WHY DO THEY TORTURE?

A SRILANKAN PERSPECTIVE

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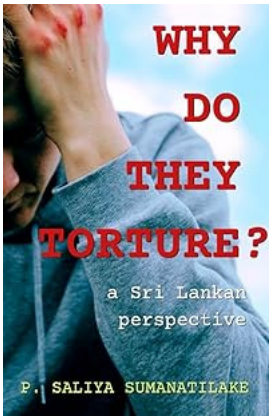

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However, owing to the SARS-CoV-2 outbreak in Sri Lanka from 2020 to 2021, followed by the dire economic crisis that has prevailed since mid-2022, producing the intended print version of this book became a virtual impossibility; domestic publishing houses refuse to accept manuscripts without being fully financed in advance. Meeting even the least expenditure of US$550 in this regard proved impossible for the author. Thus, publication of this writing had to be unavoidably suspended – that is, until the present recourse to free self-publication as an electronic book under the auspices of Amazon's Kindle Direct Publishing.

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Preface

> The Hong Kong based Asian Human Rights Commission arguably has been the most vocal regarding regional violations of the prohibition on torture, especially *via* its consistent 'urgent appeals,' 'statements' and press releases. Featured among its many published books and reports serving to promote torture awareness is a *Narrative of Justice in Sri Lanka told through stories of torture victims*, which details grave allegations of torture reported to the said Commission's partner agencies in Sri Lanka from 1998 to 2012. By providing a generous volume of source data, this novel work would undoubtedly inspire many a commentary on 'torture in Sri Lanka' in years to come.

In late 2012, I chose to devote a whole year toward restudying the extant writings on torture in a bid to correlate my own accumulated practical insights (gained during tenures of service with the Attorney General's Department and Human Rights Commission of Sri Lanka) with those advanced by academics and pragmatists the world over. While so engaged, it was possible to discern several questions left unanswered by contemporary international scholarship, prompting this audacious attempt to determine the most salient of them all: *What considerations and capacities actuate recourse to torture*?

No *truly* novel ideas on 'police torture' causatives have been advanced either globally or locally within the last few years. The sparse texts that have emerged are more or less consolidations or reiterations of already extant scholarship in this regard. Innovations within 'police torture'-related domestic case law too have been meager. Nonetheless, the unequivocal judicial acknowledgment by Sri Lanka's Supreme Court – in *Roshan Koitex* [2016], *Justin Rajapaksha* [2016], *Sarath Naidos* [2017], *Janaka Batawalage* [2018] and *Samaraweera Arachchige Wasantha* [2019] – of police propensity to fabricate charges against non-offenders does constitute a highlight.

In order to answer the aforesaid salient question (what factors incite and capacitate recourse to torture), a two-step process was effected: firstly, an extensive study of *ex post facto* victim narratives of 'police torture'; and, secondly, an original survey in respect of 300 sampled individuals *via* an atypical questionnaire (*inter alia* on the public's hypothesized inclination to *justify* torture by law enforcement, crime prevention and research agencies). The latter body of firsthand data sourced from amongst the local citizens was found to support the conclusions drawn from the former victim narrative analysis, providing for a verified representation of the torture sentiment as currently prevails in Sri Lanka. Accordingly, it was possible to determine the patent incitements that serve to actuate and perpetuate 'police torture' as well as the latent capacity that serves to precipitate the same.

All who have assisted me in perfecting this work deserve special mention: *heartfelt appreciation* to Professor W.M. Dhanapala of the University of Sri Jayewardenepura for his exceedingly kind and most competent advise; *sincere gratitude* to Mr. Mohan Parakrama Hettiarachchi, Mr. Channa De Zoysa, Mr. Kasun Chamara Munasinghe, Mr. Janaka Udayakumara, Mr. Sanka Munasinghe, Mr. Jeewaka Wickremasinghe, Mr. Kasun Adikari and Ms. Thamesha Tennakoon, for their kind assistance in securing the primary data corpus of 300 perfected questionnaires; and *grateful thanks* to my colleagues 'At-Law' Mr. Gamini Wanasekera, Ms. Nadeesha Koggalahewa, Mr. Monty Weeraman, Mr. Jagath Bandara Liyana Arachchi, Mr. Prasanna Chandralal Perera, Mr. Nalin Fernando, Mr. Trini Rayen, Mr. Viraj Premasinghe, Mr. Mahendra Kumarasinghe, Mr. Viran Corea, Mr. Shian Tissera, Mr. Dhanushka Dissanayake, Ms. Thivanka Hettiarachchi, Ms. Ridma Dias Nagahawatte, Ms. Nathaya Nanayakkara, Mr. Rohan Premaratne and Mr. W.M.G. Udayakumara for their kind inputs and/or encouragements. A *special thank you* to Mr. Hemantha Wickremasinghe for so generously gifting me a replacement computer to complete this writing.

The gracious permissions granted by copyright/license holders of texts from which I have borrowed (strictly conforming to both international and domestic 'raw data use' and 'fair use') in furtherance of correlating this work to global scholarship are *dearly valued*.

As always, I remain **wholly indebted to** both my loving mother **Indra** and devoted sister **Menik** for so benevolently releasing me from many an obligation owed to them without which this, like all my prior books, could never have materialized.

P. Saliya Sumanatilake,

23rd February 2020.

Introduction

A Sri Lankan police officer who served during the last quarter of the 20th century recently averred that 'during his time,' when confronted with a crime, first recourse was always had to an independent investigation focused exclusively on the suspect criminal. This encompassed procuring personal information, historical data and character references from a myriad of sources, including official records, immediate neighbors, work associates, friends, foes, *etc*. Any sudden changes in the suspect's generally observed disposition, likely to giveaway his complicity in a crime, were duly noted. Once adequate information evidencing probable criminality had been ascertained, the suspect would be confronted with the same. In so doing, if he were to acknowledge guilt, no force would be administered. Only in the event of his being defiant in the face of incriminating evidence would he be beaten; this too, if felt that he were intentionally concealing vital information. Hence, 'in the good old days' torture constituted the *last* resort. Today, it appears to be the *first*.

Having consistently engaged in the same for well over a century, policemen now have recourse to *interrogative* torture as their prime 'investigative method' to the exclusion of all minimally invasive techniques. After all, 'It is far pleasanter to sit comfortably in the shade rubbing pepper into a poor devil's eyes than go about in the sun hunting up evidence' (Stephen 1883, 442 n.1, citing 'an experienced civil officer').

Most nation-states have been found out as having paid only 'lip service' to the universal ban on torture. Moreover, professing respect for this prohibition has become a convenient means for securing international aid and/or patronage. Revelations of torture by France in Algeria in 1957 (Rejali 2007, 480); the United Kingdom in Northern Ireland in 1971 (Rejali 2007, 363); and, most recently, the United States in Iraq's Abu Ghraib prison in 2004 (Rejali 2007, 294) have made it explicit that even 'permanent members' of the United Nations' Security Council

(so-called patrons of human rights) themselves could openly disregard and brazenly defy the same.

Hence, for all the criminal sanctions that the world and its constituent nation-states have brought upon torture, those who perpetrate it remain, for the most part, undeterred. Apparently, the causatives of torture have overpowered the constraints thereto. If the world is to avert the threat of a new Holocaust, it must surely reverse this trend. The need thus arises to identify these very causatives (or as many as possible) with a view to nullifying their potencies to actuate, precipitate and perpetuate torture.

Torture being a crime, determining its causal factors becomes a criminological exercise. However, torture's cognizance under criminology has not been very pronounced:

> … Torture has been a minor consideration for criminology, a finding supported by the relative lack of discussions of torture in … university-level criminology textbooks (Huggins 2015, 19).

> How are criminologists to study torture when there is so little existing criminological scholarship on this important subject? Indeed, why have criminologists abdicated the study and theorizing about torture to disciplines presumably less well prepared to study it? (Huggins 2015, 23.)

In order to effect torture, one must not only be incited but also disposed toward it. Some form of inciting factor must prevail to liberate one's inhibited cruel disposition, each successful incitement progressively weakening the resolve to desist from cruelty.

Thus, two generic questions may be said to arise in respect of every instance of premeditated torture:

(***a***) What factors *incited* such recourse to torture?

(***b***) How was the perpetrator *able* to torture the victim?

Being the predominant researchers in this regard, psychologists have exerted themselves more in hypothesizing enabling capacities than inciting factors. Few have endeavored to discover any distinct disposition to torture. Most have elected to endorse the (now trite) dehumanization hypothesis (see Oliver 2011, 93 and Bandura 1990, 38).

Pundits of the past, however, appear not to have been as circumspect in opining as their modern counterparts. Alice Miller (1980) surmised *repressed anger resulting from battery and neglect as a child*, the disinhibitor of cruelty. Theodor Adorno (1966) reckoned torture and other like barbarities, resultants of *man*'*s innate dominative desire*. Stanley Milgram (1963) hypothesized *man*'*s innate obedience to authority*, the facilitator of torture.

Today it is viewed as unethical to subject a consenting individual to even feigned torture, anticipating mental health complications that could arise from the same. Hence, all opportunities for direct scientific experimentation in this regard have come to be lost.

Nonetheless, observations made and recorded during those experiments conducted prior to the enforcement of this ethical ban (the Milgram experiment and Zimbardo's *Stanford Prison* experiment) are still available and of pivotal significance as published raw data. However, for some strange reason, no initiative to reevaluate these invaluable firsthand observations and interviews in the light of causative criteria emerging from modern-day accounts of torture appears to have been undertaken. Milgram's experiment continues to be tritely associated with 'obedience to authority' and Zimbardo's likewise with 'prison brutality.' Thus, these most pertinent experimental observations on torture have to date remained resistant to critical debate. It is Milgram's and Zibardo's opinions, not their frank observations, that continue to command probative significance.

All in all, research efforts to ascertain the actual causatives of torture have come to a virtual standstill.

Sri Lankan scholarship on torture, though being comparatively meager, has at least attempted to identify such causatives, albeit quite cursorily. Jayakumar (2016, para.3.4) in 'Truth without hurt: A senior police officer's perspective of investigations into political crimes' states that when a gathering of about one hundred police inspectors were asked why they resorted to torture, (***1***) the 'sense of shame and loss of face' they would have to suffer by failing to recover either the weapon(s) or spoils of crime and (***2***) 'pressure from superior officers' to solve cases (the failure of which would prejudice career prospects) were *inter alia* advanced in response. Fernando and Weerawickrame (eds. 2009, 26) in *A baseline study on torture in Sri Lanka* add (***3***) the established practice ('habit') of 'using force on anyone that is arrested' and (***4***) police delusions of grandeur that 'proper respect has not been paid' to the above. Pinto-Jayawardena (2009) in *The Rule of Law in Decline* also indicates police 'tradition' (2009, 172) and adds (***5***) 'public pressure' to expeditiously curb crime (2009, 17, 128 and 189) as an inducement to torture. Despite *five* such factors being proposed by the said learned personalities (quite independently of one another), not *one* has received due probative scrutiny.

Two studies on crime causation in Sri Lanka have in fact hypothesized a few actuators of criminal conduct. In 'Crime and Aggression in Changing Ceylon: A Sociological Analysis of Homicide, Suicide, and Economic Crime,' Wood (1961) opined to the effect that the incidence of crime is dependent on a correlated rise in (***i***) 'chronic frustration' (irascibility arising from prolonged economic/status stagnation) and (***ii***) amorality. More recently, in 'A Sociological Study of Homicide in Sri Lanka,' Jayathunga (2010) presented the following as contributing to murder: (***i***) sexual frustration, (***ii***) revenge, (***iii***) irascibility, (***iv***) intoxication and (***v***) greed. Perpetrators were found predominantly (***vi***) poor, (***vii***) deprived of schooling or illiterate, and (***viii***) either unemployed or only menially employed. However, excepting '(***ii***) revenge,' all others appear either too remote and/or insufficiently defined to qualify (without more) as causatives specific to torture.

Hence, the central research question of this study is arrived at: **What patently incites and latently capacitates torture**? Ancillary questions such as what the specific scopes of 'torture' and 'cruel, inhuman or degrading treatment or punishment' are and whether 'torture' is in fact absolutely prohibited, too, demand pre-addressing. Again, since very few have written on torture from a legal rights perspective, the movement toward 'warranting' torture requires refuting as well.

In pursuit of meeting all the above questions, legal provisions, observed and reported incidents of torture, responses to a public questionnaire, confessions of animal abuse, recordings of simulated torture settings, accounts of an extreme instance of participant observation, scholarly opinions and pertinent statistics shall all be seen analyzed and evaluated.

