VELMURUGU

v.

THE ATTORNEY-GENERAL AND ANOTHER

SUPREME COURT
ISMAIL, J., WEERARATNE, J., SHARVANANDA, J.
WANASUNDERA, J. AND RATWATTE, J.
S. C. NO. 74/81.
OCTOBER 19, 20, 21 AND 30, 1981.

Fundamental Rights — Fundamental rights of freedom from torture or cruel, inhuman or discriminatory treatment or punishment — Fundamental right of freedom from arrest except according to procedure established by law — Articles 11 and 13 of the Constitution — Administrative practice.

The petitioner a member of the District Development Council for Amparai was prevented by army officers when travelling in a car with 3 others to go to the 4th Colony. He was stopped at the junction on the 4th colony and obliged to turn back and go back towards Kalmunai.On the way he apparently received various complaints of houses being burnt and assault. The petitioner put down the 3 persons who were in his car and proceeded back again towards the 4th Colony.

On the way he met Fr. Elmo Johnpulle who was going on a motor cycle towards the 4th Colony ostensibly regarding the safety of his parishioners. The petitioners then got on to the pillion of the motor cycle and both of them went on the motor cycle to the junction of the colony.

At this junction on the orders of the 2nd respondent the petitioner was taken into custody by army personnel and put into a jeep. The petitioner was not informed of the charge nor given the reasons for his arrest. The 2nd respondent told the army and police officers that they could take petitioner and do as they like with him and left the place. In consequence of what the 2nd respondent said the petitioner was then put on the floor of the truck and subjected to torture and/or cruel, inhuman and/or discriminatory treatment or punishment by the army personnel. Thereafter the petitioner was taken to the Central Camp Police Station where his statement was recorded on directions of the 2nd respondent. The 2nd respondent instructed the recording officer not to take down anything about the torture. He was made to sign the statement without reading it.

On the night of 9.8.1981 the petitioner was produced before the Magistrate to whom he complained of difficulty to walk. The Magistrate however does not support the petitioner on this point.

The Doctor found injuries on the petitioner but the petitioner although he had complained of assault by army men had told the Doctor nothing about the 2nd respondent.

The petitioner complains of illegal arrest and torture and/or cruel, inhuman or degrading treatment and punishment.

Held: (Sharvananda, J. and Ratwatte, J. dissenting)

1. The test applied is the degree of proof, that is, preponderance of probability, used in civil cases which is not so high as is required in criminal cases. But there can be degrees

of probability within this standard. The degree depends on the subject-matter. Where the allegation is a serious one of torture and inhuman treatment by the executive and administrative authorities of the State, a high degree of probability which is proportionate to the subject-matter is necessary.

2. Under our Constitution it is the illegal acts of the executive organ alone that could be the subject-matter of proceedings under article 126.

The liability of the State extends to the unlawful acts of a wide class of public officers, including subordinate officers at peripheral levels who in nowise constitute the decision making core of the administration. This is a new liability imposed directly on the State by constitutional provisions. The common law test of tortious liability cannot provide a sufficient test.

Article 11 which gives protection from torture and ill-treatment is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-third majority but also a Referendum. It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which in no way can be restricted or diminished. This right occupies a preferred position and it is the duty of this court to give it full play and to see that its provisions enjoy the maximum application.

The State should be held strictly liable for any acts of its high state officials. The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e. within the scope of their authority, express or implied, and should also extend to such other acts that may be *ultra vires* and even in disregard of a prohibition or special directions provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State.

The application of a concept of administrative practice can extend State responsibility to cases where the material before court can show that occurrence of the acts complained of can be attributed to the existence of a general situation created or brought about by the negligence and indifference of those in authority. In the instant case if liability is to be imputed to the State, it must be on the basis of an administrative practice and not on the basis of an authorisation, direct or implied, or that these acts were done for the benefit of the State. It is not possible to characterise those acts, if they had taken place as alleged as acts incidental to the authority and powers vested in those persons nor have they been performed to further some objective of the State. They seem to be in the nature of individual and personal acts due to some aberration or idiosyncracy. They are also suggestive of the venting of some grievance of a personal or private nature or in consequence of some strong passion, prejudice or malice. They are admittedly illegal and criminal acts and not merely acts that are unauthorised and *ultra vires.*

The alleged acts of torture and ill-treatment cannot impose liability on the State as a matter of law. The alleged acts have not been authorised, encouraged, or countenanced or performed for the benefit of the State.

The Commission of the acts has also not been proved.

Cases referred to:

(1) Maharaja v. Attorney-General of Trinidad and Tobago, [1978] 2 All ER 670, 679 PC; (No. 2) [1979] AC 385, 396.

(2) Thornhill v. Attorney-General [1980] 2 WLR 510, 519, 520 (P.C.).

(3) Ex parte Commonwealth of Virginia 100 US 339, 346.

(4) Virginia v. Rives (ex parte Commonwealth of Virginia) 100 U.S. 313, 321.
(5) Neal v. Dalaware 103 US 370.
(6) Holme Telephone and Telegraph Company v. City of Los Angeles 227 US 278 57 L. ed. 510, 515.
(7) Raymond v. Chicago Union Traction Company (1907) 207 US 20 – 52 L. ed. 78.
(8) Iowa – Des Moines National Bank v. Bennett (1931) 284 US 239 – 76 L. ed. 265.
(9) United States v. Classic (1941) 313 US 299.
(10) Civil Rights Cases (1883) 109 US 3.
(11) Shamdasani v. Central Bank of India Ltd. AIR 1952 SC 59.
(12) Thadchanamoorti v. A. G. (S. C. 63/80 – S. C. Minutes of 14.8.1980).
(13) Ireland v. United Kingdom (Jan. 18, 1978 – Decisions of the European Court of Human Rights).
(14) Sunday Lake Iron Co., v. Wakefield (1918) 247 US 350; 62 L. ed. 1154.
(15) Kathiraning Bawat v State of Saurashtra AIR 1952 SC 123
(16) Baten v Baten [1951] Probate 35
(17) Blyth v Blyth [1966] I All ER 524
(18) Loveden v Loveden (1810) 2 Hagg. Con. 1.3
(19) University Grants Commission Case (S.C. 57 of 1980) – S. C. Minutes of 8. 8. 1980

Application for infringement of Fundamental Rights under Articles 11 and 13 of the Constitution.

V. S. A. Pullenayagam with R. Siriniwasam, S. C. Chandrahasan, G. Kumaralingam, C. V. Vivekanandan, Miss M. Kanapathipillai and T. Pakyanathan for petitioner.

G. P. S. de Silva Addl. S. G. with D. C. Jayasooriya S.S.C. and S. Ratnapala S. C. for 1st respondent.

K. N. Choksy with Henry Jayamaha and P. Illeperuma for 2nd respondent.

Cur. adv. vult.

November 9, 1981

ISMAIL, J.

The petitioner in this case is an elected member of the Amparai District Development Council, is a retired teacher and a prominent member of the Tamil United Liberation Front in that area. The 2nd respondent had earlier served in the Kalmunai District as an Assistant Superintendent of Police and was presently stationed at Nuwara Eliya in the same capacity until he was drafted temporarily and assigned duties as the Co-ordinating Officer in charge of the Central Camp Police area in the Amparai District. It would appear that this posting has been made in consequence of communal disturbances which had flared up in that area in particular some days prior to the date on which the incident in respect of which this application is made by the petitioner had occurred. It is obvious that the 2nd respondent had been brought down from Nuwara Eliya and entrusted with special functions by reason of his knowledge of the locality, the people and other factors.

In these proceedings the petitioner has invoked the special jurisdiction of the Supreme Court under Article 126 of the Constitution on the basis that being a citizen of Sri Lanka, he has the fundamental right enshrined in the Constitution not to be subjected to torture or cruel, inhuman or discriminatory treatment or punishment, as well as the fundamental right not to be arrested except according to the procedure established by law, and that when arrested he had to be informed of the reason for his arrest, which rights have been declared and recognised in articles 11 and 13 of the Constitution.

The petitioner on this day in consequence of the communal disturbances that had occurred for several days in that area had conferred with the Tamil United Liberation Front Members of Parliament for Nallur, Udupiddy and Pandirippu and several others. While discussions were going on, as a result of certain information which had been conveyed to him and the others, he states he left in a car with four others including the driver to go to the 4th colony which came within the area covered by the Amparai District Development Council.

They left at about 4.30 p.m. and as they came up to the junction of the 4th colony a jeep had come from the opposite direction manned by army personnel and stopped in front of this car. The petitioner states that he got down from his car and introduced himself to the army officer, who appeared to be the leader of the group, that he was a Member of the District Development Council for Amparai. He says that the officer was adamant and told him he did not care whether the petitioner was a member of the District Development Council or whether he was a Member of Parliament and ordered him and others who were with him to turn back and go away. He at that stage made further remonstration but the army officer was adamant. He thereupon turned back, returned with the others in the car towards Kalmunai.

On the way back he had apparently met certain other persons who made various complaints to him of houses being burnt and assault. He then put down the other three persons in the car, turned back and proceeded towards the 4th colony, in spite of the order earlier given by the army officer.

Whilst he was so proceeding he states he met one Rev. Elmo Johnpulle who was also proceeding towards the 4th colony on a motor bicycle ostensibly regarding the safety of his parishioners. The petitioner states he then got on to the pillion of the motor bicycle of Fr. Elmo and the two of them proceeded and came up

to the junction of the 4th colony. There he had seen a shop owner who was known to him standing in front of his shop with two armed constables on either side of him. As he went up, he saw four or five jeeps and two army trucks with army and police personnel came up to the spot where the petitioner was and halted there. He then states that the 2nd respondent who was in one of the jeeps had recognised the petitioner and gave an order to arrest him, whereupon some of the army personnel, who were armed had come running up to him, had taken him into custody and put him into the rear of the jeep in which the 2nd respondent was.

The petitioner complains that he was not informed of the charge nor was he given any reasons for his arrest. In the meantime Fr. Elmo on orders of the 2nd respondent had been taken to the police station by an armed constable. He also referred to an incident at about 6 or 6.30 p.m. while they were proceeding in the course of which certain accusations were made against him by the 2nd respondent in the presence of army and police officers, in the course of which the 2nd respondent had berated him and he says that ultimately in paragraph 12(d) of the petition, the 2nd respondent told the army and police officers to take the petitioner and to do as they like and thereafter the 2nd respondent left the place leaving the petitioner in the hands of the army and police personnel. Thereafter he has in paragraph 13(1a) to (1g) specified the acts of torture and or cruel inhuman and or discriminating treatment or punishment he had been subjected to by the army personnel. He states all these acts were done to him after he was put on the floor of the truck in which there were about 20 or 30 army personnel. It is important to bear in mind that it is the petitioner's case that this treatment was meted out to him in consequence of what the 2nd respondent is alleged to have stated in paragraph 12(d).

Subsequently he states that the truck was stopped in a lonely spot and he was asked to walk without looking back. He walked some distance and when he looked back he saw two soldiers standing with guns aimed at him as if to shoot him. At that stage some other soldiers he states ran up to those two soldiers and prevented them from shooting. Then he was ordered back into the truck and when he got into the truck they had proceeded to the Central Camp Police Station. He states that thereafter he was ordered to get down and he walked into the police station. As he entered the police station the 2nd respondent who was watching from inside the station had made certain remarks in Tamil and subsequently had ordered a police officer to record a statement

from the petitioner but the 2nd respondent had ordered the recording officer not to take down petitioner's complaint about the 2nd respondent's conduct and the torture he was subjected to. He states that he was then made to sign the statement without it being read to him.

In respect of recording of this statement there is an affidavit of M.A. Kamaldeen who was the officer who had recorded that statement of the petitioner at the Central Camp Police Station (P.S. 10889). He in his affidavit had denied the several allegations made by the petitioner in respect of the recording of that statement and denied that the petitioner made any reference to any illegal conduct by the 2nd respondent or that he had been subjected to torture. He also stated that there was no occasion for 2nd respondent to order that certain matter should not be recorded by him since the petitioner did not make any such complaints. He has specifically denied the averments in paragraph 18 of the petition and affidavit.

To the averments made in paragraph 13(b), (c) and (d) and paragraph 17 of the petition one A. G. Weerasekera a Major in the Sri Lanka Army has filed an affidavit expressly denying the allegations in the several paragraphs. In the affidavit he states that he saw the petitioner inside the police station sometime after 6.30 p.m. that evening and the petitioner had introduced himself as the District Development Council Member for Amparai and had asked him for his name and the unit to which he was attached. He had told him that he was in command of the Army Operation Room at Amparai. He states that the petitioner did not at that time complain to him that he had been subjected to torture or assault by army personnel or any other persons. He says if any such complaint had been made he would have immediately investigated into that complaint. He has also specifically denied the entire incident referred to in paragraph 13(1a),(b).

The next step is when the petitioner was produced before the Magistrate at his bungalow on the night of 9th August 1981. The petitioner had made various allegations regarding what is stated to have happened in the presence of the Magistrate in paragraph 19 of the petition. In the course of the averments in this paragraph of the petition the petitioner states the Magistrate had requested the 2nd respondent to drop the petitioner at a convenient point on the petitioner telling the Magistrate that he was finding it difficult to walk.

