Courts have taken a view that an arrest will be lawful only if the arresting officer had reasonable grounds, either upon personal observations on knowledge of the arresting officer or upon a reasonable complaint or credible information received by him, which enables him to form a reasonable suspicion that the person he proceeds to arrest has been concerned in a cognizable offence"*

In the case of **Channa Pieris V Attorney General (1994)** Amerasinghe J extensively discusses this and states the following:

"The provisions relating to arrest are materially different to those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting point of criminal proceedings while the other constitutes the termination of those proceedings and is made by the Judge after the hearing of submissions from all parties. The power of arrest does not depend on the requirement that there must clear and sufficient proof of the commission of the offence alleged. What the officer making the arrests needs to have are reasonable grounds for suspecting the persons to be concerned in or to be committing or to have committed the offence. ….A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him or upon a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both…. A suspicion does not become "reasonable" merely because the source of information is creditworthy. If he is activated by an unreliable informant the officer making the arrest should, as a matter of prudence act with greater circumspection than if the information had come from a creditworthy source. However, eventually the question is whether in the circumstances, including the reliability of the sources of information, the person making the arrest could, as a reasonable man, have suspected that the persons were concerned in or committing or had committed the offence in question…..However the officer making the arrest cannot act on a suspicion founded on mere conjecture or vague surmise. His information must give rise to reasonable suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence"

Thus, to determine this, the courts would consider an **objective test to evaluate reasonable grounds** and not the subjective reasoning of the arresting officer.

Reasonable grounds however as per our view would vary according to the situation. There have been cases evaluated herein where innocent individuals had been arrested when they were unintentionally in the wrong place such as a protest, or a fight in a public space. However, in most cases section 13(1) was evaluated objectively as discussed above.

As observed by Shirani Bandaranayake J, in W Nandadasa V U.G Chandradasa, OIC Police Station (2005)
"the purpose of following the correct procedure is therefore to safeguard the liberty as well as maintain law and order and thereby to mete out justice and fair pla.y.."

5.4 Article 13(2) of the Constitution:

"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the Judge of the nearest competent Court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with the procedure established by law"

The procedure discussed above is contained in Section 37 of the Criminal Procedure Code Act No. 15 of 1979 which states as follows:

"Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate"

In the case **of Channa Peiris V Attorney General (1994)** Amerasinghe J, observed that the *"Constitutional requirement must be complied in a reasonable way within a reasonable time which is a matter for Court to decide on the circumstances of each case.*

In the case of **Queen V Jinadasa (1960)** it was held by the Supreme Court that Section 37 of the Criminal Procedure Code and section 66 of the Police Ordinance requires that a person arrested without a warrant should be produced before a Magistrate with the least possible delay. The limit of twenty-four hours prescribed in both sections does not enable the police to detain a suspect for the length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate.

Basnayaka CJ, further went on to state *"the law requires (Section 66 of the Police Ordinance) that an accused person taken into custody by a police officer without a warrant must forthwith be delivered in to the custody of the officer in charge of the Police Station in order that such person may be secured until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by the means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused to accompany the Police from place to for the purpose of participating in the detection of crime. The delay of his production before a magistrate in order that unlawful purpose maybe served is illegal and deserving of censure"*

In the case of Kapugeekiyana V Hettiarachchi and two others (SC No. 80/84), Courts state Section 36 and 37 of the Criminal Procedure Code, which were once statutory rights have been made into constitutional rights. The Court further went on to state that **unless there are compelling reasons** they ought not to be cut down by judicial construction.

Even in the instance more than 24 hours are required, Section 115(4) of the Code provides for the procedure that police officers are required to adopt when investigations are long drawn out and cannot be completed within a 24-hour period. In such an event the Officer-in-Charge of the police station has to first obtain the authorization of the Magistrate to have access to the remand prison for the purpose of further investigation.

5.5 Article 13(4) of the Constitution:

"No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment."

It was observed that only three cases were found where leave to proceed under Article 13(4) has been granted. Only SC FR 18/87(Ansalin Fernando Vs Sarath Perera OIC, Police Station Chilaw and Others) was found to have violated 13(4). Thus, there is insufficient material to analyse how 13(4) has been interpreted.

In SC FR 18/87 the case of **Nanayakkara V Henry Perera** was evaluated. In the case of Nanayakkara the court expressed the opinion that it would be unlawful to detain a person for an unspecified and unknown purpose as this would be an infringement of Article 13(4). Thus, it can be observed that if an individual is detained for long periods of time for an unknown purpose Article 13(4) can be considered, depending on the facts of the case.

In SC FR 471/2000 (Sriyani Silva Vs Iddamalgoda, OIC Police Station Payagala and others), Fernando J stated "Although the right to life is not expressly recognized as a fundamental right, that right is impliedly recognized in some of the provisions of Chapter III of the Constitution. In particular Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court. That is to say a person has a right not to be put to death because of wrongdoing on his part except upon a court order. (There are other exceptions as well, such as the exercise of the right of private defence). Expressed positively that provision means that a person has a right to live unless a court orders otherwise. Thus Article 13(4), by necessary implication recognizes that a person has a right to life at least in the sense of mere existence as distinct from the quality of life which he can be deprived of only under a court order. If, therefore, without his consent or against his will, a person is put to death unlawfully and otherwise than under a court order, clearly his right under Article 13(4) has been infringed. In regard to every such instance, upon the infringement taking place the victim will cease to be alive, and therefore unable to bring an action. If I were to hold that no one else-next of king, intestate heir, or dependent is entitled to sue the wrong doers, that would mean that there is no remedy for causing death in violation of Article 13(4) and that the right to life impliedly recognized by that Article is illusory, as there is no sanction for its infringement.