Although the patent incitements to torture as ascertained therefrom may remain highly specific to policemen in Sri Lanka, the latent capacity to torture as likewise ascertained shall not remain so specific and hence be amenable to generalization.

Chapter 1: Definitional Aspects Of Torture

1.1 The concept of torture

Subjecting individuals to *cruel*, *inhuman or degrading treatment or punishment* is a practice of great antiquity, equally among barbarians and otherwise highly cultured persons. Historically, the motives for doing so have encompassed: (***a***) deterring potential offending by exhibiting the same as preludes or accompaniments to capital execution; (***b***) exacting revenge; (***c***) facilitating criminal prosecutions *via* the extraction of confessions or other evidence; (***d***) subjugating foreign peoples toward annexing their territories; (***e***) manifesting ethnic and/or religious abhorrence; (***f***) experimenting in furtherance of 'knowledge'; and (***g***) deriving deviant sexual gratification (sadists and masochists). Since virtually all of the above contexts do contemplate the inflicting of severe pain on an*other* by straining, warping, contorting or bringing into some unnatural state the body or mind or both of such *other* (with a view to immediate gain or pleasure), the word 'torture' (Latin: *tortura*, literally 'to twist') came to be used synonymously with such inflictions (*e.g.*, 'judicial torture' and 'sexual torture'). Nonetheless, save for that pursued by sadists and masochists, generically all torture was and still is *interrogative*, *punitive* or *oppressive*. Since compromising the human condition is its office, injury to body, mind, reputation and property are all within its scope. Until as late as the mid-18th century, recourse to such torture remained both legal and acceptable (Conroy 2000, 31).

1.2 Founding the prohibition of torture

The necessity to accord universal reprehensibility to torture did not arise until after the true extent of brutalities committed by the Axis powers during World War II was fully appreciated. The tyranny of the German Nazi regime[1] in particular was revealed as a perpetual administration of *cruel*, *inhuman or degrading treatment or punishment*.

Hence, it was with profound conviction to circumvent the potential recurrence of such barbarities in future that the newly aligned pro-humanist nations of the world resolved to assert in Article 5 of their *Universal Declaration of Human Rights* [1948][2] that:

> No one shall be subjected
> to torture
> **or**
> to cruel, inhuman or degrading treatment or punishment (emphasis added).

It appears that the framers of the above pronouncement, firstly, sought to severally identify 'torture' and 'cruel, inhuman or degrading treatment or punishment' and, secondly, equate them by recourse to the elective conjunction 'or.' Inasmuch as 'cruel, inhuman or degrading treatment or punishment' did always constitute the 'pith and substance' of all forms of 'torture' (whether 'judicial' or 'sexual'), it was indeed logical for them to declare the latter synonymous with the former. A conceptual distinction between the two, apparently, was neither appreciated nor insisted upon; hence the marked absence of a definition for either. Thus:

> Torture is a **subcategory** of … 'cruel, inhuman or degrading treatment' … (Davis 2005, 167, emphasis added).

Even after a lapse of eighteen years, the United Nations thought it fit to reemploy this same equating formula in its initiative to fortify the said pronouncement *via* treaty provision under Article 7 of the *International Covenant on Civil and Political Rights* [1966], which reiterates that:

> No one shall be subjected
> to torture
> **or**
> to cruel, inhuman or degrading treatment or punishment[3] (emphasis added).

That the United Nations did intentionally persist with refusing to accept any distinction between 'cruel, inhuman or degrading treatment or punishment' and 'torture' is further supported by the fact that their said *Covenant* [1966] (despite possessing no less than 53 Articles) unreservedly abstained from providing a definition for either.

173[4] nations are now privy to this *Covenant*. India and Sri Lanka acceded to the same respectively on 10th April 1979 and 11th June 1980. The United States of America, though having signed it on 5th October 1997, chose not to ratify the same until 8th June 1992. The following nations are among those who have neither signed nor ratified this *Covenant*: Bhutan, Brunei, Malaysia, Myanmar (Burma), Oman, Saudi Arabia, Singapore, and the United Arab Emirates.

1.3 Distinguishing torture

Almost nine years after the *Covenant* [1966], the United Nations did resolve to provide for a clear distinction between *cruel*, *inhuman or degrading treatment or punishment* 'amounting to torture' and *cruel*, *inhuman or degrading treatment or punishment* 'not amounting to torture.' The *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment* [1975] expressed the same as follows:

> … Torture means any act by which **severe pain or suffering**, **whether physical or mental**, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions to the extent consistent with the *Standard Minimum Rules for the Treatment of Prisoners*. ([1975], Article 1(1), emphasis added.)
>
> … **Torture** constitutes **an aggravated and deliberate form** of cruel, inhuman or degrading treatment or punishment ([1975], Article 1(2), emphasis added).

> No state may permit or tolerate torture **or other** cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a *justification* of torture **or other** cruel, inhuman or degrading treatment or punishment. ([1975], Article 3, emphasis added.)

Accordingly, a distinction is seen made between 'aggravated and deliberate' *cruel*, *inhuman or degrading treatment or punishment* and that which is not so 'aggravated and deliberate.' 'Aggravated' is seen as necessitating the pain or suffering (whether physical or mental[5]) to be 'severe'; 'deliberate,' requiring the same to be administered for one of three specified purposes: (***a***) obtaining information or a confession from the victim or another; (***b***) punishing for an act or suspected act; or (***c***) intimidating the victim or other persons. However, pain or suffering occasioned by 'lawful' punishment enforced in accordance with the *Standard Minimum Rules for the Treatment of Prisoners* [1955][6] is expressedly excluded from the ambit of 'torture.'

The Convention Against Torture and Other Cruel, *Inhuman or Degrading Treatment or Punishment* [1984] – evolving from the said *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment* [1975] – recognizes the same distinction between 'torture' and 'other acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture'[7]:

> For the purposes of this *Convention*, the term 'torture' means any act by which **severe pain or suffering**, **whether physical or mental**, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. ([1984], Article 1(1), emphasis added.)

> This article is without prejudice to any international instrument or national legislation which does or may contain provisions of **wider** application ([1984], Article 1(2), emphasis added).

The *Convention* [1984] amends the aforesaid *Declaration*'s [1975] definition of 'torture' by omitting the phrase 'to the extent consistent with the *Standard Minimum Rules for the Treatment of Prisoners*' and adding the following: (***a***) 'coercing' as an alternative to 'intimidating'; (***b***) 'discrimination' as a fourth 'purpose'; (***c***) 'consent or acquiescence' as forms of complicity; and (***d***) 'other person acting in an official capacity' as a perpetrator. Furthermore, the said *Convention*'s [1984] definition is expressed 'without prejudice' to any wider definition expressed in any domestic or international legislation. *The Rome Statute of the International Criminal Court* [1998] provides an example of the latter:

> 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions ([1998], Article 7(2)(e)). (Accordingly, 'the intentional infliction of severe pain or suffering' *per se*, without any proof of purpose, suffices to constitute 'torture' under the *Rome Statute*.)

A universal expression of reprehensibility toward two distinctive species of the genus *cruel*, *inhuman or degrading treatment or punishment* now prevails: 'torture,' the 'aggravated and deliberate' of the two being classified as *interrogative*, *punitive* or *oppressive*. *Cruel*, *inhuman or degrading treatment or punishment* not amounting to 'torture' nonetheless anticipates similar defining and/or classifying. The *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment* [1988], apparently, does serve to fill this void:

> The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted **so as to extend the widest possible protection against abuses**, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time ([1988], Principle 6, note 1, emphasis added).

Accordingly, *cruel*, *inhuman or degrading treatment or punishment* not amounting to 'torture' would contemplate any act by which any physical and/or mental pain or suffering (short of 'severe') is intentionally inflicted on a person for any purpose whatsoever with the consent or acquiescence of a public official or 'state actor.' The following allegations serve to exemplify this species:

> (***a***) The petitioner was a young girl who had been arrested without reasonable grounds and detained for about six hours at a police station. During that time, several police officers, accepting the invitation of the officer making the arrest to play with the 'toy' he had fetched, touched her body, squeezed her breasts, pinched her buttocks, addressed her as 'lovebird,' questioned her as to whether she wore underwear, and invited her to come out with one of them. I said as follows in my judgment: 'In the circumstances of this case, the suffering occasioned was of an aggravated kind and attained the level of severity to be taken cognizance of as a violation of Article 11[8] of the Constitution. The words and actions taken together would have aroused intense feelings of anguish that were capable of humiliating the petitioner. I therefore declare that Article 11 of the Constitution was violated by the subjection of the petitioner to degrading treatment.' (Amerasinghe 1995, 37.)

> (***b***) A…'s T-shirt was forcefully removed while C.S. [Court Sergeant] J… continuously beat him about the face … . After his sarong was torn off and A… was completely naked, he was pushed onto the table. Then all the police officers, including the two women, started to clap, make rude noises and laugh. … This degrading and humiliating punishment continued for some time. The woman police officer called [named] M… started to scold A… with obscene language and told him that this punishment was not enough for someone who complained to higher authorities … . (Ed. Fernando 2012, 409, parentheses added.)

In the ultimate, that 'torture' should be differentiated from 'cruel, inhuman or degrading treatment or punishment' *simpliciter* appears resolvable on 'torture's' proven potential to expose a victim to (***a***) an escalating degree of pain and suffering (***b***) at the hands of a volatile perpetrator (***c***) pursuing a yield believed to *justify* such recourse (***d***) even to the extent of

risking death. Circumventing the *due process* of law toward expeditious gain is 'torture's' function. Thus, it is implicit that the law takes special offense to such a practice.

169[9] nations are now privy to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [1984]. Sri Lanka acceded to the same on 3rd January 1994.[10] India, though, having signed the *Convention* on 14th October 1997, is yet to ratify it. The United States of America has both signed (18th April 1988) and ratified (21st October 1994) the same, but owing to its reservations expressed at such instances, is yet to fully enforce the provisions of the *Convention*. Neither the United States nor India have a federal/central statute devoted to criminalizing domestic 'torture.' Non-signatories to the *International Covenant on Civil and Political Rights* Bhutan, Myanmar (Burma), Malaysia and Singapore remain non-signatories to this *Convention* as well. Hence, are these and other nations not privy to both the said *Covenant* and *Convention*, free to engage in *cruel*, *inhuman or degrading treatment or punishment*, whether 'torture' or not?

1.4 Universal banning of torture

As has already been noted above, Article 5 of the *Universal Declaration of Human Rights* [1948] constitutes the international community's first unequivocal condemnation of *cruel*, *inhuman or degrading treatment or punishment* of whatever description. Although this provision is not *per se* legally binding, there does exist a majority consensus that the right to freedom from *cruel*, *inhuman or degrading treatment or punishment* has, in reality, obtained the status of customary international law, obligating all nations. Judicial opinions in particular have both asserted and augmented this *rationale*. The pronouncements made in the judgment of *Filartiga* v. *Pena-Irala* [1980][11] perhaps pioneered such thinking:

> In light of the universal condemnation of torture in numerous international agreements and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against

> one held in detention violates established norms of the international law of human rights, and hence the law of nations ([1980], 880).
>
> **This prohibition has become part of customary international law** as evidenced and defined by the *Universal Declaration of Human Rights*, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948), which states in the plainest of terms, 'no one shall be subjected to torture' ([1980], 882, emphasis added).
>
> Indeed, several commentators have concluded that the *Universal Declaration* has become *in toto* a part of **binding**, **customary international law** ([1980], 883, emphasis added).
>
> Having examined the sources from which customary international law is derived — the usage of nations, judicial opinions and the works of jurists — we conclude that official **torture is now prohibited by the law of nations**. The prohibition is clear and unambiguous and admits of no distinction between treatment of aliens and citizens. ([1980], 884, emphasis added.)

The said *dicta* deem the *Universal Declaration of Human Rights* [1948] to have gained the status of customary international law. Hence, it is to the extent to which rights and liberties have been contemplated therein that the customarily 'binding' status inures.

It has already been observed that the phrase 'cruel, inhuman or degrading treatment or punishment' (as employed in Article 5 of the said *Declaration*) was meant to be legally explanatory of the common usage 'torture' (in light of the elective conjunction 'or' being used to accommodate both terms within the prohibition). Hence, it is such 'cruel, inhuman or degrading treatment or punishment' *simpliciter*, irrespective of any attendant aggravation or deliberation, which so finds itself prohibited under customary international law; popularly referred to as 'the global ban on torture.'