There is a comprehensive report by the Magistrate which had been filed in this case and the Magistrate categorically states that the petitioner's statement that he had told him he was finiding it difficult to walk was absolutely and categorically false. He stated that the petitioner at no stage mentioned to him about any difficulty in walking or any discomfort nor did he even complain of any physical assault, degrading treatment or bodily abuse. The Magistrate further stated that he walked and talked as a normal person. It is quite clear therefore when one examines the Magistrate's report to this Court the record of what had occurred and what he had observed during the period the petitioner was before him, no complaint whatsoever of any physical discomfort or of his being harassed or of his being subject to any torture or of his sustaining any injury had been made by the petitioner to the Magistrate. This report is also to the effect that as far as the Magistrate could observe the petitioner did not appear to him to suffer from any physical discomfort, pain or injury. When one reads the petition and the affidavit it is clear that the petitioner does not appear to have any complaint with regard to the conduct of the Magistrate. On the other hand it appears from the facts stated by the petitioner that the Magistrate had been very sympathetic towards him and considering the turbulent times and the communal violence that had been prevalent in that area and in spite of the persistent urging by the 2nd respondent, the Magistrate had refused to remand the petitioner and had taken the petitioner at his word and released him on certain undertaking given by him and had asked him to report at the Magistrate's Court on the 12th. It is manifestly clear therefore that the Magistrate had acted fairly and sympathetically towards the petitioner, and the petitioner nowhere in his affidavit or petition makes any complaint of prejudice or bias or ill-will on the part of the Magistrate. It is also clear when one reads the petition and affidavit that the petitioner had told the Magistrate certain things in response to the 2nd respondent's requests to the Magistrate and it appears to me from these facts that there was no impediment whatsoever preventing the petitioner from informing the Magistrate that he was subjected to cruel and inhuman treatment at the instance of the 2nd respondent. The petitioner has not set out any tangible or possible reasons as to why he did not tell the Magistrate that he had been subjected to torture, assault or inhuman treatment etc. at the instigation of and instance of the 2nd respondent. The failure on the part of the petitioner to have told the Magistrate what had happened to him is to my mind very significant.

In paragraph (2) of the petition there is reference to an application made by the petitioner's attorney for a private practitioner to examine the petitioner as the DMO was not available. This motion had been dated 10.8.81 but the Magistrate states that this motion was really supported on 11.8.81 and by that time DMO had already returned. In that motion there is no reference whatsoever to the 2nd respondent being responsible for any of the injuries or what injuries were inflicted at the instance of the 2nd respondent. It is to be noted that this motion had been filed by one Mr. Sivapalan an Attorney at Law on behalf of the suspect.

On the 12th the suspect had been present in Court and he was represented by Attorneys M. Samsudeen, Mustapha, Kandiah and Sivapalan. The journal entry indicates what the suspect had stated viz. that he be permitted to enter hospital, and that he had been permitted to do so. Even on that date no indication was given to Court that injuries which necessitated an order of hospitalisation by the Magistrate, had been inflicted at the instance or instigation of the 2nd respondent.

The next matter which merits attention is the medical report of DMO Kalmunai dated 11.8.81. The doctor had described the various injuries he had found on the petitioner. He states the petitioner gave a history of assault by army men on 9.8.81. Even to the D.M.O. apparently the petitioner had not stated that those injuries were inflicted on him at the instigation or at the instance of 2nd respondent. The 2nd respondent's name does not even figure at all in that complaint.

Subsequently the petitioner has been examined by the JMO on 12.8.81 whose medical legal report has been marked P2. The short history given by the petitioner to the JMO is assault by army personnel, even in this there is no reference whatsoever to the 2nd respondent or his being responsible for the injuries suffered by the petitioner.

The next important document which has a bearing on the matters in issue in this case is the document 2R15. 2R15 is a recording of the petitioner's statement at Ward No. 11 of the Batticaloa hospital by the Batticaloa Police. This statement has been recorded on 14.8.81. It is in evidence that the 2nd respondent was not attached to the Batticaloa police and had no connection with the Batticaloa police at any relevant period. The petitioner in 2R15 had made a comprehensive and detailed statement of everything which he states had occurred on this date. The main complaint of the petitioner in this case against the 2nd respondent

in so far as the injuries on him are concerned is what is stated in paragraph 12(d) of the petition and affidavit. Though this statement 2R15 had been made five days after the alleged incident yet this statement does not contain any allegation against the 2nd respondent on the basis of what is stated in paragraph 12(d) of the petition. When one reads this document it is clear that there is no reference whatever to the 2nd respondent instigating or urging army personnel and others to do what they like with him. According to the sequence of events indicated in 2R15 after Chandra Perera and the army officer left the petitioner had stated that the army personnel had put him into the lorry and from thereon proceeded to subject him to inhuman treatment. When one reads the trend of events as disclosed in 2R15 the impression one gets on what the petitioner had told the police is that after the 2nd respondent and the army officer had gone away from the scene, the army men had put him into the lorry and had proceeded to assault him. 2R15 is in Tamil which is the language of the petitioner. The statement had been read out to the petitioner who had admitted it was correct and had signed it. P.C. 671 Raveendrarajah had certified that he had accurately and faithfully recorded the statement of Velmurugu, that is the petitioner.

As far as I can see from the facts in this case until this petition was filed in this Court on the 9th September 1981 there had been no complaint made to any person in authority or to any responsible person, whatsoever, that it was at the 2nd respondent's instigation or urging that the army personnel had proceeded to attack the petitioner in this case and cause those injuries.

Mr. Pullenayagam contended that there was no reason for the petitioner to falsely implicate the 2nd respondent and saddle him with this charge of being responsible for the several injuries sustained by the petitioner. One has to remember that the petitioner is the elected member of the Amparai District Development Council, is a retired teacher and a man who is actively engaged in political activity for the Tamil United Liberation Front. On his own admission he had been in close association even on this day with the higher-ups in the TULF, namely, Messrs. M. Sivasithamparam, T. Rasalingam and P. Ganeshalingam, Members of Parliament for Nallur, Udupiddy and Pandirippu respectively and Mr. Sivasithamparam is the President of the Tamil United Liberation Front. It is clear therefore that the petitioner considered himself a man of some importance and a man of some standing in that area and that people did generally look up to him for action at least in the political sphere. What therefore would have been the reaction of the petitioner to the various acts against the

petitioner attributed to the 2nd respondent in several paragraphs of the petition? In paragraph 12 he states that the 2nd respondent had recognised the petitioner and shouted out, "You are here, arrest him". Even when they were proceeding at about 6 or 6.30 p.m. he states the 2nd respondent ordered the vehicles to stop at a lonely spot, the petitioner was then asked to get down from the jeep on the orders of the 2nd respondent. The army and police stood around in a circle having put the petitioner along with the 2nd respondent and their commanding officer in the centre *(vide* para 12). The 2nd respondent had then addressed the army and police officers and told them *inter alia* that (a) Mr. Amirthalingam was a leader of the Tamil United Liberation Front and the tiger movement and that the petitioner was the local leader for the Amparai District, that Mr. Amirthalingam was causing the banks to be robbed and was distributing the money so got through the petitioner, that the petitioner was the cause of all the communal violence against the Sinhala people in the area and even for the 1977 incident in Jaffna, that he was behind the burning of the Timber Depot at Pandirippu and such other false, mischievous and utterly malicious allegations. He further said that the petitioner and the said Messrs Sivasithamparam, Rasalingam and Ganeshalingam Members of Parliament have been roaming the area inciting the people, that they were Jaffna people who had no business in that area.

In paragraph 19 the petitioner states that the 2nd respondent made all sorts of malicious, communal and false allegations against the petitioner and even falsely stated that there were number of complaints against the petitioner and strongly urged the learned Magistrate to remand the petitioner. Further on he states that the 2nd respondent then began to make some communal statement against the petitioner and that the learned Magistrate had asked the 2nd respondent to keep quiet.

In paragraph (20) the petitioner states that on coming out of the learned Magistrate's bungalow after the Magistrate had switched off the lights and locked his door the 2nd respondent got hold of the petitioner by the collar of his shirt and told him in Tamil "that so long as this Perera lives, Perera will some day shoot the petitioner". In the same paragraph he states that a little while later while dropping the petitioner at the junction the 2nd respondent has stated "if I see you at the Central Camp area I will shoot you".

It appears to me therefore that if reasons were needed for implication of the 2nd respondent by the petitioner, the peti-

tioner's statement with regard to the conduct of the 2nd respondent to which I have made reference would be enough motive for petitioner to implicate the 2nd respondent falsely. One has to keep in mind that if the 2nd respondent had used this language attributed to him as described in the petition both in the presence of the army and police personnel and in the presence of the Magistrate and the threat held out to the petitioner indicated in paragraph 20, the petitioner would have been a person who would have had ample ground to falsely implicate the 2nd respondent. Accordingly Mr. Pullenayagam's contention that there was no motive for the petitioner to falsely implicate the 2nd respondent in a charge of this nature appears to me without substance. There is no doubt that if the 2nd respondent had used the words at various instances ascribed to him the petitioner must have felt utterly humiliated, resentful, hurt and even infuriated.

Even in petitioner's statement 2R15 he had stated that Chandra Perera ASP had the intention to make the police and army officer have a bad opinion about him and attributed to him these words:

> "This is the District Development Council Member. He is a big rogue. He is the organiser of the Tiger group. He was responsible for the communal riots. This fellow with Mr. Sivasithamparam, Mr. Rasalingam and Mr. Ganeshalingam have gone round the place and instigated racial violence, they should be taught a proper lesson".

He ran him down further and abused him as a terrorist. Mr. Chandra Perera asked him "How are you", then he said "What business have you got here", "I replied, 'I would definitely come as a Member of the District Development Council in order to find out the needs of the people' then he said that he had come to know that Mr. Sivasithamparam and others came and added what business have they got – he also abused them."

Therefore when one takes into consideration talks and behaviour attributed to the 2nd respondent by the petitioner in the petition and in 2R15 can one say that the petitioner was without a motive to implicate the 2nd respondent without justification, particularly since the petitioner states that all the allegations made by the 2nd respondent were false, without foundation and were made maliciously in order to disgrace him and diminish his standing in the eyes of various people.

Therefore when one considers the various opportunities that existed for the petitioner, if he was truthful, to state the real cause of his injuries was attributable to the instigation offered by

the 2nd respondent and that injuries were inflicted upon him in consequence of such implication, then it is patently clear that the petitioner had several opportunities open to him at which he could have mentioned the 2nd respondent as a person who caused those injuries to be inflicted on him. The petitioner had not mentioned the 2nd respondent as being responsible for these injuries in his first statement recorded by D. C. Kamaldeen. The army officer Weerasooriya in his affidavit states no mention was made to him of any injuries being inflicted on him on this evening and it is patent that no allegation in respect of injuries were made to him implicating the 2nd respondent. Then when one considers the fact that the petitioner was produced by the 2nd respondent before the Magistrate, the Magistrate makes quite clear that at no stage had any complaint been made to him of any injuries suffered by the petitioner nor any accusations made that the 2nd respondent had been responsible for instigating the army personnel to deal with him as they chose. If the petitioner's story is true that the injuries were inflicted at the instance of or at the instigation of the 2nd respondent he could have mentioned the 2nd respondent by name or description to the DMO or JMO. He has failed to do so and finally even in the comprehensive statement made by the petitioner to P.C. 671 Raveendrarajah at the Batticaloa General Hospital there is no reference whatsoever to the 2nd respondent asking army personnel to take him and do as they wish and injuries being inflicted upon the petitioner in consequence of such conduct by the 2nd respondent. All these facts which I have enumerated throw considerable doubt on petitioner's allegation that injuries were inflicted on him by army personnel at the instance or at the instigation of the 2nd respondent.

The evidence in this case discloses that as a result of communal disturbances there have been several cases of looting, arson, assault and other violent crimes prevailing in this area for several days prior to this incident. The evidence also discloses that the 2nd respondent had been specially drafted to serve in this area from Nuwara Eliya because of his knowledge of the locality, terrain and the general background of the people in this area. He had been designated as the Co-ordinating Officer between various police stations in the area and also between police and army detachments – *vide* paragraphs 10, 11, 12 of the 2nd respondent's affidavit. It is also in evidence that earlier as a result of communal disturbances in 1977 this entire area had been subjected to a great deal of unrest and violence particularly since there were a large number of colonies populated both by the Sinhalese and Tamils and there were also Muslim settlements. In view of the recent history of this area the authorities had been apparently apprehensive, and may be justifiably so, that eruption of communal violence in that area had

to be dealt with effectively. Perhaps it is with this background in mind that the 2nd respondent had been specially sent to this area since he had considerable knowledge of the area as he had earlier been stationed at Kalmunai.