Fernando J. further went on to state that where there is an infringement of the right to life implied in Article 13(4), Article 126(2) of the Constitution must be interpreted in order to avoid anomaly, inconsistency, and injustice as permitting the lawful heirs and/or dependents to institute proceedings.

Thus, it can be construed that Article 13(4) does imply a right to life, even though it may not be expressly stated in the Constitution, and in the event a person is put to death wrongfully the Court will interpret Article 13(4) to permit lawful heirs to institute proceedings as a narrower interpretation would diminish the meaning of Article 13(4).

It was observed that Leave to Proceed for Article 13(4) was permitted in SC FR 18/87, SC FR 471/2000 and SC FR 429/2003 (Guneththige Mislin Nona and another Vs OIC Police Station Maheepala and others).

6. Analysis of the cases in relation to infringement of Article 11, 13(1) and 13(2):

A total of 100 cases were evaluated and assessed to identify patterns and issues in the way in which a judgment was made. Thus, we have observed the following:

- More males have made applications to the Supreme Court for violations of fundamental rights (11,13(1) and 13(2)) for the period between 1981- 2019. Females are far few. Females were mostly acting in the capacity of guardians or representing the deceased. Few of the females who did make an application to the Supreme Court did feel threatened of sexual assault or was sexually assaulted. It was also observed that in certain instances males were stripped naked, and even had certain devices like pipes being inserted into the rectum, yet none of these acts were noted as sexual violence.

- In the 1980's the Courts discussed if the remedy prescribed by Article 126 of the Constitution is available only where there is an infringement or imminent infringement of a fundamental right by executive or administrative action. This discussion however over the 1980's era had expanded to individuals who act under the colour of office even though he/she may have not been authorized to do so.

- **Leave to Proceed:** It was observed that most often an application made by the Petitioner contained many infringements but was subsequently reduced at the Leave to Proceed stage. Thus, it would be beneficial to the public, if a research on the reasons why the violations of articles were reduced and how it was reasoned especially during the stage of preliminary objections.

  The table below however provides an overview of the number of leave to proceeds for each violation and the number of applications that were found to have infringed Article 11, 13(1) and 13(2)

Year	Leave to Proceed	Found infringement
1981-1989		
Article 11	**08**	**02**
Article 13(1)	**05**	**02**
Article 13(2)	**02**	**01**
1990-1999		
Article 11	**28**	**21**
Article 13(1)	**23**	**18**
Article 13(2)	**20**	**19**
2000-2009		
Article 11	**22**	**18**
Article 13(1)	**15**	**09**
Article 13(2)	**10**	**08**
2010-2019		
Article 11	**41**	**27**
Article 13(1)	**25**	**12**
Article 13(2)	**16**	**10**

- In SC FR No 244/2010, the Respondents had not left any marks of torture. In fact, the medical report stated healing wounds only on the wrists and ankles. However, the beating was done with a hose pipe which does not leave marks and kotchi miris as a substance was used by the Respondents, firstly by making the Petitioner eat it and thereafter by pouring the juice into the eyes and nose. Thus, as burden of proof for an infringement under Article 11 is upon a Petitioner, and if Respondents are looking for innovative ways to torture but reducing the marks on the victim's body, Courts in the future may have to look at evidence beyond what meets the eye to assess violation of Article 11.

- Number of applications in total dismissed: **21 applications in total were dismissed out of the 100 cases.** Most cases were dismissed on the basis of a lack of evidence of torture, for e.g. the Petitioner's story was not compatible with the report provided by the Judicial Medical Officer. Furthermore, Judges also considered instances where the Petitioner's witnesses provided contradictory statements to a story. Furthermore, the behavior of the Petitioner was also considered especially when evaluating Article 13. Drunken behavior, public brawls were

assessed as a deciding factor when dismissing an application. However, Respondents (Law Enforcement Officials) providing contradictory statements were considered as evidence of alleged infringement, thus strengthening the case of the Petitioner.

- In case SC FR 555/2009 (Herath Mudiyanselage Yohan Indika Herath Vs OIC Police Station Dumalasuriya and others) it was observed that the Courts were of the view that the fundamental rights provision in Article 11 was supplemented by the Torture Act No. 22 of 1994 which provides criminal sanctions for torture. SC FR 112/2010 (Ishantha Kalansooriya Vs. Karunarathne OIC Police Poddala and Others) also quoted the Torture Act. In case No. 244/2010, the definition of Torture under the Torture Act was used to analyse the facts of the case.

- It was observed that despite allegations of human rights violations during the war, or the JVP insurgency 100 applications are far too few. Furthermore, it is noteworthy to mention that these applications were not from across the country either. Certain districts had zero applications. Furthermore, only three cases were found to be connected to matters relating to the Liberation Tigers of Tamil Eelam (LTTE); SC FR 326/2008 (Edward Sivalingam Vs Jayasekera, Sub-Inspector CID) which was dismissed due to a lack of evidence, the Courts in addition to other factors evaluated two visits made by the officers of the International Committee of the Red Cross (ICRC). Updates of these visits are included in the Routine Information Book Records maintained by the CID. It had not indicated any ill-treatment or torture. The Second Case was SC 860/99 (Priyantha Dias Vs Ekanayake, Reserve Police Constable,Police Station Polpithigama and others) here the Petitioner was a teacher by profession and he was about to board a bus with the principal of the school when he was questioned about his place of birth by the Respondents. The Petitioner though a Sinhalese, his place of birth was Batticaloa . The Respondents after questioning him subsequently assaulted him as they assumed him to be an individual connected to the LTTE. However, the judges found that the respondents had violated Article 11 and lastly SC 555/2001 (Koneshalingam V Major Muthalif), the Petitioner complained that he was taken into custody, assaulted and forced to admit that he was a member of the LTTE. The Court was of the view that he was taken into custody on a vague suspicion and therefore found the Respondents to have violated Article 11, 13(1) and 13(2).