In *Siderman de Blake* v. *Republic of Argentina* [1992], this 'ban' was deemed even more binding:

> … Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm … just as a state that is not party to an international agreement is not bound by the terms of that agreement. … Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. … The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal. … The universal and fundamental rights of human beings identified by Nuremberg — rights against genocide, enslavement, and other inhumane acts … — are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*. … **Because *jus cogens* norms do not depend solely on the consent of states for their binding force**, **they** '**enjoy the highest status within international law**.' … The Sidermans' claim that the prohibition against official torture has attained the status of a *jus cogens* norm. There is no doubt that the prohibition against official torture is a norm of customary international law, as the Second Circuit recognized more than ten years ago in the landmark case of *Filartiga* v. *Pena-Irala* … .[12] ([1992], 715-716, emphasis added.)
>
> … **We conclude that the right to be free from official torture is fundamental and universal**, **a right deserving of the highest status under international law**, **a norm of *jus cogens***. … That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. … **Under international law**, **any state that engages in official torture violates *jus cogens***. ([1992], 717, emphasis added.)

The authority cited in favor of concluding that 'the prohibition on torture' falls within customary international law is none other than the hereinbefore mentioned *Filartiga* v. *Pena-Irala* [1980]. Since it was the prohibition contained in Article 5 of the *Universal Declaration of Human Rights* [1948] that was opined in *Filartiga* [1980] as gaining admittance into the *law of nations*, it is to this very prohibition that the status of *jus cogens* conferred by *Siderman de*

Blake v. *Republic of Argentina* [1992] must exclusively and necessarily attach. Thus, the 'ban' on 'cruel, inhuman or degrading treatment or punishment' *simpliciter* is construed a *jus cogens*: a peremptory norm from which no derogation is possible.

International law is yet to declare authoritatively the *modus operandi* by which a norm gains the inviolable status of *jus cogens*. However, it appears that repetitive recognition and an expanding consensus do much to secure this end.

In *Prosecutor* v. *Anto Furundžija* [1998], the Trial Chamber (basing itself preponderantly on *Siderman de Blake* above) opined extensively as follows:

> 147. There exists today universal revulsion against torture: as a U.S.A. court put it in *Filartiga* v. *Pena-Irala*, 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.' This revulsion, as well as the importance states attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. ([1998], 56.)
>
> 153. … Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs, or even general customary rules not endowed with the same normative force. ([1998], 58-59.)
>
> 154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield

> authority that the prohibition of torture is an absolute value from which nobody must deviate. ([1998], 59.)
>
> 155. … **At the interstate level**, **it serves to internationally delegitimize any legislative**, **administrative or judicial act authorizing torture**. It would be senseless to … be unmindful of a state … taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures violating the general principle and any relevant treaty provision … would not be accorded international legal recognition. **Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful** … . What is even more important is that … in spite of possible national authorization by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it, 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state.' ([1998], 59-60, emphasis added.)

The aforesaid pronouncements are manifestly instructive of the legal efficacy enjoyed by a *jus cogens* at the individual, domestic, as well as international levels; hence, their being cited verbatim herein. Deference is again seen expressedly made to *Filartiga* whilst tacitly incorporating *Siderman*, thereby perpetuating the constructive *rationale* that the *jus cogens* status attaches to the prohibition on *cruel*, *inhuman or degrading treatment or punishment* of whatever description.

In *Caesar* v. *Trinidad and Tobago* [2005], no reservations were entertained in unequivocally asserting that the prohibition of every species of *cruel*, *inhuman or degrading treatment or punishment* is now a *jus cogens*:

> 70. … International instruments and its own case law lead the court to conclude that **there is a universal prohibition of torture and other cruel**, **inhuman or degrading treatment or punishment**, **independent of any codification or declaration**, **since all these practices constitute a violation of peremptory norms of international law** ([2005], 24, emphasis added).

Espousing equal abhorrence to all forms of 'ill-treatment' is, indeed, the most conscionable approach. Hence, the Committee Against Torture is well justified in holding that:

> 3. … The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter 'ill-treatment') … are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. … In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture, and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, **the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the *Convention* and its prevention to be an effective and non-derogable measure**. (United Nations Committee Against Torture 2008, 1-2, emphasis added.)

Hence, all forms of *cruel*, *inhuman or degrading treatment or punishment* are now universally outlawed, whether consented to or not. No entity whatsoever could legalize recourse to the same without incurring both global disapprobation and ostracism.

That the victim of torture will more often than not require long-term compassion, acceptance and support from her/his family, friends and immediate society to fully recuperate from the mental trauma of torture is a fact to which the masses remain oblivious. In an era where mental wellness is yet to be acknowledged as crucial to an individual's 'quality of life,' sensitizing governments to the dire need for established rehabilitation mechanisms that cater to victims of all forms of cruelty could prove arduous.

1.5 Voiding the proposed warrant to torture

Despite such overwhelming authority to the contrary, professor of law Alan M. Dershowitz (a confirmed advocate against torture) has controversially opined that since a growing number of the world's nations do overtly condemn coerced interrogations whilst covertly practicing the

same, it would help to reduce the barbarity and frequency of such *interrogative* torture if the same were transparently regularized under the exclusive purview of courts:

> … If torture is **in fact** being used … would it be *normatively* better or worse to have such torture **regulated** by some kind of **warrant**, with accountability, record keeping, standards and limitations (Dershowitz 2003, 277, emphasis added).

His proffered method is reminiscent of the strategy of regularization employed to curtail societal vices in the nature of prostitution, gambling and alcohol consumption. None of these vices constitutes a grave crime, though torture certainly does globally.

The right to freedom from all forms of *cruel*, *inhuman or degrading treatment or punishment* is held popularly second only to the right to life. However, this is where the confusion apparently starts. Whatever legal rhetoric voiced on the preeminence of the right to life, 'U.N. sanctioned war,' 'U.N. sanctioned capital punishment,' 'domestic war,' 'domestic capital punishment' and '*justified* homicide in lawful defense' do all serve to trump the life right as excused killing. If no less a right than that to life could be compromised so legitimately, what of one that merely seeks to secure its (*i.e*., life's) integrity? In other words:

> … If our moral intuitions allow for exceptions in cases of intentional killing, it would seem to provide exceptions in cases of non-lethal torture [as well] (Cohan 2007, 1592, parenthesis added).

Logically, this would conclude the case for excused torture. Legally, however, it does not.

The right to life, undoubtedly, is the most hallowed among all human entitlements. Nevertheless, it is yet to be acknowledged as a *jus cogens*, unlike those prohibitions on *genocide*, *slavery*, *piracy*, *racial discrimination*, *acquisition of territory by force*, *forcible suppression of peoples*' *self-determination* and (the most recently noted) 'cruel, inhuman or

degrading treatment or punishment' *simpliciter*. Hence, it is both open to derogation and amenable to exception.

In order to regulate *interrogative* torture 'legitimately,' as proposed by Dershowitz (above), it must be capable of being legitimized inherently. However, it cannot, owing to the sheer gravity of harm it invariably entails.

A range of domestic, regional and international determinations has already been observed to assert, unreservedly, the universal inviolability of the prohibition on 'cruel, inhuman or degrading treatment or punishment' *simpliciter*. *Prosecutor v*. *Anto Furundžija* [1998] has expressed such *jus cogens* potency as sufficing to 'delegitimize any legislative, administrative or judicial act' to the contrary, whether national, regional or international. Torture is thus rendered an absolute illegality. Then, how could torture, which is wholly incapable of being legalized, ever be (even marginally) legitimized? Furthermore:

> If torture is permitted under exceptional circumstances, how do we categorize the exception? Is it **inside** the legal order as part of the rule of law, or is it a destabilizing **outsider**? … Does normal law, founded on the archetypal torture ban, fill the entire legal space so that torture can only be approved in a non-legal or **extralegal** way? (Parry 2008, 900, emphasis added.)

Admittedly, any sovereign state could self-determinedly manifest its aversion to the inviolability of the freedom from torture by enacting a legislative (constitutional) provision proclaiming the same whilst repudiating all prior assents (expressed or implied, either domestically or internationally) to the ban on torture. But which state would dare to do so, especially at the risk of being shunned by the majority of nations? Short of such drastic recourse, no country could ever legally enforce any regularization of torture. To do so extra legally would be to heighten the very hypocrisy that Dershowitz (2004, 257) attributes to states that overtly denounce but covertly practice torture.

Moreover, judges who are plainly vested with the honorable task of administering justice according to law could in no sense be presumed amenable toward regulating torture, an affront to the very *rule of law* that they fervently champion:

> … The **torture prohibition** reflects a deeper *principle* at the heart of our legal system; it repudiates degrading brutality as a means of achieving social order because brutality in any form abases human dignity … . … **Its** [*i.e.*, the torture prohibition's] relaxation would therefore have dire and pervasive consequences for the many other legal rules that also reflect this *principle*. (Osiel 2009, 153 (summarizing Waldron 2005, 1735-1739), emphasis and parenthesis added.)

Hence, Dershowitz's proposed 'torture warrant' (unless enabled *via* the said 'drastic recourse') finds defeat at its very inception for manifest want of legality.

To his credit, however, the learned professor has, *via* his said proposal, initiated an unprecedented level of discussion on both the practice and prevalence of *investigative* torture. By insinuating favor for torture, Dershowitz has been able to coax the world's intellectuals into gifting their own time and minds toward generating formidable arguments against it. Whether intentionally employed by the erudite professor or not, such 'reverse psychology' has in fact prompted much brainstorming and ensuing scholarship on torture.

1.6 Sri Lanka's ban on torture

Since the analysis to be taken up in the succeeding chapters shall concern itself *inter alia* with the perpetuation of torture in Sri Lanka, it is considered pertinent to note the extent to which the universal ban on torture receives expression within its domestic law.

Article 11 of Chapter III of the Constitution of the Democratic Socialist Republic of Sri Lanka [1978] provides that:

> No person shall be subjected to torture

or

to cruel, inhuman or degrading treatment or punishment. (Emphasis added.)

Accordingly, in *Velmurugu* v. *Attorney General and another* [1981], Justice Sharvananda made the following observations:

> 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*. ([1981], 421, emphasis added.)

Inasmuch as said Article 11 constitutes a verbatim reproduction of Article 5 of the *Universal Declaration* [1948], it is befitting that the former adopts the same 'equating formula' employed by the latter.

The said Constitution [1978] also provides, in terms of Article 126, for an application to the Supreme Court praying relief or redress regarding any infringement or imminent infringement of the said negative right as consequenced by either executive or administrative action. Article 126(4) correspondingly empowers the Supreme Court to grant such relief (or make whatever order) as it shall deem contextually *just and equitable*. Punitive redress, however, is not contemplated.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No.22 of 1994, in terms of section 2, provides *inter alia* that:

> [Any] … person who tortures any other person shall be guilty of an offense [and] shall on conviction after trial by the **High Court** be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees (parentheses and emphasis added).

Section 12 of the same pertinently provides:

> 'Torture' with its grammatical variations and **cognate expressions** means any act which causes severe pain, whether physical or mental, to any other person, being an act which is –
> (a) done for any of the following purposes, that is to say –
> (i) obtaining from such other person or a third person any information or confession; or
> (ii) punishing such other person for any act which he or a third person has committed or is suspected of having committed; or
> (iii) intimidating or coercing such other person or a third person;
> (b) or done for any reason based on discrimination, and being in every case an act which is done by, or at the instigation of, or with the consent or acquiescence of a public officer or other person acting in an official capacity. (Emphasis added.)

Since the only 'cognate expression' to 'torture' as contained within the said Convention Against Torture Act [1994] is 'other cruel, inhuman or degrading treatment or punishment,' it would appear that the offense created by section 2 (above) is wide enough to encompass every species of 'other cruel, inhuman or degrading treatment or punishment.' Such is in consonance with the 'equating formula' hereinbefore noted as having been adopted by Article 11 of the Constitution of Sri Lanka [1978].

An alleged 'torturer' is required by the aforesaid section 12 of the Convention Against Torture Act [1994] to be a 'public officer or other person acting in an official capacity … who holds any paid office under the Republic.' The minimum mandatory punishment of 'seven years' manifests the legislature's appreciation of the more reprehensible nature of 'torture' acts committed by public officials in contradistinction to those of mere laymen. This potential of the Act [1994] to provide commensurate *punitive* redress to those who have suffered 'torture' at the hands of public officials serves now to override that part of the scope of authority hitherto enjoyed by sections 321[13] and 322[14] of the Penal Code Ordinance No.2 of 1883. Compensatory relief for having suffered from such 'torture' remains claimable under section 17(4) of the Code of Criminal Procedure Act No.15 of 1979, which generally enables courts to award the same to persons 'affected by the offense.'