The facts also indicate that even at the time of this particular incident there had been a series of other incidents consequent as communal violence had flared up between the major communities. In this background it has to be borne in mind that the 2nd respondent had been saddled with a great deal of responsibility and in order to effectively deal with the various situations that arose and were likely to arise, he had been entrusted with the task of co-ordinating action between the police and the army. When one views this matter in the light of the 2nd respondent's responsibilities and his duties and the demands that would be made on his personal services, it is clear that once the petitioner had been arrested in view of the prevailing situations in that area one could not have reasonably expected the 2nd respondent to have kept the petitioner under his eye so to speak throughout the entire period he was in custody from time of arrest till he was handed in at the Central Police Station later on in the evening. It is also clear from the evidence that immediately after the 2nd respondent had arrested the petitioner, the 2nd respondent had entrusted the petitioner to either the army or police personnel who were present and the 2nd respondent had had to rush to the 3rd colony in order to deal with certain incidents involving arson, looting and physical assault taking place there. The responsibility placed on the 2nd respondent clearly and manifestly indicate that he had to be alert to everything that was happening in that area and he himself had to personally co-ordinate security forces to deal with situations as and when they arise. It is in this light that one has to view the action of the 2nd respondent when after he arrested the petitioner he had to rush in order to deal with a situation which had arisen in the 3rd colony.

Mr. Pullenayagam impressed on us that after the 2nd respondent had taken the petitioner into custody, in the interval between the convoy of vehicles leaving the 4th colony and the 2nd respondent's meeting it again at the 3rd colony, the 2nd respondent had failed to satisfy this Court as to how the petitioner had been placed in custody and who was responsible for his custody and on his failure to explain this, one must necessarily accept the petitioner's version of what is stated to have occurred during this period. As I have pointed out it would have been humanly impossible for the 2nd respondent to have kept a fatherly eye on the petitioner throughout the the period he was in custody, in view of the urgent

and ugly situation that had prevailed at this time. Quite apart from that the 2nd respondent in his affidavit in paragraphs 17 to 20 had given a summary of what had occurred at this time. Then in paragraphs 30, 31 and 32 the 2nd respondent had specifically denied the various averments contained in paras 12 and 13 of the petitioner's affidavit and had in several paras given his version of what had actually occurred on this date.

In the circumstances it appears to me that at the most the contention of the petitioner and of the 2nd respondent is word against word. The petitioner's allegation in respect of what the 2nd respondent has stated to have done to him or caused to have done to him received no corroboration whatever from several sources which would have corroborated his story if it were true. As I have indicated in the course of my order the petitioner's version of how he came by his injuries received no corroboration from any of these sources.

Then again one has to keep in mind that the petitioner is a person who has on his own admission been very much concerned with the welfare of his people. Even during this time of tension and terror when he was ordered by the army officer earlier that day to go back to Kalmunai and not to be in the vicinity of the 4th colony, he had proceeded back dropped three of his companions and had come back again to the junction of the 4th colony where he was confronted by the army and the police and the 2nd respondent. Viewed in this light and in the absence of independent evidence to corroborate that he was injured on the evening of the 8th during the period of his arrest and custody one is left to wonder whether he could not have been injured in some other incident after the 2nd respondent had dropped him consequent on the orders of the Magistrate near his home. There is not an iota of evidence apart from the assertion of the petitioner to indicate that he had suffered any kind of injury or physical discomfort during the period up to the time he was released by the Magistrate. I am adverting to this aspect of the matter purely for the reason that Senior Attorney appearing for the petitioner contended that it was incumbent on the 2nd respondent to explain the injuries on the petitioner. Such explanation in my opinion, could only arise if the facts point to the conclusion that injuries were sustained by the petitioner after arrest and during the period of his custody. To my mind there is considerable doubt as to how and when the petitioner came by his injuries.

Mr. Pullenayagam submitted that two questions of law emerge for consideration in this case, firstly the burden of proof required in a case of this nature and secondly whether an act of this nature by an individual which is outside the scope of his legitimate duties would come within the ambit of executive or administrative action. Both these questions have been comprehensively dealt with by Justice Wanasundera and I am in entire agreement with his views as expressed in his judgment. I do not think it necessary for me, in view of the findings of fact I have arrived at, to deal at any length or repeat my conclusions on the two questions of law that have arisen for determination in this case.

Even on the basis that the standard of proof required in a case of this nature is on a balance of probability, I am of the view that the petitioner has failed to prove his allegations as against the 2nd respondent. In the circumstances I dismiss this application with costs payable to the 2nd respondent.

WEERARATNE, J.

I am in agreement with the judgment and order of my brother Ismail, J. to the effect that the petitioner's allegations against the second respondent have not been established on the facts which have transpired in this case. In view of this finding the questions of law raised before us do not arise.

SHARVANANDA, J.

By his application dated 9th September, 1981 made to this Court under Article 126 of the Constitution, the Petitioner has alleged that one D. K. Chandra Perera, who at the relevant time was a Police officer in the service of the Government holding the rank of Assistant Superintendent of Police, had infringed the fundamental right conferred on him by Article 11 of the Constitution, namely, freedom from torture, by causing the Army to commit various acts of torture on 9th August 1981 while the Petitioner was in his custody. The Petitioner along with his application has filed his affidavit testifying to the circumstances in which he was taken into custody by the 2nd Respondent when he was functioning as the Co-ordinating Officer of the Central Camp Police in the Amparai District, along with the Army, in charge of security arrangements, and how, while he was in such custody, the 2nd Respondent, saying, *inter alia,* that the Petitioner was the cause of all the communal violence against the Sinhalese people of the

area, told the Army to take him and do as they like with him and how in consequence various acts of torture were committed on him by the Army. He has cited the Attorney-General and the said D. K. Chandra Perera as 1st and 2nd Respondents, respectively, to this application. The 2nd Respondent has filed affidavit admitting taking the Petitioner into custody on 9th August 1981, but denying that he instigated the Army to torture the Petitioner, and also denying that the Army ever indulged in the acts of torture described by the Petitioner in his affidavit.

Article 11 of the Constitution guarantees that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The practice of torture is prohibited in all civilized societies. Article 11 is on the same lines as Article 5 of the Universal Declaration of Human Rights. The fundamental nature of the human right of freedom from torture is emphasized by the fact that no derogation is permitted from this right under any conditions, even in times of war, public danger or other emergency. This human right of freedom from torture is vouched not only to citizens, but to all persons, whether citizen or not. The Constitution is jealous of any infringement of this human right. This care is not to be exercised less vigilantly, because the subject whose human dignity is in question may not be particularly meritorious.

By way of preliminary objection to the application, the Attorney-General submitted that the material before the Court did not disclose an infringement by "executive or administrative action" of the fundamental right guaranteed by Article 11 of the Constitution. He stated that only violations of fundamental rights by executive or administrative action attracted the remedy prescribed by Article 126 of the Constitution. He contended that the phrase "executive or administrative action" in Article 126 signified "State action" and that a wrongful act of a Public officer, assuming it to be done under colour of office, was no more than an individual or private wrong, unless it was sanctioned by the State or done under State authority. Counsel for the 2nd Respondent adopted the said objection and associated himself with the submissions of the Additional Solicitor-General who appeared for the 1st Respondent at the argument before this Court. He urged that when a State officer commits an act in contravention of Chap. III of the Constitution, such an act is not justiciable under Article 126, although performed in the course of his public duties, unless such act is supported by the executive branch of the State. He stressed that unless there is the element of State support, given antecedently or subsequently, the executive or administrative

action postulated by Article 126 is not there. His argument was that "executive action" represented "the action of the collective will of the State and not that of the individual Public officer."

The preliminary objection raises questions of great public importance regarding the dimension of the Constitutional remedy afforded by Article 126 of the Constitution for infraction of fundamental rights. The essence of a fundamental right lies in its enforceability against the organs of the State. The freedoms and rights enshrined in Chap. III of the Constitution are but empty formulae if they may be infringed upon with impunity without incurring any sanction. Judicial review is necessarily the bulwark of the freedoms guaranteed by the Constitution. Article 4(d) of the Constitution provides that "Fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of the Government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided". The framers of the Constitution, however, have made justiciable only the infringement or imminent infringement by executive or administrative action of the fundamental right or language right declared and recognised by Chap. III or Chap. IV of the Constitution. This Article is directed against the Executive and is designed as a corrective for executive excesses only. Under the Constitution, the Supreme Court is the Court charged with the duty of safeguarding the fundamental rights and liberties of the people by the grant of speedy and efficacious remedy under Article 126, for the enforcement of such rights. The importance and beneficial effect of this jurisdiction cannot be overestimated. This Court has been constituted the protector and guarantor of fundamental rights against infringement by State action of such rights; in view of the vital nature of this Constitutional remedy, it is in accord with the aspirations of the Constitution that this Court should take a liberal view of the provisions of Article 126, so that a subject's right to the remedy is in no manner constricted by finely spun distinctions concerning the precise scope of the authority of State officers and the incidental liability of the State.

It is to be noted that the claim for redress under Article 126 for what has been done by an executive officer of the State is a claim against the State for what has been done in the exercise of the executive power of the State. This is not vicarious liability; it is the liability of the State itself; it is not a liability in tort at all; it is a liability in the public law of the State. — *vide Maharaja v. Attorney-General of Trinidad* ((1978)2 A.E.R. 670 at 679 P.C.)(1)

If the State invests one of its officers or agencies with power which is capable of inflicting the deprivation complained of, it is bound by the exercise of such power even in abuse thereof; the official position makes the abuse effective to achieve the flouting of the subject's fundamental rights. The State had endowed the officer with coercive power, and his exercise of its power, whether in conformity with or in disregard of fundamental rights, constitutes "executive action". The official's act is ascribed to the State for the purpose of determining responsibility, otherwise the Constitutional prohibition will have no meaning.

The idea underlying Article 126 is that no one by virtue of his public office or position should deprive a citizen of his fundamental rights without being amenable to Article 126, even though what the official did constituted an abuse of power, or exceeded the limits of his authority. This sweep of State action, however, will not cover acts of officers in the ambit of their personal pursuits, such as rape by a Police officer of a woman in his custody, as contended by the Additional Solicitor-General; such act has no relation to the exercise of the State power vested in him. The officer had taken advantage of the occasion, but not his office, for the satisfaction of a personal vagary. His conduct is totally unconnected with any manner of performance of his official functions.

The "Executive" may be broadly defined as "the authority within the State which administers the law, carries on the business of the Government and maintains order within and security from without the State." (Wynes – Legislative and Executive Powers in Australia (Third Edition at p. 507). Executive functions thus include, in addition to execution of the law, the conduct of military operations, the provision of supervision of such welfare services as education, public health, transport, etc.

The 2nd Respondent is a Police officer charged with law enforcement duties. In the performance of his duties, he represents the executive arm of the State. "It is beyond question that a Police officer in carrying out his duties in relation to the maintenance of order, the detection and apprehension of offenders and the bringing of them before a judicial authority is acting as a Public officer carrying out an essential executive function of any sovereign State – maintenance of law and order . . . . . It is also beyond question that in performing these functions, Police officers are endowed with coercive powers by the common law, even apart from any statute. Contravention by the Police of any of the human rights or fundamental freedoms of the individual . . . . . thus fall squarely

within what has been held by the Judicial Committee in *Maharaja v. A.G. of Trinidad and Tobago* (1979 A.C. 385 at 396)[1] to be the ambit of the protection afforded by section 6, viz. contravention by the State or by some other public authority endowed by law with coercive powers." *(Thornhill v. Attorney-General* (P.C.) (1980) 2 W.L.R. 510 at 519, 520)[2].

The Fourteenth Amendment of the United States Constitution provides that "no State shall make or enforce a law which shall abridge the privileges or immunities of the citizen of the United States . . . . . nor deny to any person within its jurisdiction the equal protection of the laws." The prohibitions of this Amendment extend to State action through its judicial, as well as through its legislative, executive or administrative branch of Government. The judgments of the Supreme Court of the United States of America as to what actions constitute "State action," *vis-a-vis* the Constitutional prohibition, furnish helpful guidance for the resolution of the question in issue.

In *Ex parte Commonwealth of Virginia* (100 US p. 339 at 346 [3]) speaking by Mr. Justice Strong, the Court said, referring to the prohibitions of the Fourteenth Amendment:

> "They have reference to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The Constitutional provisions therefore must mean that no agency of the State or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virture of public position under a State Government deprives another of property, life or liberty without due process of the law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the Constitutional prohibition has no meaning, when the State has clothed one of its agents with the power to annul or evade it."

In *Virginia v. Rives - ex parte Commonwealth of Virginia* — 100 US p. 313 at 321[4], the Supreme Court, dealing with the question of discrimination in the selection of jurors by the Sheriff, stated:

"If the officer to whom was entrusted the selection of persons from whom the juries for the indictment and trial of the peti-

tioner were drawn, disregarding the statute of the State, confined his selection to white persons and refused to select any persons of the coloured race, solely because of their colour, his action was a gross violation of the spirit of the State's laws, as well as the act of Congress which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State, and under the laws of the United States. In the one sense, indeed, his act was the act of the State and was prohibited by the Constitutional Amendment."

In *Neal v. Delaware* (103 US p. 370)(5), a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the aforesaid Amendment. "The action of those officers, in the premises, is to be deemed to be the act of the State." The above passage from *ex parte Virginia* 339 was reiterated in support of this proposition.