- Only Two Cases were directed to the Judicial Service Commission with regard to the Magistrates orders. In SC App No. 126/94; the Supreme Court was unable to find a provision of law granting sanction for a magistrate to make a remand order that eroded the liberty of the subject. The Registrar was therefore directed to notify the Chairman of the Judicial Service Commission for action. In SC 136/2014; the Court accepted submissions that the learned magistrate had no jurisdiction to make an order of deportation. Thus, hereto the copy of the Judgement was forwarded to the Judicial Service Commission.

- SC 136/2014 (Coleman v. Attorney General and Others) was the only case found where Leave to Proceed was granted under Article 11, 12(1) and 13(1) to a foreign national. The Court held that Article 12(1) and 13(1) was infringed.

7. DIRECT ISSUES:

7.1 Duration:

Over the years, it is evident that the number of petitions had increased creating a backlog of cases especially after year 2000. In the years 1980-2000, all applications were heard, and judgments were passed within a period of one year.

However perhaps due to the increase in the number of cases the duration of cases had increased to more than 5 years. This delay could have repercussions. Whilst the Petitioner receives a delayed judgement that would be far costlier than that of a case heard within a period of one year, the Respondents would also enjoy a level of impunity until a decision on the matter has been made.

A table depicting the duration of a case over the years has been provided below:

1981-1989		
Number of Cases:	**08**	
# of cases within 1-3 years - 08	**# of cases within 3-5 years: 0**	**# of cases 5years and above: 0**
1990-1999		
Number of Cases:	**28**	
# of cases within 1-3 years - 27	**# of cases within 3-5 years: 01**	**# of cases 5years and above: 0**
2000-2009		
Number of Cases:	**22**	
# of cases within 1-3 years - 17	**# of cases within 3-5 years: 05**	**# of cases 5years and above: 0**
2010-2019		
Number of Cases:	**42**	
# of cases within 1-3 years - 02	**# of cases within 3-5 years: 08**	**# of cases 5years and above: 32**

7.2 Compensation:

Compensation varies depending on the circumstances of each case. However, it is observed that within the timeframe between 2000-2019, State Compensation has increased. Whilst the average state compensation was between 50,000 and 100,000/-, there were four cases in which the State paid Rs. 500,000/- each to Petitioners. Furthermore, in **SC FR 471/2000** the State paid Rs. 700,000/- as compensation and in **SC FR 328/2002** (Sanjeewa, Attorney at Law on behalf of Gerald Mervin Perera Vs Suraweera, OIC Police Station Wattala and others) the State paid Rs. 650,000/- as State Compensation (exclusive of costs which was also paid) The State also bore the cost of a private hospital bill of Rs. 704, 708/- in this case.

In SC FR 136/2014 (Coleman v. Attorney General and Others) State Compensation of Rs. 500,000 was granted to the Petitioner for the litany of abuse and harassment, arbitrary arrest at the hands of the

Katunayake Police, and the events that transpired at the Negombo Magistrate's Court (MC), detention at the Negombo Prison and the Mirihana Immigration Detention Camp.

Thus, in the case of Coleman, a large sum of compensation was paid due to the degrading treatment she faced at every stage. Whilst all other cases were due to how severe the torture was. Most Petitioners had suffered permanent disability or the manner in which the individual was tortured was extremely severe.

Further, Courts were of the view that **State liability** would exist if it is established to the satisfaction of the Court that the act in question was done by a State official. Therefore, State compensation was metered out to Petitioners whose rights were infringed despite the State not authorizing such violations. The issue with State Compensation however is that Respondents (State Official) may not feel the gravity or the magnitude of their actions. Ironically if the State uses tax payer's money to continue to pay out violations of fundamental rights it could be stated that as citizens we are all sanctioning such acts of violence. Furthermore, state compensation provided to a Petitioner would also mean that the Petitioner may have ultimately contributed to the compensation he receives via the tax money he pays the State.

Finally, how the courts determine the ratio between private and public compensation is rather ambiguous and no reasoning for provided as to why or how this was determined.

The table below provides an overview:

<table>
<tr><td>Number of Cases that received compensation: (1981-1989)</td><td colspan="2">05</td></tr>
<tr><td># of cases that received private compensation only? 01</td><td># of cases that received state compensation only? 04</td><td rowspan="3"># of cases that received a mix of state and private compensation? 0</td></tr>
<tr><td>Minimum compensation award</td><td>Rs. 2500/= (state)</td></tr>
<tr><td>Highest compensation award</td><td>Rs. 50, 000/= and costs Rs. 1500/= (state)</td></tr>
<tr><td>Number of Cases that received compensation: (1990-1999)</td><td colspan="2">27</td></tr>
<tr><td># of cases that received private compensation only? 02</td><td># of cases that received state compensation only? 10</td><td rowspan="3"># of cases that received a mix of state and private compensation? 15</td></tr>
<tr><td>Minimum compensation award</td><td>Rs. 2500/= and Rs. 2500 /=cost</td></tr>
<tr><td>Highest compensation award</td><td>Rs. 200,000 /= and Rs. 5000/= cost</td></tr>
<tr><td>Number of Cases that received compensation: (2000-2009)</td><td colspan="2">17</td></tr>
<tr><td># of cases that received private compensation only? 02</td><td># of cases that received state compensation only? 05</td><td rowspan="3"># of cases that received a mix of state and private compensation? 10</td></tr>
<tr><td>Minimum compensation award</td><td>Rs. 15 000/=</td></tr>
<tr><td>Highest compensation award</td><td>Rs. 1, 504, 788/=</td></tr>
</table>