Incidents of torture in educational institutions committed in respect of both students and members of the staff are categorically accommodated under the concept of 'ragging' – 'any act which causes or is likely to cause physical or psychological injury or mental pain or fear to a student or a member of the staff of an educational institution' – as conceived by the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No.20 of 1998. Section 2 of the said Act [1998] provides as follows:

> (1) Any person who commits or participates in ragging, within or outside an educational institution, shall be guilty of an offense under this Act and shall, on conviction after summary trial before a **Magistrate**, be liable to rigorous imprisonment for a term not exceeding two years and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offense was committed for the injuries caused to such person (emphasis added).
>
> (2) A person who, whilst committing ragging, causes sexual harassment or grievous hurt to any student or a member of the staff of an educational institution shall be guilty of an offense under this Act and shall, on conviction after summary trial before a **Magistrate**, be liable to imprisonment for a term not exceeding ten years and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offense was committed for the injuries caused to such person (emphasis added).

'Cruelty to children' receives special consideration under the law of Sri Lanka. Thus, section 308A of the Penal Code Ordinance No.2 of 1883 provides:

> (1) Whoever having the custody, charge or care of any person under eighteen years of age, willfully assaults, ill-treats, neglects or abandons such person or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause him suffering or injury to health (including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement), commits the offense of cruelty to children.
>
> (2) Whoever commits the offense of cruelty to children shall, on conviction, be punished with imprisonment of either description for a term not less than two years and may also be punished

> with a fine and be ordered to pay compensation of an amount determined by court to the person in respect of whom the offense was committed for the injuries caused to such person.

The 'First Schedule' to the Code of Criminal Procedure Act No.15 of 1979 specifies the above offense as both 'not compoundable' and 'triable' before the 'High Court.' Incidentally, the offenses created by the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment Act No.22 of 1994 and those under the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No.20 of 1998 (as noted above) are likewise 'not compoundable.'[15]

The Human Rights Commission of Sri Lanka Act No.21 of 1996, in terms of section 10(b), empowers the Commission:

> To inquire into and investigate complaints regarding infringements or imminent infringements of fundamental rights and to provide for resolution thereof by **conciliation** and **mediation** in accordance with the provisions hereinafter provided (emphasis added).

The resolution mechanisms specifically adverted to – 'conciliation' and 'mediation' – are both 'compounding' techniques. Section 15 (2) of the Human Rights Commission Act [1996] reiterates:

> Where an investigation conducted by the Commission under section 14 discloses the infringement or imminent infringement of a fundamental right by executive or administrative action … the Commission shall have the power to refer the matter, **where appropriate**, for **conciliation** or **mediation** (emphasis added).

However, the offense of 'torture' being 'not compoundable' (as noted above), the Commission is barred, constructively, from proceeding to resolve any allegation of 'torture' referred thereto.

Nevertheless, in terms of section 15 (3) of the said Act, the Commission may refer such an allegation either to the Attorney General for prosecution or the Supreme Court for determination.[16] Furthermore, no prejudice whatsoever is caused to the power vested in the Commission by section 11(a) of the said Act to investigate 'any infringement or imminent infringement of fundamental rights,' including one pertaining to the freedom from 'torture.'

Sri Lanka acceded to the *International Covenant on Civil and Political Rights* [1966] on 11th June 1980. Furthermore, on 3rd October 1997 it acceded[17] to the *Optional Protocol to the International Covenant on Civil and Political Rights* [1966].

The said *Protocol* provides for applications to the Human Rights Committee (created by the *Covenant*) 'from individuals subject to its jurisdiction who claim to be victims of violations … of any of the rights set forth in the *Covenant*' ([1966], Article 1), by their respective state (party), provided that they 'have exhausted all available domestic remedies' ([1966], Article 2). A state so charged with a violation is hence under an obligation to submit to the Committee 'written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that state' ([1966], Article 4(2)). Accordingly, the Committee 'shall forward its views to the state party concerned and to the individual' ([1966], Article 5(4)). Thus, there is no public determination of the issue on either a judicial or *quasi*-judicial basis. Nevertheless, the 'views' of the Committee, in substance, involve the deciding of both fact and law, and a selection of these decisions is published periodically ([1966], Article 6).

Strangely, for all the above legal provisions that seek to prevent and/or redress the same, both 'torture' and 'cruel, inhuman or degrading treatment or punishment' prevail unhampered.

Providing redress for torture (whether by way of treatment, litigation, restitution, rehabilitation, monetary compensation or otherwise) necessarily involves a burden on the state's finances, either directly in terms of the costs for investigations, prosecutions and

reparations or indirectly in terms of having to provide for imprisoned perpetrators and train their replacements. Public taxation has and will always be the source from which all such expenses remain payable. But how fair would it be to so penalize the public with further taxation for the faults of unscrupulous officials? Is it realistic to expect such benevolence from the masses?

Chapter 2: Patent Incitements To Torture

2.1 Failure of the prohibition on torture

The ideal of a torture-free society (which should have now come to be fully realized) remains unattainable. Apparently, incitements to torture have overpowered the deterrents thereto. The need thus arises to identify those very incitements toward nullifying their potencies to both precipitate and perpetuate torture. This is especially true of 'police torture.'

In *Ratnapala* v. *Dharmasiri and others* [1993], Justice Kulatunga opined:

> So it seems to me that despite so many decisions, **torture at police stations continues unabated**, in utter contempt of fundamental rights guaranteed by the Constitution ([1993], 236, emphasis added).

Also in *Sanjeewa*, *Attorney-At-Law* (*on behalf of G.M. Perera*) v. *Suraweera*, *O.I.C.*, *police station Wattala and others* [2003], Justice Mark Fernando observed:

> The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody **shows no decline** ([2003], 328, emphasis added).

Again, in *Janaka Batawalage* v. *I.P. Prasanna Ratnayake*, *Dam Street police station and others* [2018], Justice Aluwihare declared:

> **Over the past 40 years or so**, this court has, on innumerable instances … handed down judgments where it had held that police officers had acted in excess of authority in scant disregard for the fundamental rights enshrined in the Constitution. … Article 11 [freedom from torture] is an absolute right, and as such there is no room for derogation. ([2018], 17, emphasis and parenthesis added.)

2.2 Findings of the 'Monitoring and Prevention of Torture Project'

In 2004, the Human Rights Commission of Sri Lanka launched the 'Monitoring and Prevention of Torture Project' (funded by AusAID) to not only conduct surprise inspections[18] of police stations (in Hambantota, Anuradhapura and Kalutara at a frequency of approximately two visits *per* region, *per* month, over a period of nine months) but also identify key causatives that served to perpetuate 'police torture' within Sri Lanka.

Accordingly, a total number of 48 police stations were subjected to inspections, with all observations being duly recorded, evaluated and reported. The professional services of inspection teams, drawn from a pool[19] of three lawyers and a sociology graduate, were engaged in this regard. On completing visits[20] to 45 such police stations (twice over) within the months of February and March 2004, the teams were able to detect 5 victims of torture notwithstanding the retaliatory police practice of 'tipping off' neighboring stations regarding the presence of Human Rights Commission officials within their respective jurisdictions.

Table 1

Findings of Torture by the Monitoring and Prevention of Torture Project, February-March, 2004.

Inspection Date	*Police Station*	*Rights Violation*	*Subject's Initials*	*Reason for Torture*
28-02-2004	Maha-Vilachchiya	Torture and Illegal Detention	W.S.J.W. and H.K.N.S.K.	?
05-03-2004	Aluthgama	Torture and Illegal Detention	M.P.	Aiding/Abetting Theft of money
20-03-2004	Eppawala	Torture and Illegal Detention	A.S.	Theft of bicycles
28-03-2004	Tissa-Maharama	Torture and Illegal Detention	W.K.	Theft of clothes

Of the said 5 detections, 3 pertained to individuals allegedly complicit in theft.[21] The official translated record of one such detection made in respect of an individual ('M.P.') suspected of abetting a theft of money provides *inter alia* as follows:

> The team reached police station Aluthgama … . Its cell was found to contain 1 detainee whose name was subsequently elicited as M… P… . On referring the Detainee's Register however, it was ascertained that no entry had been made in respect of the said M… P… . When Mr. Sumanatilake[22] pointed out this irregularity to the Reserve Officer … the latter cited 'anticipated apprehension of another suspect' as his excuse for delaying to record the said detainee's details. … [The] Sub-Inspector … who was standing nearby, too, quite audaciously supported the said Reserve Officer in his lame defense, in a clear attempt to intimidate the inspection team. … Mr. Sumanatilake … promptly proceeded to question the said detainee toward ascertaining any ill-treatment suffered by him at the hands of the police. As suspected, it was revealed that M… P… had in fact **undergone several sessions of beatings** on that particular morning. Mr. Sumanatilake next subjected M… P… to a physical examination within the cell itself. Mr. Widanapathirana recorded the said detainee's statement soon thereafter. (Ed. Widanapathirana 2004, 5, parenthesis and emphasis added.)

Toward ascertaining whether such (majority) theft-oriented torture, as discovered by the said teams, was indicative of any predisposition on the part of the police to so engage, recourse was had to existing reports of the Supreme Court's[23] determinations on torture. Accordingly, among 18 such reported Supreme Court findings of 'police torture,' 11 (61.11%) pertained to those who had been allegedly complicit in theft (including aggravated theft), robbery and/or receiving stolen property. Although these reported cases (18) and the teams' first-hand detections (5) were wanting in numbers to draw a generalizable conclusion on any apparent incitement to 'police torture' in Sri Lanka, they did at least yield the tentative finding that suspect-thieves constitute a category most prone to such ill-treatment.

2.3 Recordings of the Asian Human Rights Commission

The Asian Human Rights Commission (hereinafter 'A.H.R.C.,' active in Sri Lanka *via* its many partner Non-Governmental Organizations) has recorded no less than 139 allegations of 'police torture' during the period 2005 to 2010 (both years included) in a systematic and

chronological manner replete with police–victim dialogues, all made freely accessible to the public *via* the World Wide Web.

Although Sri Lanka's Supreme Court findings of 'police torture' as reported in the 'Sri Lanka Law Reports' might be construed as a 'more credible' source (being based on affidavit evidence), (***a***) the majority of the said Court's said findings remaining unreported and (***b***) many a 'police torture' petition being withdrawn while pending determination (due to coercion or otherwise) have resulted in a diminutive yield of approximately 28 reported cases for the period 1978 to 2010. Even in these case judgments, police–victim dialogues averred to by victims in their affidavits (inaccessible to non-parties) are seen reproduced only infrequently.

Regarding the said A.H.R.C.'s recordings, which since 2012 remain published as a *Narrative of Justice in Sri Lanka told through stories of torture victims*, editor Mr. W.J. Basil Fernando (Director Policy and Programs, A.H.R.C.) has declared that:

> No study of human rights in Sri Lanka would be complete without reference to this publication. This is the most comprehensive book, not only on the practice of torture but also on the widespread impunity that prevails in Sri Lanka. (Asian Human Rights Commission 2013.)

Hence, whilst the said A.H.R.C.'s recordings were herein chosen as the crucial source data for the purpose of theory generation, recourse was also had to the aforesaid Supreme Court cases to corroborate, complement and/or supplement the former.

Based on the apparent grounds for torture adverted to in each account, the said 139 allegations of 'police torture' recorded by the A.H.R.C. during the period 2005 to 2010 (both years included) were classified (descriptively), aggregated and tabulated in descending frequency as follows (ending with those whose grounds were undisclosed or unclear):

Table 2

Complaints of 'police torture' made to the Asian Human Rights Commission during the period 2005-2010, classified according to their apparent grounds for torture.