In *Holme Telephone and Telegraph Company v. City of Los Angeles* (227 US p. 278 - 57 L. ed 510)(6), the Supreme Court held that the prohibitions and guarantees of the Fourteenth Amendment were addressed to and controlled not only the States, but also every person, whether natural or juridical, who is the repository of State power, and that a case where one in possession of State power uses that power to the doing of wrongs which are forbidden by the United States Constitution Fourteenth Amendment is within the purview of that Amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrong-doer. Chief Justice White in delivering the judgment of the Court said, with reference to the argument that an unauthorised act of a State agent is not State action within the meaning of the Fourteenth Amendment of the Constitution of the United States (57 L. ed. at 515), that:

> "The proposition relied upon pre-supposes that the terms of the Fourteenth Amendment reach only acts done by State officers which are within the scope of the powers conferred by the State. The proposition hence applies to the prohibitions of the Amendment, the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of the State is within the reach of the Amendment unless such act can be held to be the act of the State by, the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of State officers within the strict scope of the special powers

possessed by them and does not include abuse of power by an officer as a result of a wrong done in excess of the powers delegated. Here again, the settled construction of the Amendment is that it pre-supposes the possibility of an abuse by a State officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of State power uses that power for the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrong-doer. That is to say, the theory of the Amendment is that where an officer or other representative of a State, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorised the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

The Court referred with approval the holding in *Virginia v. Rives* (100 US p. 313)[4] that the enforcement by a State official of a non-discriminating statute in a discriminatory manner was within the Amendment.

In *Raymond v. Chicago Union Traction Company* ((1907) 207 US 20 – 52 L. ed. 78)[7], the Supreme Court stated that the prohibitions of the Fourteenth Amendment related to and covered all the instrumentalities by which the State acts and reiterated that whoever by virtue of public position uder a State Government deprives another of any right protected by the Amendment against deprivation by the State, violates the Constitutional inhibition; and as he acts in the name of the State and for the State and is clothed with State power, his act is that of the State.

In *Iowa-Des Moines National Bank v. Bennett* ((1931) 284 US 239 – 76 L. ed. 265)[8], the Court held that although the prohibition of the Fourteenth Amendment has reference exclusively to action by the State as distinguished from action by private individuals, the rights they protected may be invaded by the act of a State officer under colour of State authority, even though he not only exceeded his authority, but also disregarded special commands of the State law. "When a State official acting under colour of State authority invades in the course of his duties a private right secured by the Federal Constitution, that right is violated even if

the State officer not only exceeded his authority but also disregarded special commands of the State law.

Misuse of power possessed by virtue of State law and made possible only because the wrong-doer is clothed with the authority of State law is action taken under colour of State law. – *vide United States v. Classic* ((1941) 313 US 299)[9].

Thus, in the U.S.A. it has been established that the guarantee of the Fourteenth Amendment extends to all State action and that the 'State,' in this context, includes every repository of State power. "State action" even extends to acts done by public officers misusing their power; it is immaterial whether the State has authorised the act or not, provided it is done under colour of law or authority.

The Additional Solicitor-General relied on the following passage in the judgment of the Supreme Court of the United States in the *Civil Rights cases* (109 US p. 3)[10] in support of his submission that the Constitutional remedy is not available against violation of fundamental rights by individuals.

> "It is proper to state that civil rights such as are guaranteed by the Constitution against State aggression cannot be impaired by the wrongful acts of the individuals unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned, in some way by the State or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

The above passage must be understood in its context. There, the Court rested its decision upon the explicit language of the Fourteenth Amendment, which is that "no State" shall deny equal protection of the laws or due processes of the law; it does not say that "no person shall deny . . . . .". State action alone is forbidden to deny fundamental rights. Private individuals are no so enjoined. Constitutional guarantees of fundamental rights are directed against the State and its organs, both under section 14 of the United States Constitution and under Article 126 of our Constitution. But when a person is deprived of his Constitutional rights by a State officer in the performance of his duties,

a quite different situation is presented. A "State officer" is the 'State' against which the provisions of the Fourteenth Amendment and of our Article 126 are intended.

Mr. Choksy, in support of his submission, referred to the following passage in Chaudhuri — Law of Writs and Fundamental Rights (2nd Ed, Vol. 1, p. 17):

> "Fundamental rights afford protection against State action and not against action of private individuals — Constitutional safeguards are, as a rule, directed against the State and its organs and not against private individuals. Civil rights guaranteed against State action cannot be infringed by purely private conduct, except when it is supported by State authority."

To the same effect is a citation by the Additional Solicitor-General from Basu — Commentary on the Constitution of India (Vol. I, 3rd Ed. at p. 70). After referring to the passage in the *Civil Rights cases* ((1883) 109 US p. 3)[10] quoted above, the author states:

> "The rights guaranteed by Articles 19(1) and 31(1) of our Constitution (Indian Constitution) are available only against State action. Violation of such rights by individuals is not within the purview of these Articles."

Reference was also made to the judgment of the Indian Supreme Court in *Shamdasani v. Central Bank of India Ltd.* (A.I.R. (1952) S.C. 59)[11] where it was stated:

> "Neither Article 19(1) nor Article 31(1) on its true construction was intended to prevent wrongful individual acts or to provide protection against merely private conduct ..... The language and structure of Article 19 and its setting in Part III of the Constitution (Indian) clearly shows that the Article was intended to protect those freedoms against State action other than in the legitimate exercise of its power to regulate private rights of property in the public interest. Violation of rights of property by individuals is not within the purview of the Article."

In the above case, the petition was for the enforcement of the petitioner's fundamental rights under Article 19(1)(f) and Article 31(1) of the Indian Constitution against the Central Bank of India Ltd. a Company incorporated under the Indian Companies Act, 1882. The Central Bank of India Ltd. (respondent) was admittedly

not a State agency or department and hence its action was not State action. The State was therefore in no way involved. The Constitutional remedy is available only against a case of infringement by State action. Hence it was correctly held that the petitioner had misconceived his remedy in applying for a Constitutional remedy to the Supreme Court for the infringement of his fundamental rights by a private person.

In this case, if the 2nd Respondent had committed those acts of torture complained of by the Petitioner when he was not performing his official duty but in the course of his personal pursuits, the Constitutional remedy under Article 126 will certainly not be available to the Petitioner. The distinguishing factor in this case is that the Respondent, acting under colour of the law, had caused the torture to be inflicted when he was holding the Petitioner in custody.

The Respondents relied also on the judgment of this Court in *Thadchanamoorti v. A. G.* (S. C. 63/80 - S. C. minutes of 14th August 1980)[12] in support of their proposition as to what is meant by "executive or administrative action" as required by Article 126. The decision in *Ireland v. United Kingdom* [13] by the European Court of Human Rights was referred to, and the following comment of Harris in his book "Cases and Materials of International Law" was considered pertinent in deciding what is meant by "executive or administrative action ":

"In its judgement (the *Irish case),* the Court approved the rule that has been developed in the Commission's jurisprudence by which local remedies need not be associated where the act or acts claimed to be in breach of the Convention is or are shown to, be in consequence, of 'administrative practice', namely, a practice which, although unlawful under the defendant's State Law, has been adopted or tolerated by its official or agent and not just an isloated act or acts in breach of the Convention."

There is no justification for equating "executive or administrative action" in Article 126 to "administrative practice" or to acts resulting from administrative practice. "Practice" denotes "habitual or systematic performances" and contemplates a series of similar actions. No known canon of statutory interpretation warrants such a narrow or limited construction of the phrase "executive or administrative action", which, ordinarily understood, embraces in its sweep all acts of the Administration, especially when what is at stake is the subject's Constitutional remedy. In my view, all that is required of a petitioner under Article 126 is that he should satisfy this Court that the act of infringement complained of by him is the action of a State

official or repository of State power. Any violation of fundamental rights by public authority, whether it be an isolated individual action or consequent to administrative practice, furnishes, in my view, sufficient basis for an application under Article 126.

The motive for the infringement by the State officer is not relevant. In *Sunday Lake Iron Co. v. Wakefield* (1918) 247 US 350: 62 L. ed. 1154),[14] the complaint was against the Tax Officer who was alleged to have assessed the plaintiff's properties at their full value, while all other persons in the country were assessed at not more than one-third of the worth of their properties. It was held that the equal protection clause could be availed of against the Tax Officer. A charge of violation of equal protection (fundamental right) thus lies against an officer of State who is guilty of discriminatory conduct in his official capacity when carrying out the provisions of a law which are not themselves discriminatory. In *Kathiraning Bawat v. State of Saurashtra* (A. I. R. (1952) S. C. 123)[15] B.K. Mukerjee, J. observed as follows:

> "It is a doctrine of the American Courts which seems to me well founded on principle that the equal protection clause can be invoked not merely where discrimination appears on the express terms of the statute itself, but also when it is a result of improper or prejudiced execution of the law: *vide* Weaver on Constitutional Law, p. 404."

The complainant under Article 126 is concerned only with the impact of a State officer's action on a person's fundamental right; it is sufficient for him to show that he is aggrieved by such transgression. *Thadchanamoorti's* case mentioned above suffers from the fact that the judgments of the Supreme Court of the United States or of India which are very elucidatory of the question in issue have not been considered.

It is to be noted that in *Maharaja v. Attorney-General of Trinidad* (1979 A.C. 385)[1] and *Thornhill v. Attorney-General* ((1980) 2 W.L.R. 510 [2] cited above), the complaint in each case was of isolated acts of infringement of fundamental rights by a State official. The Privy Council held that the fundamental right of the petitioner in each case had been violated by the State. To decide the issue, the Privy Council did not embark on any investigation whether there was an administrative practice countenancing such infringements.

The facts in issue on this application have to be decided on the evidence placed before this Court in the shape of affidavits and exhibits marked by the parties.

According to the petitioner:

He is a retired teacher and an elected Member of the Amparai District Development Council, having won the election to the said Council as a Member of the Tamil United Liberation Front. On 9th August 1981, there was communal trouble in the 3rd and 4th colonies. He had, about 4.30 p.m. that day, become aware that a number of houses belonging to the Tamils in that area were burnt down. The said colonies came within the area covered by the Amparai District Development Council. Being concerned about the happenings there, he went to the 4th colony. He was going towards the Central Camp area Police Station with a view to meeting the Officer-in-Charge thereof to urge protective action. As he was going past the 4th colony junction, he was taken into custody by the 2nd Respondent, who was going in a convoy of 4 or 5 jeeps and about two army trucks with Army and Police personnel towards Sadayanthalawai. At a lonely spot, the 2nd Respondent ordered the vehicles to be stopped and the Petitioner was then asked to get down from the jeep in which the 2nd Respondent was travelling. On the orders of the 2nd Respondent, the Army and Police officers stood around in a circle, with the Petitioner in the centre. The 2nd Respondent then addressed the Army and Police officers and told them, *inter-alia,* that the Petitioner was the cause of all the communal violence against the Sinhalese people in the area and that the Petitioner with the Tamil Members of Parliament of the Tamil United Liberation Front were roaming the area inciting people. The 2nd Respondent thereafter told the Army and Police Officers to take the Petitioner and do as they like with him and left the place leaving the Petitioner in the hands of the said Army and Police personnel. The Petitioner was then put on the floor of the truck with about 20 or 30 Army personnel, and while the truck was moving, the Petitioner was subjected to, *inter alia,* the following acts of torture and cruelty and degrading treatment by the said Army personnel:-

(a) He was kicked all over the body with shod feet and trampled on his back with shod feet;

(b) He was ordered to speak in Sinhala and when he said he did not know Sinhala, he was hit on his face by the Army personnel with their fists;

(c) The petitioner was then asked to repeat after the Army personnel disparaging and obscene statements that they made in Sinhala regarding Mr. A. Amirthalingam and Mrs. Amirthalingam, and when the Petitioner pretended that he did not hear them properly, they pulled and twisted his ears;

(d) The Petitioner was then asked to stand in the truck and then kicked on his chest with shod feet by a soldier who hung on the bar of the truck with his arms and swung his feet so as to kick the Petitioner, and when the latter jerked backwards due to the force of the kick, he was hit and pushed forward by other Army personnel who were standing behind him;

(e) Tufts of his hair and beard were twisted and pulled and strands of hair were plucked; portions of his beard and hair were also burnt with lighted matches;

(f) When the petitioner, tried to protect his beard and hair being so burnt, with one of his arms he was made to lie on the floor of the truck and his arm was twisted and placed on his back and then trampled upon with shod feet; and

(g) He was hit with gun butts on his head and other parts of the body.