<table>
<tr><th>Number of Cases that received compensation: (2010-2019)</th><th colspan="2">31</th></tr>
<tr><td># of cases that received private compensation only? 07</td><td># of cases that received state compensation only? 07</td><td rowspan="3"># of cases that received a mix of state and private compensation? 17</td></tr>
<tr><td>Minimum compensation award</td><td>Rs. 50,000/=</td></tr>
<tr><td>Highest compensation award</td><td>Rs. 1,075,000/= and Rs. 50,000/=</td></tr>
</table>

Discrepancies of how compensation was determined was also observed. As the discretion of compensation is upon the Courts, and no formula/procedure is followed in determining how much compensation an individual should receive. This causes concern as one individual may receive less compensation compared to that of another individual. As torture cannot be quantifiable deciding on an amount would not be an easy task, however it should nevertheless be more transparent to avoid injustice.

7.3 Minors:

Only 6 judgements between 1981-2019 were found. Minors were between the age of 13 years and 15 years. Two females and four males. In all cases minors complained of assault. However, it is unclear how Courts handle instances when a minor is the Petitioner, especially when extracting evidence from minors and assessing the long-term impacts of these assaults when deciding on compensation.

The following cases are related to minors:

a. SC 191/88, was however dismissed due to the lack of evidence.

b. SC 190/94, was a 17 year old boy that was assaulted by his deputy principal and teachers, however the accused was found guilty

c. SC 615/95, was a 14 year old female girl that was assaulted due to alleged theft. She was assaulted with a hose pipe, thereafter hung on a tree by a rope and assaulted. Violation of Article 11, 13(1) and 13(2) was found.

d. SC 126/2008, a 14-year-old male was assaulted for alleged theft and was assaulted. Violation of Article 12(1) was allowed.

e. SC 578/2011, a 13 year old male was assaulted for alleged theft, the accused was guilty of a violation of Article 11.

However, it was only in the landmark judgement (*in 2018*) Landage Ishara Anjali (Minor) and Wijesinghe Chulangani Vs. Officer-in-Charge, Matara Police Station and others (SC FR 677/2012), that the Courts took the opportunity to address and provide the following guidelines for law enforcement authorities to ensure the rights of the public are secured:

- Law Enforcement Officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

- Law enforcement officials shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity.
- Law enforcement officials shall at all times protect and promote, without discrimination, equal protection of law. All persons are equal before the law, and are entitled, without discrimination, to equal protection of the law.
- They shall not unlawfully discriminate on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth or other status.
- It shall not be considered unlawful or discriminatory to enforce certain special measures designed to address the special status and needs of women (including pregnant women and new mothers), juveniles, the sick, the elderly, and others requiring special treatment in accordance with international human rights standards.
- Children are to benefit from all the human rights guarantees available to adults. In addition, children shall be treated in a manner which promotes their sense of dignity and worth; which facilitates their reintegration into society; which reflects the best interests of the child; and which takes into account the needs of a person of that age.
- Detention or imprisonment of children shall be an extreme measure of last resort, and detention shall be for the shortest possible time.
- Children shall be detained separately from adult detainees.
- Detained children shall receive visits and correspondence from family members.
- Law Enforcement Officials shall exercise due diligence to prevent, investigate and make arrests for all acts of violence against women and children, whether perpetrated by public officials or private persons, in the home, in the community, or in official institutions.
- Law Enforcement Officials shall take rigorous official action to prevent the victimization of women and shall ensure that revictimization does not occur as a result of the omissions of police or gender-insensitive enforcement practices.
- Arrested or detained women shall not suffer discrimination and shall be protected from all forms of violence or exploitation.
- Law Enforcement Officials shall not under any circumstance use Torture and other cruel, inhuman or degrading treatment.
- No one shall be subjected to unlawful attacks on his or her honour or reputation.
- Law Enforcement Officials shall at all times treat victims and witnesses with compassion and consideration.
- Law Enforcement Officials shall at all times promptly inform anyone who is arrested of reasons for the arrest.
- Law Enforcement Officials shall maintain a proper record of every arrest made. This record shall include: the reason for the arrest; the time of the arrest; the time the arrested person is transferred to a place of custody; the time of appearance before a judicial authority; the

identity of involved officers; precise information on the place of custody; and details of the interrogation.

- Anyone who is arrested has the right to appear before a judicial authority for the purpose of having the legality of his or her arrest or detention reviewed without delay.
- Law Enforcement Officials as far as possible shall take every possible measure to separate juveniles from adults; women from men; and non-convicted persons from convicted persons.
- Law Enforcement Officials shall at all times ensure to obey and uphold the law and these rules.

The impact of the above guidelines would have to be assessed in future cases

8. Factors which the Court took into consideration when analyzing infringement:

8.1 Medical Evidence:

Medical evidence is an integral component in assessing if an infringement or violation has occurred, especially in relation to Article 11 as physical evidence of torture would support a Petition.

It was observed that both public medical reports and private medical reports were accepted by the Judiciary.

In instances where a JMOs report was incompatible with a Petitioner's narrative or if a Petitioner has failed to provide a medical report, it was observed that it weakened a Petition. It was further observed that there were instances where a Government medical report and a private medical report were contradictory. However, in circumstances where a government medical officer had stated no evidence of torture whilst a private hospital had stated evidence of torture the Judges have reviewed and accepted the private medical report based on the circumstances of each case.