Rank	*Apparent Grounds for Torture*	*Number*	*%*
1	The torture victim's alleged Theft or Robbery or Receiving of Stolen Property[24]	47	33.81%
2	Retaliation against the torture victim's prior act or omission regarding the assailant (Personal Revenge)[25]	28	20.14%
3	Retaliation against the torture victim's prior act or omission regarding a third party (Proxy Revenge)[26]	11	7.91%
4	The torture victim's alleged Aiding or Abetting Terrorism[27]	7	5.03%
5	The torture victim's alleged Possession or Selling of Illicit Alcohol[28]	7	5.03%
6	Alleged Murder by the torture victim[29]	5	3.59%
7	The torture victim's alleged Possession of an Offensive Weapon or Firearm[30]	2	1.43%
8	The torture victim's alleged Aiding or Abetting Illegal Immigration[31]	2	1.43%
9	The torture victim's alleged Possession of a Dangerous Drug[32]	1	0.71%
10	Alleged Mischief by the torture victim[33]	1	0.71%
11	Undisclosed and/or Unclear[34]	28	20.14%
Total		139	100%

A *prima facie* conclusion regarding this tabulation would be that those allegedly complicit in theft (47) ranked foremost amongst all victims of 'police torture' reported to the A.H.R.C., followed respectively by those who were tortured out of 'personal' (28) and 'proxy' revenge (11). However, not much else could be gleaned from this tabulated frequency ranking of classified apparent grounds for torture. Instead, by conceptually categorizing these 'apparent grounds' (***a***) ranked '1,' '5,' '6,' '7,' '8,' '9' and '10' cumulatively as '***interrogative***' **torture**; (***b***) ranked '2' and '3' cumulatively as '***punitive***' **torture**; and (***c***) ranked '4' as '***oppressive***' **torture**, a more distinctive differentiation based on definitive properties and dimensions was made possible:

> (***a***) ***Interrogative*** **torture**: utilized in contexts where suspicions are raised by third parties or by policemen themselves that a particular individual has committed a crime in respect of which torture constitutes an expeditious means to extract his/her confession or other information deemed vital to the investigation (not necessarily the trial) thereof.

(***b***) ***Punitive* torture**: utilized in contexts where a prior (or even immediately prior) act or omission on the part of the tortured victim in respect of either the torturer or another in whom the torturer has an interest is construed as an 'affront' deserving of prompt retaliatory 'disciplining.'

(***c***) ***Oppressive* torture**: utilized in contexts where suspicions are raised by third parties or by policemen themselves that a particular individual maintains ties with those concerned in subversive and/or terrorist activities in respect of which torture constitutes an expeditious means by which to both (*i*) extract his/her confession thereon along with other revelations regarding anti-state activity and (*ii*) execute summary punishment to deter him/her from further engaging in the same.

Table 3

Complaints of 'police torture' made to the Asian Human Rights Commission during the period 2005-2010, categorized conceptually according to their generic causal setting.

Interrogative torture		*Punitive torture*		*Oppressive torture*	
Theft	47	Personal Revenge	28	Terrorism	7
Illicit Alcohol	7	Proxy Revenge	11		
Murder	5				
Offensive Weapon	2				
Illegal Immigration	2				
Dangerous Drug	1				
Mischief	1				
Total	65		39		7
Approx. %	58%		35%		6%

Incidentally, the aforesaid 58:35:6 percentile ratio for the A.H.R.C.'s recordings of *interrogative*: *punitive*: *oppressive* 'police torture' was seen closely reproduced as 64:28:7 by the reported (*i.e.*, excluding unreported) Supreme Court findings of 'police torture' for the broader period of 1978 to 2010 as follows:

Table 4

Reported Supreme Court findings of 'police torture' 1987-2010, categorized conceptually according to their generic causal setting.

Interrogative torture		*Punitive torture*		*Oppressive torture*	
Theft	11	Personal Revenge	7	Subversion	2
Illicit Alcohol	2	Proxy Revenge	1		
Murder	2				
Offensive Weapon	2				
Traffic Offense	1				
Total	18		8		2
Approx. %	64%		28%		7%

2.4 Hypothesizing incitements for *interrogative* and *punitive* torture

The tactic employed by this study to approximate inciting factors for both *interrogative* and *punitive* torture was to elicit the same from impromptu exclamations made by police officers (as to why they were torturing their victims) during such instances of torture. Hence, both the said 65 *interrogative* torture recordings and 39 *punitive* torture recordings made by the A.H.R.C. (as *per* 'Table 3' above) were analyzed (purposively) to demarcate those that reported any verbal expression by a police officer sufficiently indicative of any incitement(s) to torture.

However, owing to its resemblance to 'military torture' (whose inciting factors would logically encompass those that prevail during a time of war), *oppressive* torture was designedly left out for the most part of this study, with 'police torture' during times of peace instead receiving the fullest attention. Moreover, on perusing the 7 recordings of *oppressive* torture (as *per* 'Table 3' above), it was found that none were sufficiently indicative of any form of direct or indirect inciting factor for police engagement in the same.

2.4.1 Hypothesizing incitements for *punitive* torture

2.4.1.1 Personal and proxy revenge

The following 3 sample allegations (from a total of 28, *per* 'Table 3' above) vividly evince the brutality that police officers employ in exacting personal revenge:

> (***a***) Erandaka … stopped by a restaurant to buy some food at 2 a.m. … . While he was waiting, he noticed three men in a white car stop near the restaurant. One man got out and asked a boy who was in the restaurant to come out to him. When the boy approached, the man started hitting him without uttering a word. As the boy was being beaten, Erandaka went to him and told him not to hit the boy. Then the man asked, 'What authority do you have to tell me not to hit the boy? Do you know who I am?' Erandaka replied, 'I don't care who you are, but please don't assault the boy.' Then the man identified himself as I.P. [Inspector of Police] N… from Kandana police station. He asked who Erandaka was. Erandaka said that he was a photojournalist. Then I.P. N… said, 'Oh! People like you are wanted.' He then released the boy and started assaulting Erandaka. … I.P. N… ordered two other plainclothes policemen to take him to the police station by taxi. Erandaka was brought to the police station and held in a cell. After some time, I.P. N… came to the police station. … The I.P. opened the cell and started beating Erandaka again. He punched him in the stomach. Erandaka fell to his knees, with the I.P. striking him about the face for about 30 minutes. Due to this assault, his mouth, eyes and ears sustained multiple injuries and started bleeding. Erandaka was ordered to remove his shirt and mop up his own blood, which he did. (Ed. Fernando 2012, 325-326, parenthesis added.)

> (***b***) … Sergeant J… and a Constable A… asked Tharidu … to join them at Akuressa police station to discuss a motorcycle for sale. When he arrived, they began to interrogate him about an incident days earlier in which he had slapped his girlfriend; the girlfriend was Sergeant J...'s daughter. The officers also brought in Tharidu's friend Nuwan Madusanka, who had been with him at the time of the dispute. The two were asked about a chain that they were supposed to have snatched during the incident … both denied the theft, though not the assault. … Sergeant J… then slapped them both and told them that they would be punished for hurting his daughter. The two were taken into police custody. That day at about 6:30 p.m., two police officers reportedly stripped the men naked in the police station, tied their hands and feet together, and allowed Sergeant J… to beat the

heels of their feet with a wooden baton. He demanded that they confess to the theft of a necklace. Police scattered a substance like salt on the floor and forced the two to jump on it for about ten minutes. Tharidu was also subjected to a form of water torture, which simulates drowning, using a hose. (Ed. Fernando 2012, 348-349.)

(***c***) … Lakshman … went to the place where the celebration was held … . … He parked his three-wheeler on the side of the road and went … inside … . A short while later he returned to the three-wheeler to go back to his home. He observed four people sitting inside in a casual manner, smoking cigarettes and lying on the seat with their legs up. He requested them to get down, as he wanted to leave. … They asked him, 'Do you know whom you are speaking to? This is the son of the Officer In Charge (O.I.C.).' Later they got down and left. Lakshman took the three-wheeler and moved on. … … In the evening, Lakshman returned to the same place to see a musical show organized for the New Year celebrations. A short while later, a police jeep of the Ganemulla police station arrived. The O.I.C., who was in a black jacket and a black hat, was in the Jeep and repeatedly demanded, 'Who is Lakshman?' Then Lakshman went to the O.I.C.; he thought that he had come to inquire into the earlier incident. Without warning, the O.I.C. hit him on the chest, asking, 'Are you the man?' Lakshman fell to the ground, and when he was trying to get up, the O.I.C. assaulted him with a torch [flashlight] he was holding. He also kicked Lakshman, who fell down again. … Lakshman got up slowly and was able to enter the adjoining land, which belongs to Mr. Chaminda. However, the O.I.C. was not satisfied and followed him, asking repeatedly, 'Where is the bugger?' Then he assaulted some other people who were there having soft drinks and who witnessed Lakshman being assaulted. Then the son of the O.I.C., who was in the jeep, came to the scene and pointed out Lakshman to his father … . The O.I.C. caught Lakshman and used a helmet in his hand to strike him about the head. (Ed. Fernando 2012, 371, parenthesis added.)

Even more damning is the fact that police officers seek to avenge not only their own grievances but also those of others (seemingly with comparable fury), as evinced by the following 3 sample allegations (from a total of 11, *per* 'Table 3' above):

(***a***) … Demanding to know why Ajith had attempted to assault … Riffas … the I.P. [Inspector of Police] F… continued to beat him. When the assault was over, Ajith told the inspector that he would go to the police station to lodge a complaint against him. I.P. F… then allegedly threatened

Ajith, saying, 'Even though you go to the police station, you can do nothing to me. Once I give a call to the police station, you will be arrested.' According to Ajith, five days earlier he had asked Riffas to return Rs.5,000/-, which Ajith loaned him over one year ago. Instead of paying the money, Riffas immediately went to I.P. F… and allegedly asked for help in dealing with this private matter. Ajith says that this is the reason behind his assault and intimidation by the said inspector. (Ed. Fernando 2012, 218, parenthesis added.)

(***b***) Two of the policemen pounced on him, shouting, 'You are our man,' and gave Fernando two hard slaps on his face. Fernando recognized three policemen as F…, B… and P… and asked them why they had broken into the house and assaulted him. The policemen replied, 'How dare you spit on *Bada* (big tummy) Nimal?' *Bada* Nimal was a prominent businessman of the area involved in the fisheries industry. Fernando denied spitting at Nimal and insisted that he only had an argument with him. Nonetheless, the policemen handcuffed him and dragged him outside the house. … The policemen continued to drag Fernando up to the Kudapaduwa Church and severely assaulted him. The Negombo police O.I.C. [Officer In Charge] also arrived at the scene and, striking him, queried sneeringly, 'How dare you spit on the face of *Bada* Nimal?' When Fernando continuously denied doing so … the policemen thoroughly assaulted him for about 15 minutes. … They took him to the Kamachchode Junction in Negombo and pushed him outside the vehicle. … The O.I.C. then instructed someone to fetch *Bada* Nimal. After about 15 minutes, when *Bada* Nimal came, the policemen dragged Fernando to him and forced Fernando to kneel before him and seek his forgiveness. … Then the O.I.C. told *Bada* Nimal to spit on Fernando, at which *Bada* Nimal spat on the ground nearby. Thereafter the O.I.C. pulled Fernando to his feet and viciously punched his stomach. Then the O.I.C. spat on his face. The police put Fernando into the jeep and took him to the Negombo police station. … Accordingly, Fernando was locked up in a holding cell … . The next day … he was taken before a J.M.O. [Judicial Medical Officer] at the Negombo Hospital. However, before leaving, the police warned him that if he told the J.M.O. he was assaulted by the police, they would falsely implicate him in a case and send him to jail for 3-4 years. … At the hospital … Fernando remained silent. He was taken back to the police station where … the O.I.C. … [pointed] to a couple of small bombs and an old revolver and said, '**We had already prepared the goods to implicate you with**, **but since you remained silent**, **we will not do so**.' (Ed. Fernando 2012, 222-224, parentheses and emphasis added.)

> (***c***) … Sujith … having passed the Ordinary Level Examination … was preparing to sit for the Advanced Level Examination. … During the school interval, Sujith had a confrontation with a 10th-grade student by the name of Tharidu during which blows were exchanged. Tharidu suffered a scratch on his face, and … the principal had sent Sujith home … . Tharidu's father, S… J…, is a well-known businessman in the area. On the same day at about 3 p.m., six persons in civilian clothes arrived at Sujith's house saying that they were from the Anamaduwa police station. … … Two persons … went into Sujith's room, brought him out of the house … and put him into a brown-colored vehicle that had been parked near the house. … At that moment, four of S… J…'s employees turned up on two motorcycles, and they followed the police vehicle. On the way to the police station, a constable named C… pushed Sujith to the floor of the vehicle and assaulted him violently. He told Sujith, 'I am going to put an end to your thuggery.' At the police station … … C… repeatedly assaulted Sujith. At about 4:30 p.m., Sujith's father went to the police station to visit Sujith. There he had seen Sujith on the floor while C… was slapping and assaulting him … . … Tharidu's grandmother had taken him to the Anamaduwa hospital. … Sujith's father had gone to the hospital and had seen Tharidu. There he had spoken to Tharidu and had inquired about his condition. Tharidu had told him that he was all right and there was nothing serious. As Sujith's father was leaving the hospital, he met Tharidu's parents. … Then Tharidu's mother said quite openly, '**We got the police to punch your son properly**.' (Ed. Fernando 2012, 384-385, emphasis added.)