When the truck reached the Central Camp area Police Station, the 2nd Respondent was there at the Police Station. The 2nd Respondent then asked the Petitioner: "How are you feeling now"? Thereafter, on the orders of the 2nd Respondent, a Policeman recorded a statement from the Petitioner, and when he referred to the 2nd Respondent's conduct and the torture he was subjected to, the 2nd Respondent ordered that such matters be not mentioned and he was made to sign the statement which was in Sinhala. Thereafter, at about 11.00 p.m., he was taken to the Kalmunai Magistrate's bungalow. There, the 2nd Respondent urged the Magistrate to remand the Petitioner. The Magistrate, however, did not make any order remanding him, but requested him to stay indoors and appear in Court on 12th August 1981. He did not tell the Magistrate about the torture inflicted on him by the Army, but had told him that he found it difficult to walk. In his statement to the Batticaloa Police on 14th August 1981 recorded at the Batticaloa hospital, he had stated the reason why he did not tell the Magistrate that he was assaulted by the Army. He said: "Because I feared that I would be attacked and I was, to be taken by them again. When I was put into the jeep again, he (2nd Respondent) showed me his revolver and said that he would one day or other shoot me. I kept silent." (2R15)

According to the 2nd Respondent:

He was posted to the Central Camp Police with instructions to intensify security arrangements in the Central Camp Vellavalai

and Uhana Police areas with the assistance of the Army. He was directed by the Inspector-General of Police to take steps to bring under control the communal violence in the area and also to take necessary steps to prevent its escalation or continuance. His functions included liaison between the Police Stations in his area and also between the Police and Army detachments and ensuring adequate patrolling and prevention of physical violence, arson and looting. From inquiries and Police intelligence he became aware that the Petitioner was one of those who incited violence. On 9.8.81, when he was at the Vellavalai Police Station, shortly after 4.00 p.m. he received a message that a Sinhalese man in the No. 3 colony had been stabbed and his wife had been assaulted and in consequence a large number of huts in the No. 4 colony which was populated by Tamil persons had been set on fire. He immediately proceeded by jeep accompanied by two other jeeps – one a Police jeep and the other an Army jeep – with Police and Army personnel. On the way he met the Petitioner at the junction of the No. 4 colony. He took the Petitioner into custody pending further inquiries on suspicion of his instigating and inciting communal disharmony and violence, as he suspected the Petitioner of instigation in connexion with the incidents that had just taken place. On reaching the No. 4 colony, he found several huts burnt and some still smouldering. Most of the inhabitants had previously entered refugee camps. The remaining people had informed him that some villagers had come across the paddy fields, set fire to the huts, saying that the Tamil people had stabbed Sirisena of their colony. He observed a crowd of people in the paddy field at a distance and thereupon he gave chase with the assistance of the Police and Army personnel. On reaching the No. 3 colony, he made enquiries and questioned the villagers in order to ascertain the persons responsible for burning the huts in the No. 4 colony. When he was questioning the colonists, Lt. Col. Mohandas Sumanasena arrived there with Sirisena and two suspects, Vallipuram and Ponnadurai, who were suspected of having stabbed Sirisena. Thereafter he sent a message for the vehicle which was still in the No. 4 colony to be brought to the junction of the roads leading to the No. 4 colony and No. 3 colony. His jeep came to the No. 3 colony and he got into the jeep and proceeded to the junction. At the junction he found that the other vehicles had arrived from the No. 4 colony and that Lt. Col. Sumanasena had also come to the junction with his vehicles. All the occupants, including the Petitioner, had alighted and were awaiting him. Major Ananda Weerasekera had also come there. They all decided to return to the Central Camp area Police Station. He travelled back in his jeep, while the Petitioner, Sirisena and the other two suspects got into the other vehicles in which the Police and the Army personnel travelled. On arrival at the

Central Camp area Police Station, at about 6.30 p.m. he instructed the Officer-in-Charge and P. S. Kamaldeen to record the statements of the suspects. Thereafter, at about 11.00 p.m. he produced the Petitioner before the Kalmunai Magistrate and moved that he be remanded. There, the Petitioner stated to the Magistrate that he would be leaving for Peradeniya on 12.8.81 after reporting to Court that day and gave an undertaking to remain indoors till 12.8.81. The Petitioner made no complaint to the Magistrate of any assault or incitement by him to be assaulted. Thereafter he took the Petitioner in his jeep and left him in the Kalmunai town. He denied the allegations made by the Petitioner against him.
According to the record maintained by the Magistrate:

On 10.8.81, Mr. Sivapalan, Attorney-at-Law for the Petitioner, filed a motion in the Magistrate's Court that "permission be granted to take Dr. Murugesupillai and treat the suspect at his residence, as the D.M.O. was not available at Kalmunai." On that date itself, the Magistrate had made order: "D.M.O. to examine and report if the patient needs hospitalisation or other treatment." The D.M.O. in his report dated 11.8.81 to the Magistrate states:

> "I examined Mr. K. Velmurugu (petitioner) of Pandiruppu today at your request. He gives me a history of assault by Army men on 9.8.81 evening with boots, hands and rifles.
>
> On examination –

He is a case of mitral incompetence (valvular heart disease) which necessitates treatment by a physician. Probably due to assault, he has

- contusions and abrasions on the back of the chest;
- painful swelling of left wrist;
- abrasions on legs and left ear-lobe;
- swelling of both ankle-joints;
- tender and painful left jaw-joint on movement;
- tender and swollen left mastoid process where fracture cannot be excluded.

I am of opinion that he should be kept under observation and treated in a hospital where investigation facilities and Consultants are available."

On 12.8.81 the Petitioner appeared in Court. The record states: "Suspect states he desires to enter hospital. He is permitted to do so. D.M.O. should mention his condition."

The Petitioner was admitted to the General Hospital, Batticaloa, at 4.50 p.m. on 12.8.81 and he was examined by the J.M.O. at at 8.00 a.m. on 13.8.81. The doctor's report P2 reads as follows:

"Short History:
Assault by Army personnel with boots and rifle. Patient was suffering from mitral incompetence, heart disease."

The medical report proceeds to set out in detail a number of injuries found on the Petitioner and states that the injuries were caused by blunt weapon. The J. M. O. further states that the X'rays revealed "fracture of neck of left side of mandible."

The Petitioner was discharged from the hospital only on 25.8.81.

When the present application was supported on 24.9.81 in this Court, this Court called for the observations of the Magistrate with regard to the Petitioner's version of what happened on 9.8.81 in the Magistrate's presence.

In his report, the Magistrate has stated that the 2nd Respondent strenuously urged the remanding of the Petitioner, on the ground that the Petitioner was inciting communal feelings and that security could not be maintained if the suspect was at large. He further stated that he did not remand the Petitioner as 'the petitioner agreed to self-imposed confinement in his residence till 12th August. Thereafter he was to leave the area for Peradeniya till the end of the month to sit for his Degree examination". The Magistrate has further stated that: "The petitioner's statement that he told me that he was finding it difficult to walk is absolutely and categorically false. The petitioner at no stage told me of any difficulty in walking or bodily discomfiture; nor did he hint at having been subjected to physical assault, degrading treatment or bodily abuse. But the 2nd respondent and the petitioner were seated on chairs at the same table as I was, and the petitioner showed no external signs of physical strain or exhaustion. He walked, sat and talked as a normal person. I saw no evidence of singeing of his beard nor other marks of any injuries. The shirt he was wearing was grimy and soiled".

With reference to the Petitioner's averment in paragraph 23 of his affidavit, "On the motion of my Attorney-at-Law Mr. Sivapalan, on the next day, 10th August, the learned Magistrate ordered that I be examined by the D.M.O., Kalmunai, and the said doctor examined me on 11th August 1981", the Magistrate observes:

"The application made by the petitioner's Attorney was for a private practitioner to examine the petitioner as the

D.M.O. was not available. Although the application was journalised on 10.8.81, it was not supported till the following day, by which time the D.M.O. had already returned. He was therefore ordered to examine and report on the need for hospitalisation."

This observation of the Magistrate is contradictory of the record (M. C. Kalmunai 84155) , according to which it would appear that the Magistrate had, on the motion of the Petitioner's Attorney, made order on 10.8.81 itself that the D.M.O should examine and report. The Magistrate further states: "On 12th August 1981, in the presence of a large throng of supporters, the petitioner was assisted into the well of the Court with much ceremony". In journal entry dated 12.8.81, the record states : "Suspect states he desires to enter hospital. He is permitted to do so. The D. M.O. should mention his condition". Howerver, the Magistrate in his observation states that though the D.M.O. had detailed the Petitioner's injuries and recommended that the Petitioner be kept under observation and treated in a hospital, "there was no reason to deny the application that hospitalisation would even more effectively ensure his absence from the area, thus eliminating all possibility of incitement." It is difficult to appreciate the relevance of this prejudicial observation. The Magistrate appears to have pre-judged the Petitioner.

That the Petitioner had not mentioned to the Magistrate when he was produced before the Magistrate by the 2nd Respondent on the night of 9.8.81 that he was assaulted by the Army ordinarily should count against the Petitioner. But he has given a good reason in his statement 2R15 to the Police dated 14.8.81 for failing to do so. In the face of the D.M.O.'S reports dated 11.8.81 and of the Medical Officer, General Hospital, Batticaloa, dated 13.8.81, it cannot be disputed that the Petitioner had been brutally assaulted after he was taken into custody by the 2nd Respondent on the evening of 9.8.81; we have only the version of the Petitioner how the Army had, at the instance of the 2nd Respondent, inhumanly treated him while he remained in the 2nd Respondent's custody. After the 2nd Respondent, had dropped the Petitioner at midnight on 9th August 1981, the Petitioner had stayed at home in compliance with the undertaking he had given to the Magistrate. The motion filed by the Petitioner's Attorney on 10.8.81 shows that the Petitioner was confined to his house on 10.8.81 and had wanted the doctor to come and treat him there. On the sequence of events, it cannot be seriously denied that the injuries that the doctors found on the Petitioner resulted from the brutalities committed by the Army on 9.8.81. The injuries speak for themselves and confirm the Petitio-

ner's version of how he came by them. The 2nd Respondent admits in his affidavit that the Petitioner was taken in the Army truck after the arrest by him. It is significant that the Magistrate should think of hospitalisation of the Petitioner when he made order on 10.8.81 on the application made to him that a doctor should be allowed to see and treat the Petitioner at his house.

The conclusion is irresistible that the Petitioner received his injuries on the evening of 9th August 1981 after he was taken into custody. There is no suggestion by the 2nd Respondent that prior to his taking the Petitioner into custody, he was already having those injuries. In my view, the 2nd Respondent is untruthful when he denies the averments in paragraph 14 of the Petitioner's affidavit that the Army personnel inflicted the acts of torture referred to therein.

The Petitioner was taken into custody by the 2nd Respondent at about 4.30 p.m. on the 9th and continued to be in his custody until he was taken before the Magistrate at about 11.00 p.m. that same night. He was responsible for the custody and it was his duty to see that the Petitioner was not ill-treated while in such custody. The 2nd Respondent has therefore to explain what happened to the Petitioner while he was thus in custody. He has however not chosen to tell this Court as to how the Petitioner came by his injuries while the Petitioner was in such custody. He has also failed to explain why the Petitioner was put in the Army truck and why he gave charge of the Petitioner to the Army personnel to take him to the Central Camp area Police Station when he could have taken him in his jeep to the Police Station. The conclusion is unavoidable that the 2nd Respondent arranged with the Army officers for the Petitioner to be taken by them to the Central Camp area Police Station. The Petitioner, being in custody, had no choice in the matter. In my opinion, the Petitioner's version as to how the 2nd Respondent handed the physical charge of the Petitioner to the Army with instructions that are highly improper and ill become an officer of his responsible position represents the true facts.

The 2nd Respondent did not become functus after taking the Petitioner into custody. The 2nd Respondent, as a Police officer endowed with coercive powers, was carrying out his official duty in keeping the Petitioner in his custody until the Petitioner was produced before the Magistrate that night. In carrying out such duty, he was acting as a Public Officer performing an essential

executive function of the State – the maintenance of law and order, and any contravention by him of the detainee's fundamental rights constitutes contravention by the Executive, as referred to in Article 126. According to the Petitioner, the 2nd Respondent had addressed the Army and Police officers that the Petitioner was the cause of all the communal violence and had asked them to take him and do as they like. The 2nd Respondent, the Police officer charged with the duty of bringing under control the communal violence in the area, appears to have conceived that if the Petitioner could be silenced by torture, the communal violence could be contained. Hence, he chose to achieve that object by having the Petitioner tortured by the Army personnel. He thus violated the fundamental right guaranteed to the Petitioner by Article 11 of the Constitution, namely, freedom from torture. As stated earlier, where an officer of a State, in the exercise of the authority which he is clothed with, uses the power to do a wrong forbidden by the Constitution, inquiry whether the State had authorised the wrong is irrelevant; the State is bound by the way the 2nd Respondent exercised the coercive powers vested in him.

The European Commission on Human Rights in the *'Greek case'* commented on the difficulties faced by litigants alleging that public officers had inflicted or instigated acts of torture:

> "There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations, of torture or ill-treatment are made, the authories, whether the Police or Armed Services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves . . . . . few external marks." – *Vide* Journal of Universal Human Rights, Vol. 1, No. 4, Oct-Dec. 1979 at p.42.

It is well to bear the above comment in mind in investigative allegations of torture by the Police or Army.

The case discloses a shocking and revolting episode in law-enforcement. If fundamental rights assured by our Constitution are to be meaningful, trampling underfoot the fundamental freedoms of subjects by law-enforcement officers should not be tolerated.

In my view, the Petitioner has established that he was subjected by the 2nd Respondent and the Army personnel to torture and cruel, inhuman and degrading treatment in violation of Article 11 of the Constitution. The 2nd Respondent by the misuse of his official powers has compromised the State and has made the State liable for his grave misconduct.

I allow the Petitioner's application. He is entitled to the declaration that his freedom from torture and cruel, inhuman and degrading treatment guaranteed to him by Article 11 of the Constitution has been violated by the 2nd Respondent and the Army personnel.

In my view it is just and equitable that the State should pay fair compensation for the distress, humiliation and suffering undergone by the Petitioner as a result of the aforesaid contravention by its officer. I direct the State to pay Rs. 10,000/= as such compensation to the Petitioner. I also direct that the State take appropriate disciplinary action against the 2nd Respondent for his aforesaid misconduct.