However, it was further observed that **police officers have threatened Petitioners to lie and provide a false narrative to JMOs,** and in certain instances the Petitioners have followed such instructions out of fear.

Furthermore, it was appalling to note that in some instances the **JMO had produced false reports obstructing the Petitioners right to justice by attempting to state that the injuries are not compatible with the narrative of the Petitioner.**

e.g.: In **SC FR 387/2013** (Hewa Munumullage Ajith and another Vs Kalinga de Silva HQ Inspector Police Station Weligama and others), it was stated that the Courts cannot rely on the report submitted by the Judicial Medical Officer Matara, since his conduct is highly suspicious. The Court further went on to state that the said Judicial Medical Officer in Matara should be investigated by the relevant authorities.

8.2 Time Bar:

In all cases assessed herein the Courts did not apply the time bar if it was brought into contention

Article 126(2) of the Constitution states as follows:

" Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or

by an attorney at law on his behalf within one month (emphasis added) thereof in accordance with such rules of court as may be in force, apply to the Supreme Court by way of Petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such applications may be proceeded with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be by not less than two judges"

In the case of SC FR 555/2009 (Koneshalingam Vs Major Muthalif), Tilakawardena J, went on to state that the exception to the rule exists in the Human Rights Commission of Sri Lanka Act No. 21 of 1996.

Section 13 of the Act states as follows:

"*Where a complaint is made by an aggrieved party in terms of Section 14 to the Commission within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaints is pending before the Commission,* ***shall not be taken into account in computing the period of one month within an application may be made to the Supreme Court by such person in terms on Article 126(2) of the Constitution."***

Thus, the Petitioner could avoid the time bar if the application that was made to the Human Rights Commission was made within one month. Most of the cases herein that considered the time bar, had already made an application to the Human Rights Commission. This goes to show the importance of the HRC and its functions and more awareness of the functions of the HRC must be made known to the general public.

However, time bar would be dependent on the circumstances of each case. In the Case of SC FR 859/2009(W. N. D Gunasekara Vs Police Constable Chandana, Police Station Grandpass and others) Priyasath Dep PC CJ, stated that the question of time bar is a threshold issue which should have been taken as a preliminary objection to the maintainability of the action. Priyasath Dep PC J, quoted two cases:

Lewla Thithapajjalage Ilangaratne V Kandy Municipal Council and others (1995) where the Supreme court has held that the question of time bar is a relevant matter to be considered when granting leave to proceed and if an application is out of time the court has no jurisdiction to entertain it.

Romesh Cooray V Jayalath, Sub-Inspector of Police and Others (2008) hereto the question of time bar has been raised for the first time at the stage of argument and the statement of objection was completely silent on the said objection.

Thus, it would be interesting to observe how the argument of time bar is evaluated at the onset of an application as in most of the applications herein the argument of a time bar may not have not been raised as a preliminary objection in the first place, and therefore more research must be done on this matter.

8.3 Informing an authorized person:

It was observed that when the Courts evaluated the Petitioners story, who the Petitioner informed of the torture or the circumstances were taken into consideration. For e.g. informing the magistrate or the magistrates' observations of torture, the JMO's report, the application and the narrative to the Human Right Commission. The Courts have also observed that informing an official depends on

circumstances as many times the Petitioner may have been threatened to not disclose torture to the magistrate or to the medical officer.

9. INDIRECT ISSUES: `

9.1 Behavior of the Police:

The police are responsible for most of the abuses examined in this report. It is appalling to see the kind of behavior metered out towards the public by a police force that's meant to provide protection to the citizens it serves.

The researcher observed the following:

- Several times the police attempted to fabricate evidence or charges or threaten the lives of the petitioners by falsely charging the Petitioner with possession of a bomb, grenade, or cannabis. It was observed that there were instances where individuals were forcefully thumb printed on to grenades and/or forcefully requested to sign documents and statements.
  Whilst the magistrate has most often acquitted the Petitioners from these false charges, it is unclear if the relevant police stations are reprimanded for such despicable actions.

- The police have tortured individuals and **caused irreparable damage to the wellbeing of the person**. For e.g. in SC 162/91 (Rathnapala Vs. Dharmasiri HQ Inspector Rathnapura and others) the petitioner's lung had to be removed due to the extensive torture caused by the Police. In SC FR 471/2000, the Petitioner died due to his injuries, the Post Mortem showed 20 injuries inflicted on the deceased. In the case of SC FR 213/2001 (Siripala Vs Sub Inspector Wijesinghe and others) it was observed that the Petitioner had to use a catheter for the rest of his life and was impotent due to the torture he endured.

- In cases such as SC(FR) 430/2005 (H. A. Manoj Talis, OIC Police Station Gorakarella and others) it was observed that the Petitioner was taken to the police station and was assaulted in a separate room. Further, an s-lon pipe was also inserted through the Petitioner's rectum. In SC FR 66/97 (Jayasinghe Vs Sub Inspector of Police, Jayakody and Others) the Petitioner was handcuffed and stripped, and chili powder was put into his nose and private parts and he was hanged on a beam. In SC FR 244/2010 it was observed that Kotchi Miris was put into his eyes and nose. The Petitioner claimed he was put through physical and mental pain for the crime of theft he never committed (The Magistrate had subsequently acquitted him of this charge). The police for the purpose of torture usually use clubs or similar weapons, hosepipes to torture the victim. Often times the Petitioner suffers from fractures and contusions. There have been cases where the Petitioner was slapped to a point that the Petitioner had vomited or had fallen unconscious.
- In SC(FR) No. 1006/2009 (Hapugegoda Jagath Perera Vs. OIC Police Station Mirigama and others), the Petitioner had only gone to the Police station to assist his employee. The 2nd Respondent had questioned why the Petitioner was there at the station and had subsequently assaulted him and broken his teeth and put him in the cell (without reason). In SC FR No. 09/2011 (Suriyarachchige Lakshman de Silva, B.M Ajantha Weerasinghe Vs OIC, Police Station Kiribathgoda and others) the petitioner was tortured by burning him with charcoal and by the

use of chili.