Apparently, policemen do *punitively* torture individuals in furtherance of exacting both personal and proxy (on behalf of others) revenge. Furthermore, they seem more than willing to misrepresent such vengeance-based torture as *interrogative* torture (incriminating victims with fabricated and/or falsified evidence as observed in '(***b***)' above) in order to claim the benefits of *societal justification* (see '2.4.3,' below).

39 complaints of such vengeance-based torture (28 personal + 11 proxy) had been recorded by the A.H.R.C. (as *per* 'Table 2' above), amounting to 28.05% of the totality. An apparent inciting factor for *punitive* 'police torture' is thus demarcated: **revenge** (retaliation), **both personal and proxy**, which has seen many a trumped-up criminal charge being filed against law-abiding citizens.

2.4.2 Hypothesizing incitements for *interrogative* torture

2.4.2.1 Contemptuous disregard for the law

In Sri Lanka, as in most other social equality jurisdictions, a police officer is under a duty not to offer or make (or cause to be offered or made) any inducement threat or promise to any person charged with an offense in furtherance of securing from her/him any statement with reference to the charge against such person (Code of Criminal Procedure Act No.15 of 1979, section 111). If a police officer acts contrary to this rule and compels an accused person by the use of violence or threats of violence to make statements that are not his own, the contents of which have been put into his mouth, a court will prevent the use of these statements against the accused in subsequent proceedings (*The Queen* v. *Tennakone Mudiyanselage Appuhamy* [1959]), even when they are technically admissible. Above all else, the law categorically provides that 'no confession made to a police officer shall be proved as against a person accused of any offense' (Evidence Ordinance No.14 of 1895, section 25(1)).

Presuming the said legal provisions to be within the 'common knowledge' of all police officers, it might be inferred that compelling a (inadmissible) confession *per se* is not the objective of those who torture suspect-criminals. Nonetheless, it was this most naïve and counterproductive indulgence that manifested itself in no less than 15 out of 65 (23.07%) *interrogative* torture narratives recorded by the A.H.R.C. In all of these,[35] the emphasis appears to have been on extracting a confession only (as opposed to securing a 'discovery'). 2 allegations serve to exemplify:

> (***a***) … Dharmasiri learnt that … he was suspected of stealing jewelry and money from a nearby home. … … Dharmasiri was told that if he did not confess, he would be hung from the ceiling and mercilessly tortured. He was then assaulted and slapped for about 20 minutes before falling to the ground due to the force of the blows. … P… [a policeman] then kicked him viciously on the right side of his chest. He [the policeman] then exclaimed aloud, '**This devil** [Dharmasiri] **won't confess**, **no matter how hard I hit him**. Now my arms are paining.' (Ed. Fernando 2012, 156, parentheses and emphasis added.)

> (***b***) … Wikrama … was arrested on his way to work … . Sub-Inspector (S.I.) Ashoka and another officer of the Nikaweratiya police accused him of buying stolen property and demanded a confession. … He was beaten by the men for much of the day, until early evening. According to Wikrama, he could hear someone else being tortured nearby in the same manner. … When Chandrika, his daughter, traced him there and met with the Officer In Charge (O.I.C.) at Nikaweratiya … … the O.I.C. admitted that the police had been mistaken about Wikrama's guilt but claimed that they '**had to assault him to find out the truth**. **There is no other way**. But your father denied it continuously, and we now know that he is not connected with this crime.' (Ed. Fernando 2012, 356, emphasis added.)

The 'acid test' of truth, then, appears to be a suspect-criminal's ability to withstand torture, solely through the strength of his convictions of innocence. Archaic ordeal-based recourse is what policemen manifest in so proceeding to elicit the 'truth' from suspect-criminals:

> **The suspect**, as such, **always deserved a certain punishment**; **one could not be the object of suspicion and be completely innocent**. … When one reached a certain degree of presumption, one could then legitimately bring into play a practice that had a **dual** role: to begin the punishment in pursuance of the information already collected and to make use of this first stage of punishment in order to extort the **truth** that was still missing. (Foucault 1975, 42, emphasis added.)

On *par* with the said trend in Sri Lanka, it has been observed in **India** repeatedly in 2008, 2009 and 2010 that:

> A large number of reported cases of torture and custodial death result from attempts **to extract a confession** relating to theft or other petty offense~~s~~ (Chakma 2008, 13; 2009, 30; 2010, 20; emphasis added).

But does *interrogative* torture always yield the truth? Darius Rejali provides as follows:

> The problem of torture does not lie with the prisoner who has information. It lies with the prisoner with no information. Such a person is … **likely to lie**, to say anything, often convincingly.

> … The torture of the ignorant and innocent overwhelms investigators with **misleading information**. (2007, 461, emphasis added.)

The underlying mindset appears to be that if a suspect-criminal were to confess under torture, he would most likely confess again when arraigned before a Magistrate, resulting in a plea and summary sentence 'win' for the prosecution:

> (***a***) At the police station … three police officers … started to beat him with a cricket bat. Another officer beat him with a plastic pipe that had been filled with sand. Sisil was assaulted all over his body and pleaded with the officers not to beat him. … … Two officers held his arms while another officer forcefully poured liquor into his mouth. Sisil tried to resist, but the officers forced him [to drink]. Then he was brought before the doctor. … … In the morning … Sisil was asked to sign a document, but he refused. … The officers told him that if he signed and pleaded guilty at Court, he could go home … . He then signed the document and was brought to the Wattala Magistrate's Court. The police officers who had tortured him were present in Court, and they stood close to Sisil while he was produced before the Magistrate. Sisil did as he was instructed and pleaded guilty. He later learned that he had been charged with indecent behavior due to being inebriated. He was then fined Rs.1,500/-. Sisil vehemently denies the accusation and states that, as he was in severe pain and in fear of further torture by the perpetrators, who never once left his side … **he had no option but to plead guilty to the charge**. (Ed. Fernando 2012, 521, emphasis added.)

> (***b***) … Devaraj was told that to avoid further trouble and more severe charges, he **should plead guilty** in the Magistrate's Court (Ed. Fernando 2012, 381, emphasis added).

> (***c***) … An officer came to the room where Manohara was detained … … and suggested that to finalize the matter, Manohara **should plead guilty** for some crimes. (Ed. Fernando 2012, 493, emphasis added.)

However, contrary to the expectations of the police, suspect-criminals more often than not plead 'not guilty' before the Magistrate (as did both Deveraj and Manohara, respectively in '(***b***)' and '(***c***)' above). This is constructively confirmed by the following 'conviction percentages'

based on the annual 'Crime Statistics' published *via* the official website of the Sri Lanka Police (n.d.), which do not appear to exceed even 30% for any given year:

Table 5

Total police plaints filed, convictions secured and conviction percentages in Sri Lanka from 2005-2017, with the total average conviction percentage.

Year	*Plaints filed*	*Convicted*	*%*
2017	12,216	2,277	18.63%
2016	12,625	3,296	26.10%
2015	11,728	2,504	21.35%
2014	15,064	3,476	23.07%
2013	14,630	3,417	23.35%
2012	1,514	244	16.11%
2011	13,424	3,061	22.80%
2010	14,579	3,437	23.57%
2009	13,810	3,341	24.19%
2008	13,722	2,885	21.02%
2007	12,781	2,192	17.15%
2006	13,207	2,251	17.04%
2005	14,816	2,269	15.31%
Total	164,116	34,650	21.11%

Thus, it may be deduced that at least 70% of suspect-criminals do not plead 'guilty' to 'plaints' filed by the police. Then, to what end does a policeman elect to strain himself both physically and mentally in torturing another? **Cambodia**'s then Minister of Justice Chem Snguon's testimony to the Commission on Human Rights, 21st February 1997, provides thus:

> The problem is that those who arrest still think they have to beat the detainee; otherwise, he won't answer … they generally arrest first and seek to find evidence second … (Barber 2000, 31).

Justice Selvam, in the **Indian** case of *S. Krishnamoorthy* v. *The State of Tamilnadu* [2007], para.21, has declared that:

> … It is true that the police are … under a legal duty and have legitimate right to arrest a criminal and to interrogate him during the investigation of an offense, but the law does not permit use of **third**-**degree** methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. **End cannot justify the means**. (Chakma 2008, 74-75, *sic*, emphasis added.)

If so, the manifestly counterproductive police inclination to compel confessions could only be explained by imputing much ignorance of the criminal law (especially its procedural and evidentiary norms) to police officers, which indeed appears tenable when considering the 26-year-long (1983 to 2009) internal armed conflict in Sri Lanka that saw police recruits being indoctrinated more in military defense rather than civilian policing.[36] However, it is not mere (naïve) ignorance of the law but willful blindness to the same (indicative of defiance) that appears to prevail:

> The problem in our current situation … is that despite torture's illegality, people are still engaging in it. This demonstrates a disregard for the commitment to law, as well as a disregard for the seriousness of torture. (Wisnewski and Emerick 2009, 41-42.)

The following serve to exemplify the alleged police aversion to human rights law:

> (***a***) Inside the room, the senior officer proceeded to tell Thilakarathana that he was not to go to the human rights community, for the police were not going to file a case against him. The officer continued that **if Thilakarathana went to the human rights community**, **they would again remand him and keep him for fourteen days**. (Ed. Fernando 2012, 161, emphasis added.)

> (***b***) The policeman had also perused a document written in English and commented, 'So you are taking legal action with the help of some Asian organization' (presumably the A.H.R.C.). He also commented, 'Those from Pinwatte **commit wrong and then run for human rights**, heh?' (Ed. Fernando 2012, 176, emphasis added.)

> (***c***) … The O.I.C. threatened him that he had heard that **his mother had consulted human rights activists**, and **if he tried to continue such steps**, **they would fabricate a charge and send him to prison** (Ed. Fernando 2012, 268, emphasis added).

Though police defiance to either section 25(1) of the Evidence Ordinance [1895] or the proviso to section 111 of the Code of Criminal Procedure Act [1979] remains unexpressed, the blatant contempt officers do unabashedly express regarding 'human rights' must be construed to extend toward the said evidential and procedural (general law) civilian protections as well.

At least 15 out of 65 instances of such *interrogative* torture (constituting 10.79% of the total 139 reported to the A.H.R.C. *per* 'Table 2' above) being in pursuance of securing inadmissible confessions, the first inciting factor for *interrogative* 'police torture' is thus demarcated: **contemptuous disregard for the law**, which has rendered a significant number of police officers incapable of comprehending *inter alia* the futility of a compelled confession.

In the remaining 50 out of 65 *interrogative* torture narratives (being 35.97% of the total 139 reported to the A.H.R.C. *per* 'Table 2' above), the plain purpose of the concerned police officers was to compel a disclosure of withheld or concealed facts. The following sample allegations exemplify this end:

> (***a***) While being escorted, the police officer told Thilakarathana, 'You know what you have done; you have broken into four boutiques in Teldeniya and stolen goods, including potatoes, dhal and soap. **Where are you keeping these things**?' Thilakarathana responded that he did not know of anything concerning this matter. … As Thilakarathana was being taken into S.I. [Sub-Inspector] R…'s office, he noticed that in the corner of the room there were batons and coconut cord … . The police officers proceeded to pick up these objects and commented, 'Tell the truth, or we are going to beat you.' … At this time, there were about four or five police officers in the room. All of the officers then proceeded to kick and hammer Thilakarathana all over his body while he was suspended from the ceiling. (Ed. Fernando 2012, 159-160, emphasis and parenthesis added.)

(***b***) … Police stopped the victim while he was returning home after attending the funeral … . … After beating the victim for some time, the police then asked him where the *kasippu* (illegally made liquor) was located. The victim maintained that he was not in possession of any *kasippu*. … Once at the police station … … S.I. H… came and warned, '**If you don't tell me the place**, **even now**, **I know where you should be left**.' (Ed. Fernando 2012, 176-177, emphasis added.)

(***c***) During police custody, Dammika was allegedly assaulted and interrogated despite his mental disability. **He was asked about the location of the stolen goods**, and he replied that the goods were in his home. Dammika was then taken back home and asked to give out the stolen goods. Two police officers named S… and B… searched and took some imitation goods with them. While they were going to leave the house, the victim's father told them that the goods were only imitation. The officers threw them away and assaulted Dammika again. (Ed. Fernando 2012, 213, emphasis added.)

(***d***) … Nilantha … and Chathuranga were among the guests at a wedding party in their neighborhood. An argument arose between the hosts and some of the guests, and it developed into a brawl. Goods in the house were smashed, and three motorcycles belonging to the guests were torched. The Elpitiya police were informed by the hosts and arrived at the scene. … Then, the officers took Nilantha to a police jeep where … … his hands and feet were tied together with a piece of wire … . The officers beat Nilantha's entire body using their hands, feet and some poles. He was taken to the Elpitiya police station, where Nilantha saw his friend Chathuranga in a cell. They attacked Nilantha … and put him into the adjoining cell. … **They particularly wanted information about who was responsible for setting the motorcycles on fire**. (Ed. Fernando 2012, 298-299, emphasis added.)