The Respondents shall pay the Petitioner the costs of this application.

RATWATTE, J.

I agree with the judgment and order of Sharvananda, J. and allow the Petitioner's application with costs.

WANASUNDERA, J.

I am in agreement with my brother Ismail's statement of the facts and his evaluation of the evidence in this case. It is my view too that even adopting the standard of proof advocated by Mr. Pullenayagam, the petition must fail. But, since a number of important legal questions have been argued at the hearing, and

more particularly since my judgment in *Thadchanamoorti v. Attorney-General*[12] has come in for some criticism, I think in fairness to counsel I should deal with these submissions.

There is first Mr. Pullenayagam's submission regarding the nature of the burden of proof that lies on him to establish his case.

This question has assumed some importance because there is a sharp conflict in the material the petitioner on the one hand and the respondents on the other have placed before us. Probably conscious of certain infirmities in his case, Mr. Pullenayagam emphasised that we should follow the standard of proof usually adopted in civil cases, namely proof by a preponderance of probability. Accordingly, he criticised a suggestion thrown in *Thadchanamoorti's* case(12) where I said that we could profitably adopt, with suitable modifications, the test formulated in the *Irish case*. There, the European Court on Human Rights said–

> "161. To assess this evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the co-existence of sufficiently strong, clear and concordant inference or similar unrebutted presumptions of fact."

In coming to our own findings on the facts set out earlier, we have taken the view that the petitioner must prove his allegations to the satisfaction of the Court. We have, in this case, tried to steer clear of using a formula or language that may lead to any misunderstanding. But, we make clear that the test we have applied is the degree of proof used in civil cases which is not so high as is required in criminal cases.

When we find from case law that the words "reasonable doubt" is an ambiguous expression and could be used aptly not only with reference to a criminal case but also in regard to a civil case, it is doubtful whether the European Court intended to say anything different from what we have in mind. Although the expression "beyond reasonable doubt" has a criminal flavour, it is possible to use that expression in other contexts.

The following passage from the judgment of Lord Denning in *Baten v. Baten,* [1951] Probate 35,[16] cited by Mr. Pullenayagam is particularly interesting for the manner in which he has handled the formulae relating to the burden of proof in civil and criminal cases without allowing himself to be lost in the verbiage.

"The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there in no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt – but there may be degrees of proof within that standard . . . .

So also in civil cases, the case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court even when it is considering a charge of criminal nature; but still it does require a degree of probability which is commensurate with the occasions. Likewise a divorce court should require a degree of probability which is proportionate to the subject-matter . . . . . 'The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to conclusion.' The degree of probability which a reasonable and just man would require to come to the conclusion - and likewise the degree of doubt which would prevent him coming to it – depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was and what the consequences might be; and if he were left in real and substantial doubt on the particular matter, he would hold the charge not to be established: he would not be satisfied about it.

But what is a real and substantial doubt ? It is only another way of saying a reasonable doubt; and a reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to the conclusion. So the phrase 'reasonable doubt' takes the matter no further. It does not say that the degree of probability must be high as 99 per cent or as low as 51 per cent. The degree must depend on the mind of the reasonable and just man who is considering the particular subject-matter. In some cases 51 per cent would be enough but not in others. When this is realised the phrase 'reasonable doubt' can be used just as aptly in a civil case or in a divorce case or in a criminal case."

In a later House of Lords' case *Blyth v. Blyth,* 1966 (1) A.E.R. 524,[17] Lord Denning quoted with approval the following statement from an Australian case as correctly setting out the law:—

> "While our decision is that the civil and not the criminal standard of persuasion applies to matrimonial cases, including issues of adultery, the difference in effect is not as great as is sometimes represented. This is because . . . . . the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account."

Mr. Pullenayagam submitted that the proper test should be gathered from the definition of the word "proved" as contained in section 3 of the Evidence Ordinance. The definition is as follows:

> "A fact is said to be proved when, after considering the matters before it the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists."

I do not think that those words are any different from the language quoted by Lord Denning from Lord Stowell's judgment in *Loveden v. Loveden,* (1810) 2 Hagg. Con. 1.3[18] when he said, "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." In coming to our conclusions we have taken into consideration both Mr. Pullenayagam's submission that this Court must not in any way lay an undue burden on a petitioner complaining of an infringement of a human right if we are to safeguard those rights and the counter submission by the respondents that the liability that has been imposed is one against the State and since the allegation is a serious one of torture and inhuman treatment by the executive and administrative authorities of the State, a high degree of probability which is proportionate to the subject-matter is necessary. These rights which are alleged to have been infringed appear also to reflect certain obligations that the Government had recognised under the U.N. Declaration of Human Rights.

I turn next to a consideration of the main submissions made by counsel relating to the nature and extent of the liability of the State for an infringement of the provisions of Article 11 of the Constitution.

Mr. Pullenayagam cited a number of local and foreign cases and his submission in brief was that when a public officer acts in the name of the State and is clothed with the authority of the State, his act must be considered as action of the State for which the State is liable.

He relied on certain dicta in my brother Sharvananda's judgment in the first application to this Court against the *University Grants Commission* (S.C. 57 of 1980)[19] and in particular on *Thornhill v. Attorney-General,* 1980(2) W.L.R. 510,[2] and *Maharaja v. Attorney-General,* [1979] A. C. 385 [1].

Both the Deputy Solicitor-General G. P. S. de Silva and Mr. Choksy sought to distinguish these cases. They suggested an interpretation of Article 11 of our Constitution, which is much more restrictive and narrower than that outlined by Mr. Pullenayagam.

Of the two important cases relied on by Mr. Pullenayagam, the first is *Maharaja v. Attorney-General of Trinidad,* [1978] (2) A.E.R. 670[1] a decision of the Privy Council. In this case the appellant, a member of the Bar of Trinidad and Tobago was imprisoned for contempt of Court. In charging the appellant with contempt, the Judge had not made plain to him the particulars of the specific nature of the contempt. In his appeal, the appellant alleged that the judge had inadvertently failed to observe a fundamental rule of natural justice and that this constituted a deprivation of liberty otherwise than by due process of law guaranteed as a human right and fundamental freedom by Chapter I of the Constitution of Trinidad and Tobago, 1962

The Constitution of Trinidad and Tobago contained, *inter alia,* provisions setting out certain human rights and fundamental freedoms and the machinery for granting redress for their infringement. The most important of these provisions for the purpose of our case are the following:—

"CHAPTER 1

1. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or, sex, the following human rights and fundamental freedoms, namely —

   (a) the right of the individual to life liberty, security of the person and enjoyment of property, and the right not not to be deprived thereof except by due process of law;

   (b) .....

   (c) .....

2. Subject to the provisions of sections 3, 4 and 5 of this Constitution no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms thereinbefore recognised and declared and in particular no Act of Parliament shall —

   (a) authorise or effect the arbitrary detention, imprisonment or exile of any person .....

   (b) impose or authorise the imposition of cruel and unusual treatment or punishment.....

   (c) deprive a person who has been arrested or detained .....
   (ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him.

   (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

   (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.

3. Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.

6.11 For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing section or sections of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Higher Court for redress."

In interpreting these provisions, their Lordships of the Privy Council said:—

"Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described is s.1 already existed, it is in their Lordships view clear that the protection afforded was against contravention of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of the rights of another private individual s. 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to."

Thereafter their Lordships held that :—

"the order of Maharaj, J., committing the appellant to prison was made by him in the exercise of the judicial power of the State, the arrest and detention of the appellant pursuant to the Judge's order was effected by the executive arm of the State. So if his detention amounted to a contravention of his rights under s. 1(a) it was a contravention by the State against which he was entitled to protection."

In considering the question of the contravention of section 1, it was necessary to find out whether the law in force before the Constitution came into effect had required that the Judge must specify sufficiently the nature of the contempt charged before a person charged with contempt could be convicted. This was because this section proceeds on the basis that fundamental rights which it covers are already secured to the people of that country by existing law. Such a requirement was found to exist in the common law, and their Lordships said that it would have been sufficient even if such a right had been enjoyed *de facto,* as the constitutional provisions had dignified those rights to the level of a constitutional right under the constitutional provisions.

Before granting relief to the appellant, their Lordships went on to deal with a formal objection raised by the State. The Attorney-General argued that relief should not be granted to the petitioner because it was a long established rule of public policy that a judge cannot be made personally liable in law for anything done by him in the exercise or purported exercise of his judicial functions. It is mainly on this point that Lord Hailsham dissented from the majority view. The majority in overruling this objection said:—

> "In the first place no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s. 1(a) and no mere irregularity in practice is enough, even though it goes to jurisdiction, the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

Straightaway it should be mentioned that Mr. Choksy sought to distinguish this case and the other case coming from this same jurisdiction, to which I will presently refer, on the ground that they are based on a wider application of those rights than under our constitutonal provisions. It would be convenient if I now turn to Mr. Choksy's submissions.

Mr. Choksy first referred to Article 4 of our Constitution and drew our attention to the use of the terms "executive" in contradistinction to the terms "legislature" and "judicial" in these provisions. He submitted that the words "by executive or administrative action" contained in Article 126 must necessarily be limited to the acts of only one of the traditional triumvirate of State organs, namely, the legislative, the executive, and the judiciary.

He next referred to Chapter V11 titled "The Executive" which deals with the President of the Republic, Chapter V111, also titled "The Executive", dealing with the Cabinet of Ministers, and to Chapter 1X again titled "The Executive", dealing with the Public Service. Similarly it would be found that Chapters X, XI and X11 are headed "The Legislature" and Chapters XV and XV1

deal with the judiciary and the Courts. It was Mr. Choksy's submission that we have in the above provisions a definition of the term "Executive "and unlike in the cases from the West Indies cited by Mr. Pullenayegam, our jurisdiction in respect of violations of fundamental rights is confined to such "infringement by executive or administrative action" and does not have the width and range of the jurisdiction obtaining in the West Indies where violations "by the State or other public authority" is made justiciable. In fact in *Thornhill v. Attorney-General (supra),* which followed the *Maharaja case (supra),* the Privy Council explained what is meant by public authority and said that it must be understood as embracing local as well as central authorities and include any individual officer who exercises executive functions of a public nature.

Although there is a great deal of force in Mr. Choksy's submission on this point, it is possible for us to dispose of this case on a narrower basis without a discussion of the matter at the level of the fundamental constitutional structure of the two countries. Mr. G. P. S. de Silva has sought to distinguish this case on a much narrower basis, namely that in *Maharaja's case* we have an instance of an inadvertent omission on the part of the judge to comply with a fundamental right, whereas the allegations in the instant case is in respect of certain positive and illegal acts quite outside the ambit of the officer's normal functions or such functions as are incidental thereto. *Thornhill's* case is in some respects closer to the present case, in that it concerns certain wrongful acts or omissions on the part of the police which took place in the course of an investigation and was done in furtherance of such investigation. *Thornhill's* case, therefore, may have greater relevance to the present case than *Maharaja's* case.

It may however be mentioned that even in the *Maharaja's* case there was some reluctance and hesitation on the part of the Privy Council to make the acts of the judiciary justiciable under these provisions. It would appear that some pains have been taken in an effort to shift liability as much as possible away from the judicial sphere and bring the impugned act, if not within the executive sphere, at least as close as possible to it. It was stated that, though redress was claimed from the State for a violation of the fundamental rights by the judicial arm of the State for making an order of commitment to prison, the arrest and detention of the appellant however was effected by the executive arm of the State.

I shall now deal with *Thornhill's* case. The appellant in this case was arrested and taken to a police station in consequence of a shoot-out with the Police. As guaranteed in section 2 c (ii) of the

Constitution. The appellant made several requests to be given the opportunity of communicating with his lawyer. The police did not accede to his request. The appellant was suspected by the police of committing other crimes about which they wished to interrogate him. It would appear that there was nothing in connection with the investigation that would have made it inconvenient for him to be allowed to consult his lawyers. The only reason why he was not allowed to do so was because the police officers interrogating him were of the view that if the appellant were to obtain a lawyer's advice as regards his legal rights, he may decline to answer some of the questions that would have tended to incriminate him and the police would have been less likely to obtain from him a confession as regards the commission of earlier offences.

The reasoning in this case is somewhat complex and involved and turns on the interpretation of sections 1, 2 and 3 of that Constitution. Although the right claimed by the appellant is contained in section 2 (c)(ii), it was contended for the respondents, which included the Attorney-General, that the effect of section 3 of the Constitution was to reduce the ambit of sections 1 and 2 and limit them to rights that had obtained and which could have been enforced by a person under a written law or in terms of the common law prior to the coming into operation of this Constitution. The respondents submitted that the petitioner had no such enforceable right at the relevant point of time.

The Privy Council however held that section 2 only spells out expressly and in greater detail what is described in more general terms in section 1 and section 2 c(ii) and has adequately secured the rights of the appellant to have access to a lawyer. So interpreted, it was unnecessary to embark on a consideration as to whether or not such a right subsisted under the law at the commencement of the Constitution. Their Lordships however proceeded to interpret section 1 and said that they caught up only *de jure* rights, but included *de facto* rights enjoyed by a person as a result of settled executive policy or the manner in which administrative or judicial discretion had been exercised. They said that the right to consult a lawyer had in fact been a matter of settled practice.