- A pattern was also observed that in certain cases individuals were blindfolded and taken to **unused houses**. It was also observed that arrests were sometimes made in private vehicles. Furthermore, there have been occasions in which police officers have been in civil at the time of arrest. This causes concern as it would be difficult for an individual to identify the police officer for the purpose of evidence.

- **Assaulted by private parties**: SC(FR) 260/2011 (A.A Dinesh Priyankara Perera Vs OIC Plice Station Panadura North and Others), SC (FR) 09/2011(Suriyarachchige Lakshman de Silva, B.M Ajantha Weerasinghe Vs OIC, Police Station Kiribathgoda and others), SC 18/87 are examples for when private individuals have assaulted the Petitioner whilst in the custody of the Police.

- It was also observed that the police had **denied individuals opportunity or access to meet with lawyers** or had denied family member the right to visit the individuals in custody.

- **Public Shaming**: it was observed that in certain cases such as SC(FR) 514/2010 (Hewawasam Sarukkalige Rathnasiri Vs. OIC Police Station Welipena and others), the Petitioner was publicly shamed. In the above case, the Petitioner was dragged for about 8kms to a kovil and the First Respondent publicly stated he had caught one of the rioters. In SC 235/96 (Subasignhe Vs Police Constable Sandun and Others) a similar incident occurred, the policeman took the petitioner in a private vehicle and paraded him to the public with the intention to shame. SC FR No. 527/2011 (Sajith Suranga Bogahawatta Vs. OIC Thelikada and others) and 689/2012 (Rajapaksha Pathirage Justin Vs OIC, Police Station Homagama and others) are other examples in which the police publicly shamed the petitioners.

- It was also observed that in relation to arresting an individual the **police would sometimes detain family members to lure the individual**. In the case of SC FR 09/2011 the Courts stated that detention of the spouse or a family member or a relative of a suspect cannot be a reasonable reason for the peace officer to arrest and detain such a person in police custody under section 32 (1) (b) of the Criminal Procedure Code. The detention of a spouse or a family member or any other relative of the suspect by a peace officer must be discouraged by Courts of Law in this country. In the case of SC FR 387/2013, it was observed that the brother of the Petitioner was arrested to lure the Petitioner to the police station where he was subsequently assaulted.

- **Attitudes:** The research observed several instances in which the Respondents were alleged to have been drunk at the point of arresting an individual. Whilst from a perspective of sentencing this particular issue would be hard to assess, several Petitioners especially in the 2000-2019 timeframe have alleged that the Respondent was under the influence of alcohol. In case No.SC (FR) 26/2009 (Dodampe Gamage Asanka Vs. OIC Police Station Pitabeddara and others), it was alleged that the police had also consumed alcohol within the police station.

- **Detention:** It was observed that there have been many instances where an individual was simply taken to a police station on the basis of falsely fabricating a case. Thus, in SC FR 608/2008 (Sarath Kumara Naidos Vs OIC Police Station Moratuwa and others), the Petitioner was kept in remand for eight days with two false charges and then released. In the case of SC FR 1/2001 (Rohana Michael Vs. Saleh OIC Police Station Narahenpita and others) it was observed that the Petitioner was detained in excess. In the case of SC FR 198/2011(Tuduge Achalanka Srilal Perera Vs OIC Police Station Madampe and others) the Petitioner was never produced to a Magistrate from the point of arrest to release. In SC FR 241/14 the Police had lied to the petitioners stating that a case was filed in the Magistrate's Court when no such case was filed. It was further observed that law enforcement officials had many times attempted to falsify documents or to manipulate incidents to subvert the truth in violation of the law. This attempt was found especially when documenting the time of arrest.

In Abasin Banda V S. I Gunaratne and Others (SC No 109/95) Kulatunga J states the following *"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 this Court had observed in previous judgements, 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."*

All of the above goes to show that abuse is rampant in a police station and despite Court requesting the police to treat individuals with care and courtesy, nothing has changed over the years.

E.g.
In SC 65/88 the Courts informed the IGP that he must give instructions to all police stations concerning the manner in which a person who is taken into custody is treated.

In SC 89/91 (Faiz Vs AG and others), the IGP was requested to give instructions to all OIC's on care and courtesy.

In SC 71/96 (Rifaideen Vs Sub Inspector of Police Jayalath, Wellawatte Police Station and Others) the IGP was requested to give instructions to police stations on care and courtesy.

In SC 559/03 (Sarjun Vs Kamaldeen and two others) Judges commented on the abuse of authority

SC FR 107/2007 (Bandula Samarasekera Vs OIC Police Station Ginigathena and others) Courts stated that officers must possess a higher standard of moral and ethical values than that of an average person.

SC FR 689/2012 Courts directed the IGP to conduct an investigation and to consider instituting proceedings against the 1st Respondent.

In SC 677/2012 (Landage Ishara Anjali, Wijesinghe Chulangani Vs OIC Police Station Matara and Others) the Courts provided guidelines to the IGP such as law enforcement officials shall

respect and protect human dignity and maintain and uphold the human rights of all persons, etc.