(***e***) An… officer then asked Prasantha **if he had stolen any bicycles** and that if he showed them where they were, they would not harm him. … Then the officers, saying, '**We know how to extract information from you**,' took him into a hall adjoining the Crimes Branch. (Ed. Fernando 2012, 321, emphasis added.)

(***f***) One officer asked her where her parents were. Madushani told them that she was not aware, since she had been at school the whole day. In response, two officers suddenly assaulted

> Madushani on her thighs and hands and **kept on threatening and asking her parent's whereabouts**. (Ed. Fernando 2012, 324, emphasis added.)

> (***g***) Mr. Govindaraj was arrested for the murder of Bandula Ariyapala … on January 9, 2009. After the arrest, Nawalapitiya police allegedly hung him from the ceiling and **tortured him to reveal five names**. Due to the severity of the torture, he finally named friends who had no knowledge about this murder case. (Ed. Fernando 2012, 336, emphasis added.)

In '(***a***),' '(***c***)' and '(***e***)' above, the victims were tortured to reveal the location of stolen goods. In '(***b***)' above, it was to compel the surrender of allegedly possessed *kasippu* (illicit alcohol). In '(***d***)' and '(***g***)' above, it was to discover the identities of alleged perpetrators, and in '(***f***)' above, to ascertain the whereabouts of specific individuals.

It would be apt to cite an (abridged) example from **India** in this regard as well:

> On 13 September 2008, a minor[37] boy aged 16 (name withheld), a resident of Nepal, was allegedly tortured at Kotwali police station in Nabha in Patiala district of Punjab. The victim was arrested on theft charges. The police allegedly tortured the victim in order **to recover the stolen goods**. (Chakma 2009, 39, emphasis added.)

Given that in 50 out of 65 instances (76.92%) of *interrogative* 'police torture' recorded by the A.H.R.C., 'discovering facts' did constitute the basis for doing so, the suspicion that there must exist some form of legal exception to Sri Lanka's general prohibition on direct admittance of a suspect-criminal's statement contents does naturally arise.

2.4.2.2 Legal enablement *via* section 27(1)

Inasmuch as the practice of torture constitutes a manifest wrong, the yields from such practice should be deemed equally wrong. However, in countries where evidentiary laws introduced by the British still prevail,[38] this is not always the case. In these jurisdictions, there does exist

one species of substantive evidence that is relatively immune to 'inadmissibility by taint of torture.' Exemplifying the same, section 27(1) of the Evidence Ordinance No.14 of 1895 of Sri Lanka (hereinafter 'section 27(1)') provides as follows:

> When any **fact** is deposed to as **discovered** in consequence of information received from a person accused of any offense, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved[39] (emphasis added).

But what constitutes a 'fact discovered'? In the Indian case of *Pulukuri Kottaya* v. *King-Emperor* [1947], Justice John Beaumont opined as follows:

> … The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. … Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offense, the fact [so] discovered is very relevant. ([1947], 70, emphasis and parenthesis added.)

In *Queen* v. *Tennakone Mudiyanselage Appuhamy* [1959], it was pondered laudably as follows:

> The … question is whether information forced out of an accused person by the use of violence is the kind of information contemplated in section 27. **We think not**. (319, emphasis added.)

However, in the subsequent and superior Privy Council decision of *Queen* v. *Murugan Ramasamy* [1964], Viscount Radcliffe observed (at pages 268-269) that the principle underlying said section 27(1) was laid down by Baron Park in *R*. v. *Thurtell and Hunt* [1824], wherein the latter had opined as follows:

> … A confession obtained by saying to the party, 'You had better confess, or it will be worse for you,' is not legal evidence. But though such a confession is not legal evidence, it is everyday practice that if in the course of such a confession the party states where stolen goods or a body may be found, and they are found, accordingly, this is evidence, because **the fact of finding proves the truth of the allegation**, and his evidence in this respect is not vitiated by the hopes or threats which may have been held out to him. (Ed. Watson 1920, 144-145, emphasis added.)

In *Nandasena* v. *The Republic of Sri Lanka* [1979], Justice Colin Thome (with Justices Atukorale and Tambiah agreeing) proceeded to reproduce verbatim both Viscount Radcliffe's aforesaid observations on the historical lineage of section 27(1) and Baron Park's above *dictum* in *R*. v. *Thurtell and Hunt*. In the light of the same, the following conclusion was made:

> It must be taken as settled, therefore, by Ramasamy's case that section 27 of the Evidence Ordinance is an exception and a proviso to all the three preceding sections: **24**, 25 and 26 (*Nandasena* v. *The Republic of Sri Lanka* [1979], 248, emphasis added).

The said section '24' expressedly prohibits a confession procured by 'inducement, threat or promise' being admitted into evidence. Hence, by constructively endorsing the thinking in *Thurtell and Hunt* [1824], the above *dictum* furthers recourse to inducements, threats, promises and the like toward eliciting information under section 27(1).

In the Supreme Court decision of *Attorney General* v. *Potta Naufer and others* [2006], Justice Shiranee Tilakawardane (with Justices Udalagama, Dissanayake, Amaratunga and Somawansa agreeing) elected to derive authority for the *rationale* underlying section 27(1) from E.R.S.R. Coomaraswamy's treatise *The Law of Evidence*, rather than *Murugan Ramasamy* [1964] above:

> The principle underlying **this** section is that the danger of admitting false confessions is taken care of as the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. The fact discovered shows that so much of the section as immediately relates

> to it is true. (**Vide**, **Coomaraswamy**, Vol.1, p.440.) (*Attorney General* v. *Potta Naufer and others* [2006], 172, emphasis added.)

The relevant passage on said page '440' of Coomaraswamy's said treatise (1989) reads as follows:

> The main reason why confessions made under the circumstances mentioned in the previous sections are excluded is the danger of admitting false confessions. But the necessity for the exclusion disappears in a case provided for by this section, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. The fact discovered shows that so much of the confession as immediately relates to it is true.

A footnote ('**748**') to the above passage attributes its authority *inter alia* to **Indian** case law. However, by following the said passage immediately with *Queen* v. *Murugan Ramasamy*'s adoption of Baron Park's *dictum* in *R*. v. *Thurtell and Hunt* in full (1989, 441), Coomaraswamy plainly recognizes *Murugan Ramasamy* [1964] as epitomizing the *rationale* of Sri Lanka's section 27(1). Hence, it is *Murugan Ramasamy*'*s* judicial interpretation that echoes in the words of Coomaraswamy, quoted above. Accordingly, it is the authority of *Murugan Ramasamy* that constructively pervades *A*.*G*. v. *Potta Naufer* [2006] as well.

Further on in his said treatise, Coomaraswamy submits unequivocally that 'all the wickedness of the police in having beaten up the accused' (1989, 453) would not defeat the admissibility of evidence under section 27(1). He concludes:

> The correct view … is that Section 27 **will qualify** Sections 24 and 25 also in appropriate circumstances (Coomaraswamy 1989, 448, emphasis added).

Hence, so long as 'information received' from the accused does lead to the 'discovery' of a 'fact' (*i*.*e*., either the physical being/object upon which the crime was committed or some

other perception relevant thereto), such information would be admissible notwithstanding that s/he was tortured into divulging the same.

A manifest contradiction thus prevails under the law of Sri Lanka. Where a police officer obtains a confessionary statement from a suspect, with or without coercion, it is *ipso facto* barred. However, if he extracts information that leads to the 'discovery of a fact,' this bar no longer applies.

In effect, section 27(1) as interpreted in *Queen* v. *Murugan Ramasamy* [1964] provides the police with an implied warrant to torture. So long as *Murugan Ramasamy* continues to be endorsed by the Superior Courts of Sri Lanka (either directly or indirectly, as observed above), its impetus toward entailing a warrant to torture under section 27(1) too continues.

The second inciting factor for *interrogative* 'police torture' is thus demarcated: **legal enablement *via* section 27(1) of the Evidence Ordinance No.14 of 1895**, which vests implicit authority in police officers to torture suspect-criminals.

Those alleged of being complicit in generic theft offenses (33.81% of all torture complainants and 72.30% of *interrogative* torture complainants) ranked foremost amongst all torture victim classes reported to the A.H.R.C. (*per* 'Table 2' and 'Table 3' above). As to why persons suspected of theft feature as those most susceptible to *interrogative* torture appears explicable *via* the affinity that exists between section 27(1) and 'Illustration (a)' to section 114, both of the Evidence Ordinance No.14 of 1895. The latter provision states:

> The Court may presume … that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession … .[40]

Although the bare recovery of stolen property from an open place in consequence of information received from an accused individual under section 27(1) does not necessarily prove *his* having possessed such property (or *his* being the thief), if the stolen article were recovered from *his* garden pursuant to *his* statement, 'all the wickedness of the police in having beaten up the accused' in order to extract the same would not prevent *his* being lawfully presumed the thief (Coomaraswamy 1989, 453). Herein lies the impetus for theft suspects to be subjected to *interrogative* '27(1) torture' at a much greater frequency than others.[41] Section 27(1)'s instrumentality as an inciting factor for 'police torture' is thus made manifest.

The following narrative exemplifies a **foreign** police force's recourse to its own 'section 27' provision:

> A door-to-door saleswoman visited the apartment of one Ms. L. on the 6th of March, at approximately 6 p.m. After the said saleswoman's departure, Ms. L. found her gold bangle missing and suspected that the former might have made away with the same. Ms. L. was apparently able to get hold of the saleswoman, but the latter denied taking the bangle. Hence, Ms. L. reported the said saleswoman to the police. She was accordingly arrested that very evening. The suspect-saleswoman was interrogated from approximately 12:25 a.m. to 6:10 a.m., and her statement was recorded at 10:00 a.m. In the 1 hour and 15 minutes it took to record this statement, she not only (allegedly) confessed to theft but also disclosed vital information facilitating the discovery of the gold bangle found lying on a grass strip at the foot of Ms. L.'s apartment block. The suspect-saleswoman, however, vehemently denied both the authenticity and voluntariness of the statement ascribed to her. She alleged *inter alia* that she was not given any food or drink after her arrest; she was taken to a cold, dark room for interrogation and was continuously harassed, abused and assaulted by the police; the police had threatened to lock her up if she did not admit to the charge; she was forced to sign a prepared statement; the police had threatened to put her in a lockup for three months if she did not sign; and she did not know the contents of the statement. Hence, when the State Prosecutor sought to have the accused-saleswoman's alleged statement admitted at her trial, her lawyer objected to the same on the basis of involuntariness. Despite avowed denial by the police of all said accusations raised by the accused-saleswoman, the District

> Judge (apparently found 'involuntariness' and) acquitted the latter of theft. Appealing the said decision, the Prosecutor contended that it was only consequent to the woman's statement that the police had proceeded to the foot of the apartment block, where they found the bangle; the discovery of the bangle showed that the woman had knowledge of its location, and the facts gave rise to an irresistible inference that the woman must have taken the gold bangle and thrown it out of the flat with the intention of stealing it. It was further urged that when a section 27 application is made by the prosecution, the only question for Court to decide is whether the statement in fact led to a discovery. If the answer is yes, then that part of the statement pertaining to the find should be admitted. Acceding to the prosecutor's arguments, the Court of Appeal quashed the accused saleswoman's acquittal and ordered a retrial, specifically directing the trial judge to admit the accused-saleswoman's statement under section 27. She was convicted of theft at her retrial. (Raffleslaw 2001.)

The above, meant to illustrate the efficacy of a foreign jurisdiction's 'section 27,' amply portrays that of Sri Lanka's section 27(1) as well.

It is indeed striking to note the similarity that *interrogative* torture incited by section 27(1) bears to that enforced during the Middle Ages of European history, wherein:

> The goal was **not** the confession of **guilt** – it was recognized that any person might confess just to stop the torture – **but** the confession of **details** of the crime (Conroy 2000, 29, citing Langbein 1978, 7, emphasis added).

At the outset of this study, a doubt was raised (by a third party) regarding whether section 27(1) in fact did exert any exhortation toward *interrogative* 'police torture' at grassroots level. To eradicate such doubt, it was thought prudent to demonstrate that investigating officers are not only mindful of the provisions of section 27(1) but also in possession of a working knowledge regarding the same. Accordingly, a mini questionnaire comprising the following premises (translated verbatim from the original Sinhala) was drawn up and posed to 42 serving police officers:

1. During any investigation concerning movable property that has been hidden (whether stolen goods or a murder weapon), the main objective in questioning any suspect is to ascertain the place at which said property is located so as to enable such disclosure being admitted under section 27(1) of the Evidence Ordinance.