Having given a ruling on the legal provisions, their Lordships proceeded to consider the question of the liability of the State for the acts of the police officers. It would appear from the judgment that there had been some discussion about the precise relationship of a police officer to the executive particularly because there had been previous authority for the proposition that persons who have been responsible for appointing a constable were not

held to be vicariously responsible for his tortious acts done by him in purported exercise of his common law powers of arrest. Dealing with this aspect of the matter, their Lordships said –

> "It is beyond question, however, that a police officer in carrying out his duties in relation to the maintenance of order, the detection and apprehension of offenders and the bringing of them before a judicial authority is acting as a public officer carrying out an essential executive function of any sovereign state – the maintenance of law and order or to use the expression originally used in English "preserving the King's peace." It is also beyond question that in performing those functions police officers are endowed with coercive powers by the common law even apart from statute. Contraventions by the police of any of the rights or fundamental freedoms of the individual that are recognised by Chapter I of the Constitution thus fall squarely within what has been held by the Judicial Committee in *Maharaja v. Attorney-General of Trinidad and Tobago,* No. (2) 1979 A.C. 385–396[1] to be the ambit of the protection endowed by section 6 viz. contraventions 'by the state or by some other public authority endowed by law with coercive powers.' In this context public authority must be understood as embracing local as well as central authorities and including any individual officer who exercises executive functions of a public nature. Indeed the very nature of the executive functions which it is the duty of police officers to perform is likely in practice to involve the commonest rule of contravention of an individual's rights under section 1 (a) and (b) through over-zealousness in carrying out those duties."

Mr. Pullenayagam relied heavily on the above passage for the submission that acts or omissions on the part of a police officer done under colour of office or in the purported exercise of his powers would involve the state in liability. Nevertheless he made a significant concession, namely that there could be acts which can be regarded as an individual or personal act not entailing liability on the State. As an example he gave the case of a police officer arresting a woman, then taking her to the police station and raping her. This concession however is *prima facie* inconsistent with the width of his main submission, but unfortunately Mr. Pullenayagam made little effort to reconcile these two positions.

It may be mentioned that it is precisely in this area that one has to search for an answer in the present case. This is particularly so because the statement of law contained in the foregoing passage

in *Thornhill's* case as Mr. G. P. S. de Silva argued, need not be given the wider meaning contended for by Mr. Pullenayagam and by no means provides a ready-made answer. Mr. de Silva submitted that this statement was an *obiter dictum* and it was not permissible to give a wider construction to the words than was warranted by the facts.

It would be convenient if, at this stage, I return to the second aspect of Mr. Choksy's argument where he had sought to demarcate the liabilty of the State for the acts of its officers and thereafter deal with Mr. de Silva's submissions.

Proceeding from his submission that under our Constitution it is the illegal acts of the executive organ alone that could be the subject-matter of proceedings under Article 126, Mr. Choksy contended further that the act of a public officer, even in the executive sphere, would not attract the liability of the State unless such act can be said to constitute the act of the executive. He explained this to mean that an act to qualify for such liability must signify the will of the collective body called the Executive. In this connection he drew our attention to the provisions of the Constitution which provides for the collective responsibility of the Cabinet and stated that likewise an act of an executive officer from the highest level to the most subordinate must represent and be in accordance with the collective will of the government, if it is to be regarded as constituting executive action. He was however prepared to concede that an unlawful act occurring as part of a settled administrative practice could legitimately be included in the category of executive acts.

The effect of this argument is to further restrict the ambit of Article 126. If only such acts as representing the will of the State or done in consequence of a settled administrative practice can alone be admitted as falling within the ambit of Article 126, then the bulk of unlawful and illegal acts committed by executive and administrative officers would be left without redress. Such an interpretation would even exclude unlawful acts committed through over-zealousness in carrying out duties which the Privy Council said involves the commonest risk of the contravention of an individual's right, and for which the State should be held liable. I agree with Mr. Pullenayagam when he said that such a construction would empty these provisions of nearly all content and make these safeguards ineffective and void.

For the purpose of his argument Mr. Choksy laid undue emphasis on the word "executive" to the exclusion of the connected word "administrative" in Article 126. Article 126 uses the expression "executive or administrative action." When my brother Sharvananda drew his attention to this, he said that the two words were synonymous and interchangeable and meant the same thing, namely the concept of the executive. Such a view was apparently necessary for the purpose of his argument. In my view the terminology in Article 126 has been chosen with some care and the juxtaposition of these two terms conveys certain nuances of meaning suggesting that the liability of the State extends to the unlawful acts of a wider class of public officers, namely, subordinate officers at peripheral level who in nowise constitute the decision making core of the administration. I would adopt Mr. Pullenayagam's description of executive officers as those whose hands are on the levers of power. All those not falling within this category are designated administrative officers. I find Mr. Choksy's interpretation of Article 126 far too restrictive with the result that if accepted it would whittle down considerably the protection of fundamental rights guaranteed and protected by the Constitution. Further reasons for my taking a different view will become evident from this judgment.

I next turn to the submissions made by Mr. G. P. S. de Silva. The interpretation he placed on the relevant provisions was less restrictive than Mr. Choksy's interpretation and he conceded that Article 126 would catch up unlawful acts of an executive or administrative officer provided they are performed in the course of his duties and under colour of authority. At the time these events took place, a state of emergency had not been proclaimed and the army was merely assisting the police. Mr. de Silva submitted that the army personnel had no more authority than any civilian. He stated that when the 2nd respondent handed the petitioner to the army personnel and left saying, "Take him and do as you like," the 2nd respondent had actually relinquished all control he had over the petitioner and was literally to use counsel's words, "throwing him to the wolves."

It is strange that the State has chosen to put the entire weight of its argument on a statement alleged to have been made by the 2nd respondent – but denied by him- and which interpreted in the manner suggested by the petitioner is certainly indefensible. Fortunately, I think, this argument is not entitled to prevail either on the facts or in principle. Mr. Silva also sought support for his argument from certain *dicta* in the judgments cited by Mr. Pullenayagam, which I do not again think are very much in his favour.

In *Thornhill's* case, the infringement was by way of omission and it related to a positive requirement expressed as a fundamental right, namely the duty of the Police to allow the appellant to consult a legal adviser. In *Maharaja's* case too, the infringement complained of was of an omission, namely the failure of the judge to comply with a legal requirement to specify the nature of the contempt that was alleged.

Firstly, it could validly be said that the facts in the instant case are different in kind rather than degree from the facts in those cases. For the purpose of this discussion I shall confine myself to the alleged assault by the army personnel on the assumption that the burden of proof lying on the petitioner in that respect has been discharged. Even this assumption will be shown later to be unjustified. The allegation against the 2nd respondent has been ruled out and those facts are not relevant here. Here we have an instance of an act of commission — the performance of a positive act which is both *ultra vires* and illegal in nature. To that extent it could be said that the cases cited by Mr. Pullenayagam are not of real assistance in this matter. Mr. de Silva's argument, if I understood him right, included a further distinction that in those decisions the unlawful acts or omissions took place in furtherance of the matter or proceedings which those officers were lawfully authorised to do, or in the context of powers that could be implied or incidental thereto. Here, there was the total absence of any authority and it is a case of a wanton assault. He invoked in support the concession made by Mr. Pullenayagam contained in the example of a woman being ravished by the police officers and wanted to know how that example differed from the present case.

Although some of the distinctions made by Mr. de Silva in respect of these cases have a certain validity and the *dicta* relied on by him could be pressed to serve his arguments, I do not think his analysis of the problem any more than Mr. Pullenayagam's has dealt satisfactorily with the underlying principles governing State liability for unlawful acts performed by these executive and administrative officers.

The learned Deputy Solicitor-General sought to advance his argument further by relying on certain decisions relating to vicarious liability of a master for the acts of his servant in the sphere of the law of tort. I am in agreement with Mr. Pullenayagam that the test of liability formulated in those cases is not an appropriate or safe test for application in the present case. 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 provi-

sions. 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 a master can be held liable in tort would undoubtedly fall also within the liability of the State under the constitutional provisions, the converse need not be true unless we are to give a restricted interpretation to the constitutional provisions. The common law test of tortious liability therefore cannot provide a sufficient test and we have to look elsewhere for the appropriate principles.

In this regard I should like to mention that an indication of what those principles are has to some extent been foreshadowed in *Thadchanamoorti's* case *(supra),* although in that case the court merely quoted certain excerpts from foreign authorities but did not think it was necessary, in the circumstances of that case, to enunciate those principles in any detail. When I expressed those views I was generally having in mind a situation like the present case. The excerpts are taken from the decision of the European Court of Human Rights in the *Irish* case and certain observations about that case that appear in Harris's "Cases and Materials on International Law," Mr. Pullenayagam alleges that in *Thadchanamoorti's* case *(supra)* this Court had misunderstood the effect of the ruling in the *Irish* case. The reference to an "administrative practice" in that material, he states, is with reference to the plea of the need for the exhaustion of domestic remedies required by Article 26 of the Convention and has no relevance whatsoever to the present context. I shall examine that contention later in this judgment.

Article 11 which gives protection from torture and ill-treatment has a number of features which distinguish it from the other fundamental rights. Its singularity lies in the fact that it is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-thirds majority but also a Referendum. It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which is no way can be restricted or diminished. Whatever one may say of the other rights, this right undoubtedly occupies a preferred position.

Having regard to its importance, its effect and consequences to society, it should rightly be singled out for special treatment. It is therefore the duty of this Court to give it full play and see that its provisions enjoy the maximum application.

Brandeis J. in *Iowa - Des Moines National Bank v. Bennett,* (1931) 284 US 3239[8] , dealing with the liability of the State for acts of public officer said –

> "The prohibition of the 14th Amendment, it is true has reference exclusively to action by the State as distinguished from action by private individuals. But acts done by virtue of a public position under a State Government and in the name and for the State ..... are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of State Law. Where a State official, acting under colour of State authority invades in the course of his duties a private right secured by the federal Constitution, that right is violated, even if the State officer not only exceeded his authority, but disregarded special commands of the State Law"

Whatever be the application of this statement to the other fundamental rights, in our country, in my view, Article 11 will be rendered ineffective unless we interpret it on more or less the lines set above. But I think the guarantee contained in Article 11 is capable of further refinement.

Earlier in this judgment, when dealing with Mr. Choksy's submissions, I favoured the view that in the relevant provisions, a distinction has been drawn between high State officers and subordinate personnel. Such high State officers constitute the Executive, but subordinate officers act for and on behalf of the State. Article 126 lends itself to this interpretation though I find rightly or wrongly text writers and tribunals have thought on somewhat the same lines when dealing with the liability of a State for the acts of its officials in international law.

I am inclined to the view that the State should be held strictly liable for any acts of its high State officials. I should think, in the present case, if the allegations against the 2nd respondent had been proved, this would have constituted an act of the State itself and entailed the liability of the State for such acts.

The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e., within the scope of their authority, express or implied, and should also extend to such other acts that may be *ultra vires* and even in disregard of a prohibition or special directions provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State.

The above principles appear to be generally supported by the case law and Mr. de Silva, I think, was prepared to admit liability to this extent or almost to this extent. The illustration Mr. Pullenayagam, gave on his own admission falls outside these limits. As I stated earlier, Mr. de Silva's position is that the instant case is practically identical with the exception indicated by Mr. Pullenayagam.

My own view is that the liability indicated in the cases cited by counsel need not be the last word on the subject. Justice and common sense demands a further elaboration of these principles of State liability to dispose of cases like the present one. Mr. Pullenayegum, I am sure, would not have fought this case with so much tenacity if he had not felt a sense of injustice about the whole affair. It is the marginal character of cases such as this — assuming that the assault by the army personnel took place as alleged — that make them so disturbing. If going by the case law, we were to draw the line here so as to exclude liability in those situations, I am not at all sure that we would have done all we can to discharge the trust placed in us to safeguard these rights.

International tribunals and jurists do not appear to agree on the precise principles that should govern State liability in situations such as this. It is in this context that I found myself thinking of the concept of "administrative practice" referred to earlier, which has come in handy in analogous situations. The application of such a concept could help to extend State liability to cases like this and the one given by Mr. Pullenayagam so that they too can be brought within State responsibility if the material before the Court can show that the occurrence of the acts complained of can be attributed to the existence of a general situation created or brought about by the negligence and indifference of those in authority.

In the *Irish* case (*Ireland v. U. K.*, Jan. 18, 1978) (13) the Irish Government complained to the European Human Rights Commission against the U.K. Government's policy of internment, investigation and detention in Northern Ireland. The Royal Ulster Constabulary (R.U.C.) Special Branch had established a number of interrogation centres throughout the province and applied various methods of interrogation in order to secure confessions and information about the outlawed I.R.A. One of the allegations made against the U.K. Government was that some of the persons arrested had been subjected to interrogation in depth involving the use of five techniques, namely, wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food. These

devices were used to deprive prisoners of the normal exercise of their senses to facilitate the obtaining of confessions. At the Palace Barracks Centre, the R.U.C. forced prisoners to stand spread-eagled against a wall and severely beat them up. At other centres various punishments were inflicted on the prisoners. The Irish Government alleged that these acts constituted an "administrative practice" in violation of Article 3 of the European Convention on Human Rights.