Over the years as depicted above, Courts have called for disciplinary action and the Inspector General of Police has many times informed police stations of the way in which an individual must be treated when in custody. Despite these actions torture and fundamental right violations have continued by law enforcement officials. Compensation is not enough, what is needed is that a fundamental right should be treated as sacred constitutional rights and not be violated in the first place by the very officials who are placed by its citizens to safeguard it. Perhaps more stringent disciplinary action must be developed to curtail this matter because it is evident that despite such disciplinary action the Police continue to abuse their power and authority.

TORTURE ACT NO. 22 OF 1994

In 1994, to give effect to the obligations under Convention against Torture and other cruel inhuman or degrading treatment or punishment, the government enacted the Torture Act, No 22 of 1994. Torture is considered to be a non-bailable offence and state of war, threat of war, public emergencies or an order from a superior would not be considered as a defense for Torture.

However, while the Act is generally in conformity with the definition of torture in the Convention, it does not include "suffering" but only "severe pain, whether physical or mental" nevertheless this does not reduce the impact of the Act.

The definition of ***torture*** as per the Act shall mean:
"with its grammatical variations and cognate expressions, means any act which causes <u>severe pain</u>, whether Physical or mental, to any other person, being an net which is
(a) done for any of the following purposes that is to say"
(i) obtaining from such other person or a third person, any information or confession; or
(ii) punishing such other person for any act which he or a third person has committee, or is suspected of having committed ; or
(iii) intimidating or coercing such other person or a third person

or (b) done for any reason based on discrimination, and being in every case, an act which is done by, or at the initiation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity."

Despite the Act, having tough sanctions on offences related to torture, it is important to note that the first case under this Act was only filed in the year 2000 The Act covers all individuals, both citizens and law enforcements authorities are covered under this Act and if found guilty shall be punishable with 7-10 years imprisonment and a fine of Rs. 10,000-50,000/=

Section 2 of the Act states:

(1) Any person who tortures any other person shall be guilty of an offence under this Act.
(2) Any person who"
(a) attempts to commit;
(b) aids and abets in committing;
(c) conspires to commit,
an offence under subsection (1), shall be guilty of an offence under this Act

(3) The subjection of any person on the order of a competent court to any form of punishment recognized by written law shall be deemed not to constitute an

offence under subsection (1).

(4) A person guilty of an offence under this Act shall on conviction alter trial by the High Court be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees

Thus, this Report considers 10 cases under the Torture Act No. 22 of 1994 and has attempted to draw a pattern or an understanding in the manner in which the Act has been interpreted by Judges.

It was observed that unlike the infringement of fundamental rights, the Courts scrutinized the alleged offence deeply. This could be because the accused if found guilty would be imprisoned. Unlike an infringement of a fundamental right where compensation can be paid either in private capacity or by the State, a guilty verdict would entail an imprisonment between seven to ten years.

1. ANALYSIS OF CASES:

Observation: only 10 cases were analysed for this research. Each case was chosen at random and does not represent a particular location. A few cases that were subsequently appealed at the Court of Appeal are also included within the 10 cases herein.

Duration:
The duration between all cases varied from 4 to 10 years as depicted below.

Case Number	Duration (Years)
HC 294/03	4
HC 276/03	5
HC/B 1242/2009	9
HC/B/1368/11	4
HC/ 1765/2003	5
HC/ 2303/2007	9
HC/ 2350/2007	10
HC/216/16	9
HC/326/2003	5
HC/183/2007	8

Witness statements: In HC 1765/2003 (Panadura), the Court was of the view that a witness cannot be expected to have a photographic memory. The Court used the case of **Bhognibhain Hirjibhai V State of Gujarat (1983)** to further emphasize this. Furthermore, the case of **Arendtsz V Wilfred Peiris G. A. W 121** was quoted to state that "*just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the test of spontaneity, the test of contemporaneity and the test of promptness, the Court ought to scrupulously proceed to exercise the reasons for the delay. If the reasons for the delay are justifiable and probable the trial judge is entitled to act on the evidence of a witness who had made a belated statement*"

In CA 277/2017 the decision delivered by Sisira de Abrew J, in **Dadimuni Indrasena Dadimuni Wimalasena V AG (2008)** was accepted. In the case of Dadimuni it was stated that "whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent. This principle was also echoed in **Philipu Mandige Nalaka Krishanth Kumara Tissera V AG (2007)** as well. In the case of CA 277/2017 the test of promptness and probability was also applied.

Furthermore, the courts evaluated medical evidence, Witnesses statements, HRC Statements, evidence presented at an SCFR case against an accused. However, despite the number of factors taken into consideration, as the accused had to be identified without any contradictions these statements held very little value. Thus, for e.g. even if medical evidence corroborated with what the victim stated, the identification of who committed the torture would be of far more importance and thus, to hold an accused guilty, it had to be proved beyond reasonable doubt that the accused committed the alleged violation.

It was observed that cases were dismissed due to the following reasons:

- A contradiction in medical evidence
- A contradiction in witness statements
- Victims unable to identify the accused.

However, it is important to state at this juncture that as the responsibility has been placed on the victim to prove that torture was committed by an accused, this may be difficult to prove in most cases as victims may be tortured blindfolded, in dark spaces or police officers would be in civil clothing. Further, due to the type of torture inflicted upon the victim, the victim may not be even be able to recall the perpetrators.

Thus, identification of the perpetrator may only be possible if the torture was inflicted in a public space. In the case of HC (Pandura) 1765/2003 it was stated that **"family members as witnesses should be treated with utmost caution"** as they are connected to a case. Therefore, in such a situation it would be nearly impossible to identify or determine the perpetrator because it has been narrowed down to a point of impossibility.

Mandatory Sentencing: As per the Torture Act, a mandatory sentencing of 7-10 years of imprisonment is required if the accused is found guilty. However, in the case of HC Panadura 1765/2003 the decision delivered by Lordship Justice Wanasundera in **Abagala Mudiyansela Samatha Sampath V AG** on mandatory sentencing was adopted. Wanasudenra J, went on to state "*sentencing is the most important part of a criminal case, and I find that the provision of any law with a minimum mandatory sentence goes against judicial discretion to be exercised by a Judge."* And thus, the mandatory sentence was not applicable.

Sentencing: Whilst various factors was taken into consideration to evaluate the guilt of the accused, certain other factors would be taken into consideration when deciding on the sentence to be imposed. In HC 1368/2011 the Courts evaluated the following factors:

- The duration of the case
- The fact that the accused had agreed to apologize
- Further, the Judge didn't want to ruin the family life and was of the opinion that a harsh sentence would affect the dependents of the accused.

- The Judge also took into consideration the number of years of service as a police officer and if this was a first-time offence.

Thus, more cases must be examined and researched under the TA to evaluate if the above factors were taken into consideration when evaluating a sentence against an accused.

In conclusion: Due to the heavy emphasis upon the victim to prove a case beyond doubt, many perpetrators may get away with fundamental violation rights, because from the view point of a victim it would be difficult to provide evidence especially based on the situation the victim is placed in. The general victim may not have investigative skills, the victim does not have access nor is given access to modern technology to pinpoint to a perpetrator, unlike a police investigations unit which is set up to do this job. In such an instance it would be nearly impossible for a perpetrator to be found guilty under the Torture Act No. 22 of 1994 and more substantive material would be required to evaluate the offence of torture under this Act.

GENERAL RECOMMENDATIONS:

1. Law and Policy Reforms:

- A transparent formula for compensation must be introduced so that disparities when awarding compensation is reduced.

- Remove the time bar period (30day limit) to filing a fundamental rights application in the Supreme Court. Physical and psychological abuse would create unimaginable amounts of trauma and stress and thus, a 30 day time period is not sufficient for a person to make a decision to progress with an application or not. A time bar does not take away the abuse carried out and therefore should not be used as an opportunity to discourage an individual from seeking justice.

- Duration of Court cases must be urgently addressed. The delay in justice has increased over the years and it is hereby recommended that more Judges perhaps must be appointed to reduce the backlog of cases.

- Magistrates must be trained to evaluate and ascertain if an individual produced before Court has suffered torture or has been denied any of his rights (especially the right to an Attorney), and to ensure confidential medical examinations are conducted so that a detainee would not have fear in vocalizing a problem.

- Proceedings must be instituted against accused/law enforcement authorities, Judicial Medical Officers, and other witnesses that have lied or attempted to provide fraudulent documents before Courts to discredit the Petitioner.

- Amendment of the Torture Act, No. 22 of 1994. The mandatory sentence between seven to 10 years must be re-evaluated. The Punishment must vary according to the abuse metered out and therefore a minimum sentencing period of 1 year should be introduced.

2. Law Enforcement Authorities:

- An independent authority must be established to investigate allegations of police abuse. Abusers of Power investigating abusers of power will not result in any vital change. Thus, a completely different body comprising of expertise in the field must be established to:

  - Conduct regular, unannounced checks of the police stations; and
  - Investigate allegations and complaints.

- Police officers that are been investigated for a violation of a fundamental right must be publicly listed so that the public is aware of the investigation and any similar infringement would be reported to authorities by the Public.

- Superior officers in a Police station must be held accountable for the abuse of powers within their police stations. These positions of power are given for leadership and responsibility and therefore they cannot be excused for failing to prevent such crimes or not knowing of such crimes.

- Disciplinary measures taken against police officers must be revaluated and appropriate practices must be adopted that is proportionate to the offence committed. Those that abuse power must know the gravity of what they have done and for example, merely transferring them from one police station to another is insufficient.

- Compulsory learning programs for accused that have been found to infringe fundamental rights of an individual.

- Strict disciplinary action on enforcement authorities that use private locations for the purpose of torture and for permitting private individuals to harass or assault individuals under their custody.

3. FUTURE RESEARCH:

- Applications dismissed at the preliminary stage must be conducted and the number of complaints on Torture the Human Rights Commission received on an average.

- the psychological impact caused to the abuser must be researched. The reasoning behind it is that there is a lot of evidence showing the psychological trauma caused to the victim. Any negative impact caused to the abuser due to his acts could be used as a base for designing proper training programmes for law enforcement authorities.

- Number of Law enforcement authorities serving prison sentences for torture across the country.

4. OTHER:

- Strict disciplinary action against medical officers that attempt to tamper with evidence or maliciously attempt to discredit the Petitioner.

- Random tests for police officers for drug and alcohol abuse. This can be easily carried out if an independent authority is established to investigate allegations of police abuse.

- Urge the Government to adapt, provide, fund new technologies for police stations to extract evidence. Torture is widely believed to be an inefficient method to extract information and solve a crime. The police are in dire need of technology upgrades and new skills. Training programmes designed for enforcement authorities may not be sufficient if it only tells them torture is wrong but fails to provide an alternative method to problem solve.

- The Human Rights Commission has proved to be an extremely important support system thus, more awareness and outreach programmes designed to educate the citizenry is vital especially because time bar may not be considered if a complaint has been lodged within one month of the alleged incident with the Commission.

Acknowledgements