It may be of interest to know that although the U.K. Government admitted from the start that the use of the five techniques was authorised at "high level", such authority was "never committed to writing or authorised in any official document, the techniques had been orally taught to members of the R.U.C. by the English Intelligence Centre at a Seminar". It was therefore apparent that the Irish Government came before the Commission claiming a violation based on an "administrative practice", and not on the basis of known and specific directions given by the U.K. Government authorising such wrongful acts. Apart from the complaint of the Irish Government, there were also individual complaints made on the same basis, namely, the violation of Article 3 by means of an "administrative practice". These individual complaints were consolidated and dealt with under the name *Donnally and others v. United Kingdom.* It should be noted that the accusation of the infringement of Article 3 was founded solely on the basis of an administrative practice. The following paragraph from the judgment makes this clear.—

> "158. Following the order of 11th February 1977 (see Paragrahp 8 above) the Irish Government indicated at the hearing in April 1977, that they were asking the court to hold that there had been in N. Ireland from 1971 to 1974 a practice or practices in breach of Article 3 and to specify if need be where they had occurred."

The findings of both the Commission and the Court also puts the matter beyond any argument. In paragraph 147 the Court reproduces the conclusions of the Commission, In sub-paragraphs iv and vi, the Commission holds —

> "iv. unanimously that the combined use of the five techniques in the case before it constituted a practice of inhuman treatment and of torture in breach of Art. 3.
>
> vi. Unanimously that there had been at Palace Barracks, Holywood in the autumn of 1971 a practice in connection

with the interrogation of persons by members of the R. U. C. which was inhuman treatment in breach of Art. 3 of the Convention."

The Court's own conclusions regarding the violation of Article 3 are as follows:-

"3. holds by sixteen votes to one that the use of the fire techniques in Aug. and Oct. 1971 constituted a practice of inhuman and degrading treatment which practice was in breach of Art. 3.

6. holds unanimously that there existed at Palace Barracks in the Autumn of 1971 a practice of inhuman treatment, which practice was in breach of Art. 3."

The confusion in Mr. Pullenayagam's mind has apparently arisen because the question of an administrative practice can also have particular relevance in another connection. The Court said:

"The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies."

Article 26 provides that before a complaint can be entertained under the Convention, a party must exhaust all domestic remedies. In the *Irish* case apparently that had not been done. So, when that plea was taken in that case, it was countered by the complainant Government that if a Government countenances an administrative practice that is a violation of the Convention, domestic remedies in that country are likely to be non-existent or ineffective and accordingly a plea under Article 26 should be ruled out. The allegation of the existence of an "administrative practice" was thus relied on by the Irish Government not in subsidiary manner by way of defence – though it came in useful also as a defence – but it constituted the main thrust of the complainant Government's case. A practice, the Court said, does not itself constitute a violation separate from the act complained of, meaning that in certain circumstances where there is the need to rely on the existence of an "administrative practice", the specific act complained of becomes a violation only when it is viewed against the background of such practice. This ought to be sufficient to dispel any misunderstanding that Mr. Pullenayagam may have that *Thadchanamoorti's* case has substituted the test of "administrative practice" as against the test of executive or administrative action" required by Article 126 of our Constitution.

The concept of "administrative practice" therefore appears to carry with it certain features that give it wide-ranging application in a number of different situations. In the *Greek* case, a complaint was made in 1967 by the three Scandinavian countries, Denmark, Norway and Sweden against Greece, after army officers in Greece had seized power by a *coup d'etat.* One of the charges was that of torture and ill-treatment of political prisoners.

The Commission, after carefully reviewing all evidence, concluded that torture had been inflicted in a number of cases and that there was a strong indication that the acts of torture or ill-treatment were not isolated or exceptional, nor limited to one place. It was of the view that there was a practice or torture and ill-treatment by the Athens Security Police of persons arrested for political reasons, that the Greek authorities, confronted with numerous and substantial complaints and allegations of torture and ill-treatment, had failed to take any effective steps to investigate them or remedy the situation.

In the course of its order, the Commission gave a ruling on the impact of an "administrative practice" in relation to a plea of the exhaustion of domestic remedies. The Commission said:

> "25. Where, however, there is a practice of non-observance of certain convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate. Thus if there was an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence and administrative enquiries would either be non-instituted or if they were would be likely to be half-hearted and incomplete ....."

The Commission then went on to give a definition of the expression "administrative practice" which can by no means be limited in application only to a case where plea under Article 26 is taken. The Commission said:

> "28 ..... two elements are necessary to the existence of an administrative practice of torture or ill-treatment; repetition of acts and official tolerance. By repetition of acts is meant a substantial number of acts of torture or ill-treatment which are the expression of a general situation. The pattern of such acts may be either on the one hand, that they occurred in the same place, that they were attributable to the agents of the same police or military authority or that the victims belonged to

the same political category; or on the other hand, that they occurred in several places or at the hands of distinct authorities or were inflicted on persons of varying political affiliations.

29. By official tolerance is meant that though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible though cognisant of such acts takes no action to punish them or prevent their repetition; or that the higher authority, in the face of numerous allegations manifest indifference by refusing any adequate investigation of their truth or falsity or that in in judicial proceedings, a fair hearing of such complaints is denied."

In the *Irish case* (13) these principles have been further elucidated when the court observed -

"159 A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system..... a practice does not of itself constitute a violation separate from such breaches. It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore under the Convention those authorities are strictly liable for the conduct of their subordinates, they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected."

Mr. Pullenayagam's submission, as I stated earlier, is wide enough to take in an alternate ground irrespective of the charge against the 2nd respondent, that in any event the evidence was adequate to establish the probability of the petitioner coming by his injuries at the hands of the army personnel. He has argued backwards from the medical reports and sought to link the injuries with the events of the 9th August. The reports show that he had ten injuries, nine of them contusions and abrasions and one a fracture of neck of left side of mandible, said to be grievous. The petitioner is also said to have a heart complaint (mitral incompetence) which has nothing to do with the alleged ill-treatment. Incidentally, the inflictment of these injuries would not constitute torture if we are to go by the definition given to that term in the *Irish* case. The injuries were found on the petitioner on the 11th August and since the petitioner had been exposed to a situation on the 9th night when he was in the custody of army personnel

who he alleges assaulted him, Mr. Pullenayagam submits that we should hold that the charges against the army personnel have been established irrespective of whether or not the charge of incitement against the 2nd respondent is proved.

I have set out above as to what the burden of proof should be in a case of this nature and how it should be applied. In all the circumstances of this case, I am unable to say that the petitioner has proved those matters to my satisfaction. The conduct and behaviour of the petitioner leaves a seriout doubt in my mind as to whether or not the incidents spoken of by him happened in the manner narrated by the petitioner. In fact, Mr. Choksy stated that the material before the Court shows that the petitioner left the custody of the authorities on the night of the 9th August as a free man without any injuries on him or without his drawing the attention of the Magistrate to any injuries on him and, therefore, there is no burden on the authorities to discharge as to how the petitioner came by the injuries set out in the medical reports.

Even if we were to assume that this allegation has been proved adopting the lowest degree of probability in the range permitted by the rule of a balance of probability, I still entertain a doubt as to whether the liability of the State for these alleged acts could be established as a matter of law.

In the instant case if liability is to be imputed to the State, it must be on the basis of an administrative practice and not on the basis of an authorisation, direct or implied, or that these acts were done for the benefit of the State. If we rule out the allegations against the 2nd respondent, we have here the case of the petitioner being roughly handled by some army personnel while the petitioner was being transported to Kalmunai town from the spot where he was taken into custody. This involved a drive of about half an hour or a little more. This assaulting is alleged to have occurred on the high road, in public apparently under the cover of darkness. It may be noted that the instructions and the responsibility of the army to which he was temporarily handed over was only to transport him and hand him over to the police at the other end. The learned Deputy Solicitor-General has informed us that at this time no emergency had been proclaimed and the army authorities had no more powers over the petitioner than any civilian. This does not appear to be identical with the case of an assault or ill-treatment by, say the police, who having arrested a person, ill-treats him in the confines of the police station and in the privacy of a secluded cell in the course of and for the purpose of an investigation.

The incident has also to be viewed in the context of the extraordinary conditions prevailing in the locality. It is apparent that the base passions of many persons in that area had been excited by communal passions. There was tension in the air. Mr. Pullenayagam suggested that the army personnel were all Sinhala persons, but there is no definite evidence of it. That a few persons belonging to other races could have been among the personnel cannot be ruled out. As far as the police personnel were concerned, we find them not confined entirely to one race or community. The petitioner himself says that on one occasion some of the other soldiers cautioned those who were assaulting him. The insinuation being that they cautioned his tormentors against their leaving telltale marks of violence on the petitioner's body. The petitioner has also said that at another point, on the journey, some soldiers intervened and prevented the petitioner from being shot by the others. All in all the acts complained of, if they had taken place as alleged, seem to be in the nature of individual and personal acts due to some aberration or idiosyncracy. They are also suggestive of the venting of some grievance of a personal or private nature or in consequence of some strong passion, prejudice or malice. They are admittedly illegal and criminal acts and not merely acts that are unauthorised and *ultra vires.* It is also not possible to characterise those acts as being incidental to the authority and powers vested in those persons nor have they been performed to further some objective of the State.

This does not of course mean that an individual can be exposed and abandoned to the mercies of the army or police personnel and left without redress. A high standard of discipline is expected of the armed services and the police. Complaints made against such personnel must be promptly and fairly investigated. Disciplinary action should be taken where necessary and suitable compensation by way of an *ex gratia* payment paid to innocent persons who may have suffered at their hands.

In the *Irish* case the Court has adverted to some of the measures taken by the U.K. Government which were designed to prevent ill-treatment and to grant redress in such instances. These provisions can provide a useful guide to the authorities in this country. Apart from the normal regulations requiring humane treatment, certain special directives had been issued in this regard. There was a directive on interrogation prohibiting the use of coercion. Medical examinations, the keeping of comprehensive records and the immediate reporting of complaints were made mandatory. But the Court added that mere directives would be insufficient and there must be satisfactory evidence that there has been the

diffusion and enforcement at all levels of these directives and that they were in fact implemented and obeyed in practice. After the Parker Commission Report, complaints both against police and army personnel were referred to an outside authority for investigation and there was evidence of prosecution or disciplinary action in numerous cases. In many cases compensation had been paid.

We have before us the affidavits of the three Service Commanders – the Commanders of the Army, the Navy, and the Air Force – and also of the Inspector-General of Police. They state in categorical terms that they have at no time authorised, encouraged or condoned unlawful acts or breaches of discipline among their personnel. Statute law, regulations and directions also outlaw such acts in categorical terms. They state that when such infringements are brought or come to their notice they have not hesitated to set in motion disciplinary or criminal proceedings to punish the offender.

The Inspector-General of Police refers in particular to action he has taken in similar cases. In 1980 alone, in consequence of complaints against members of the Police force, 108 officers have been prosecuted, 10 officers have been dismissed, the enlistment of 48 persons has been cancelled and 235 other officers have been interdicted. In regard to the incidents that took place in Jaffna in 1981, a committee of senior police officers headed by R. Suntheralingam, D.I.G. had conducted a full scale investigation and proceedings have been set on foot against nearly 175 police officers.

As far as this case is concerned, the I.G. states that when it was found that the petitioner had complained of an assault and was warded at the Batticaloa hospital, the Headquarters Inspector, Batticaloa, was directed to record the petitioner's statement. In consequence of the statement recorded from the petitioner, the Superintendent of Police, Batticaloa, has instructed A.S.P., Amparai, to hold an investigation. The petitioner, though summoned by letter dated 11th September 1981 to attend an inquiry, has failed to do so.

The Army Commander has stated that no complaint whatsoever has been made to the army authorities by the petitioner alleging that he was tortured or ill-treated by army personnel. Had he received any such complaint, he would have taken prompt steps to cause investigations to be made and if the allegations were true, action would have been taken against the personnel guilty of such indiscipline. He has drawn the attention of Court to a telegram

sent by the petitioner to His Excellency the President which had been referred to him for action and on which he had initiated proceedings. The telegram reads:

> "18 morning public of Kalmunai assaulted by Army personnel. Beg to initiate action to stop please – Kandiah Velmuruge D.D.C. Member Amparai."

It would be observed that this complaint by the petitioner himself made to the head of State does not contain one word about his own alleged torture and ill-treatment. In the face of material such as this, could any tribunal have confidence in the veracity of the petitioner or place any reliance on the allegations he has sought to make in this case. It is for this reason that I agree with my brother Ismail, J's conclusion that even his allegation of army assault has not been proved to our satisfaction.

On the face of this material, I do not think that the alleged acts of torture and ill-treatment administered by army personnel has been made out or could be imputed as a liability of the State as a matter of law. The alleged acts have not been authorised, encouraged, or countenanced or performed for the benefit of the State. The material before us shows that they would also not have been tolerated by the authorities, and redress in all probability granted if there had been a genuine complaint. In these circumstances I am of the view that no legal liability under the constitutional provisions can be imputed to the State.

For these reasons I am of the opinion that this application fails. I would also make an order for costs in favour of the 2nd respondent.

Application dismissed.