☐ Agree ☐ Disagree

2. Officers who assist in such an investigation concerning movable property that has been hidden may be presumed knowledgeable of the Evidence Ordinance's section 27(1).

☐ Agree ☐ Disagree

3. Officers who assist in such an investigation concerning movable property that has been hidden do so not with any knowledge of section 27(1) but with the intention of recovering the property or restoring it to its true owners.

☐ Agree ☐ Disagree

The outcome of this mini questionnaire was as follows:

Table 6

3 (three) Questions posed to 42 (forty-two) police officers regarding the utility of section 27(1) of the Evidence Ordinance of Sri Lanka.

Questions	*Officers who Agreed*	*Officers who Disagreed*
1.	38 (90.47%)	4 (9.52%)
2.	31 (73.80%)	11 (26.19%)
3.	2 (4.76%)	40 (95.23%)

Although 26.19% of respondents (to '**2**.' above) did not agree that officers assisting an investigation (concerning hidden property) could be 'presumed knowledgeable' of section 27(1), only 4.76% of them (responding to '**3**.' above) were willing to attribute a complete lack of knowledge of section 27(1) to such assisting officers. This flat denial of ignorance by 95.23% of respondents (to '**3**.' above) entails the conclusion that police investigators, though falling short of possessing a profound awareness regarding the same, do possess at least a basic

working knowledge of section 27(1). Furthermore, that they do employ such knowledge in investigations toward discovering crucial facts has been affirmed by 90.47% of respondents *via* their manifest assents to '**1**.' above. Hence, an average of approximately 86.5% (*i.e.*, (90.47 + 73.80 + 95.23) ÷ 3) of police officers have constructively admitted to possessing a working knowledge of section 27(1). Being so confidently knowledgeable regarding the workings of section 27(1), police investigators could be presumed to both (***a***) know of and (***b***) be actuated by the warrant to torture it impliedly prescribes.

Policemen obviously deem the possibility of securing a revelation leading to an incriminating discovery greater than that of incurring compensatory and criminal liability for forcibly procuring the same. Such thinking does not find itself confined to instances of theft but extends to all crimes wherein a 'fact' – *e.g.*, *dead body*, *knife*, *gun*, *grenade*, *dangerous drug*, *bloodstained garment*, *ticking bomb*, *etc*. – remains to be 'discovered.' To this extent, section 27(1) does appear to constitute a potent impetus for the perpetuation of *interrogative* torture as regards both petty and grave crimes.

The Evidence Ordinance No.14 of 1895 came into force in Sri Lanka on 1st January 1896.[42] Since then, section 27(1) has enjoyed uninterrupted efficacy. Its antiquity, taken within the context of the preceding analysis, cues one to hypothesize that section 27(1) could have even founded the very practice of *interrogative* torture now prevalent in Sri Lanka. If so, the same could prove true of all other jurisdictions that have incorporated the *doctrine of confirmation by subsequently discovered facts* into their respective evidentiary provisions. However, in order for this assumption to be rendered plausible, 'discoverable facts' as contemplated under section 27(1) should at some point in time have enjoyed a much wider reach than that already appreciated so as to include not only 'facts' but also their human perceivers.

Section 3 of the Evidence Ordinance No.14 of 1895 of Sri Lanka[43] provides that:

> 'Fact' means and includes –
>
> *(a)* any thing, state of things, or relation of things capable of being perceived by the senses;
>
> *(b)* any mental condition of which any person is conscious.

The following 'illustrations' are seen appended to the above interpretation:

> *(a)* That there are certain objects arranged in a certain order in a certain place is a fact.
>
> *(b)* That a man heard or saw something is a fact.
>
> *(c)* That a man said certain words is a fact.
>
> *(d)* That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word, or is or was at a specified time conscious of a particular sensation, is a fact.
>
> *(e)* That a man has a certain reputation is a fact.

Accordingly, it is clear that what 'a man' hears, sees ('*(b)*' above), says ('*(c)*' above), opines, intends, feels ('*(d)*' above) or is reputed for ('*(e)*' above) are all 'facts' capable of being admitted into evidence. However, the 'man' himself is not expressedly acknowledged as a 'fact' (though he may be the source of a 'fact'). Hence, on a strict application of the maxim *expressio unius est exclusio alterius* (proclaiming those typical implies disclaiming those atypical), an offender, accomplice and even a witness would be properly excluded from being construed as a 'fact,' howsoever intimately 'connected' with the crime. Thus, 'a person' has been expressedly held incapable of constituting a 'discoverable fact' under the law of Sri Lanka:

> The Crown proved through inspector Egodapitiya the following statements made by the [accused] appellant to him and recorded by him: –
>
> (a) 'I went to Daniel *Baas*, the goldsmith, and got him to pour lead onto the impressions and got the key.'
>
> (b) 'I kept Rs.3,100/- with Appuhamy of Pillakalamulla, and I gave Rs.1,000/- to Rev. Pragnakeerti *Thero* of Nigrodaramaya Temple of Nattandiya.' (*Queen* v. *Tennakone Mudiyanselage Appuhamy* [1959], 317, parenthesis added.)

> In admitting the statements set out above, the learned Commissioner … held that **the facts discovered** in consequence of the information **were the witnesses** Daniel the goldsmith, Podiappuhamy and Rev. Pragnakeerti. (*Queen* v. *Tennakone Mudiyanselage Appuhamy* [1959], 318, emphasis added.)
>
> We are unable to uphold the learned Commissioner's view. According to the prosecution, the facts discovered were the witnesses. **Is a person a fact**? **We think not**. (*Queen* v. *Tennakone Mudiyanselage Appuhamy* [1959], 318, emphasis added.)

It was on 27th February 1959 that Chief Justice Basnayake expressed the above. It has already been noted that the Evidence Ordinance of Sri Lanka came into force on 1st January 1896. Accordingly, during the intervening period of 63 years (1896–1959), 'a person' could in all probability have been regarded as a 'discoverable fact' under section 27(1), especially for want of any authoritative legal pronouncement to the contrary.

In fact, preceding case law does provide for a clear instance wherein 'a person' has been unequivocally held to qualify as a 'discoverable fact' under section 27(1):

> I accordingly hold that **the witness** Bruin, who states that he filled up the application form at the request of the accused, **was discovered in consequence of information given by the accused within the meaning of section 27**, and that the statement made by the accused to the inspector and deposed to by Bruin, although it amounts to a confession, has been rightly admitted in evidence (*King* v. *Sudahamma* [1924], 222, emphasis added).

The above decision was declared on 8th August 1924. Hence, from this date to 27th February 1959 (when Chief Justice Basnayake impliedly overruled the same), 'a person' was legally acknowledged as a 'discoverable fact' under section 27(1).

Considering that a judicial pronouncement accommodating 'a person' as 'discoverable fact' existed for nearly 35 years (1924–1959), with no contrary position being authoritatively taken

up even during the 28 years (1896–1924) preceding such 'pronouncement,' policemen must surely have reckoned section 27(1) as granting them *carte blanche* in eliciting not only the location of wanting evidence but also the whereabouts of any accomplices and/or conspirators.

Whatever the civil and criminal liabilities incurred by forcing a suspect's statement, that section 27(1) served to admit otherwise inadmissible disclosures of knowledge pertaining to incriminating 'facts,' accomplices, conspirators and even witnesses (toward benefiting the prosecutor's case) would undoubtedly have nurtured a general inclination among members of the police force to favor *interrogative* torture above all else. The lapsing of 63 years (1896–1959) would have surely transformed this 'inclination' into a habitual exercise so as to render disengaging from the same extremely difficult, if not impossible.

Moreover, despite the definitive *de jure* ouster of 'a person' from the ambit of 'discoverable fact' (proclaimed by said Chief Justice Basnayake on 27th February 1959), policemen still persist in their *de facto* reliance on *interrogative* torture as the preferred means by which to 'discover' persons and the like. Every morsel of information (be it incriminatory or exculpatory) possessed by a suspect-offender is thus extracted toward summarily determining his guilt or innocence.

In light of the preceding analysis, it appears that section 27(1) did in all probability both incite and institutionalize *interrogative* torture within the confines of Sri Lanka. Similarly, other nations that possess a provision comparable to section 27(1) – incorporating the *doctrine of confirmation by subsequently discovered facts* into their law – might rightly attribute any institutionalizing of *interrogative* torture within their respective domains to the same.

This manifest legal impetus exerted by section 27(1) aside, it remains to be fully appreciated why a police officer would engage in such *interrogative* torture when he stands to risk not only compensatory and penal liability but also consequential loss of livelihood, income and status.

Given the extremely low rate of torture convictions (Nowak 2008, 16) and the relatively meager number of compensatory findings, it appears that the probability of incurring any of the aforesaid liabilities and losses is in reality quite low:

> … Throughout the world … torturers are rarely punished, and when they are, the punishment rarely corresponds to the severity of the crime (Conroy 2000, 242).

> We see the growing feeling of impunity inculcated by those officers … that repeatedly get away with inappropriate behavior, recognizing that their actions will be protected due to political patronage and favor and are likely to receive no disciplinary repercussions at all[44] (*M.D. Nandapala* v. *Sergeant Sunil*, *police station Homagama and others* [2009]).

Seldom do true criminals complain of the *interrogative* torture that led to their being found out, for most would hesitate to approach the 'founts of justice' with 'tainted hands.' More often than not, they elect to abstain from pursuing redress in fear of either threatened torture by prison proxies or threatened introductions of spurious evidence by the police.

Threatened filing of false charges is a strategy allegedly employed by policemen to dissuade innocent 'suspects' from pursuing legal redress against them, often where such 'suspects' have sustained serious hurt. If remedial action is pursued nonetheless, policemen allegedly tend to propose a compromise whereby the fictitious charges are dropped in favor of an abandonment of redress. In the relatively recent Supreme Court determinations of *Roshan Koitex* v. *S.I. Sanjeewa Seneviratne*, *police station Hikkaduwa and others* [2016]; *Justin Rajapaksha* v. *H.Q.I. Prasanna Rathnayake*, *police station Homagama and others* [2016]; *Sarath Naidos* v. *I.P. Damith*, *police Station Moratuwa and others* [2017]; *Janaka Batawalage*

v. *I.P. Prasanna Ratnayake*, *Dam Street police station and others* [2018]; and, *Samaraweera Arachchige Wasantha* v. *Liyanarachchi*, *O.I.C.*, *police station Moronthuduwa and others* [2019]; allegations against policemen of having introduced spurious evidence and filed false 'B Reports' were found adequately substantiated.

Despite their recourse to such nefarious tactics, policemen cannot wholly quell the likelihood of torture proceedings being instituted against them. This risk, though admittedly trivial, is nonetheless real. If so, why incur it? Is it in pursuance of a feeling of gallantry, akin to that which pervades the soul of the self-sacrificial soldier in battle? Is it with the noble conviction of rendering his utmost to society in due discharge of both contractual and *social contractual* obligations? If so, does society expect policemen to use whatever means possible – deplorability notwithstanding – to redress crime?

2.4.3 Societal justification of *interrogative* and *punitive* torture

At first sight, duty consciousness seems rife in the minds of police personnel. In the words of a former law enforcement official in **Cambodia**[45]:

> 'The police don't see themselves as torturers. It's just a way to get something done – if you want a statement of confession, this is what you do.' (Barber 2000, 30.)

However, it appears that policemen elect to domineeringly enforce both *retributive* (legal) and *restorative* (social) justice with a manifest penchant for immediacy.

Furthermore, an excessive discriminatory demarcation between victim and offender is seen to engulf the mind of the police officer, which in turn convinces him to view all apprehended suspects as *less than human*. Hence, beating a *less than human* suspect is deemed 'justified' toward eliciting the 'truth' on behalf of a *human*(*e*) victim-complainant:

> In this context … in which **criminals are despised and considered to deserve whatever treatment they get**, torture is just part of doing your job and even doing it well (Barber 2000, 30, emphasis added).

As self-designated 'elicitors of 'truth,'' policemen undoubtedly see themselves discharging a 'pivotal' social function unparalleled by any other. They apparently assume that even if the victim-complainant were made aware of the coercion exerted upon the suspect-criminal, s/he would still be grateful for the effort taken, even more so for a productive end. Thus, much complacency is seen derived from this presumption of society's tacit approval of 'police torture.' But have policemen assumed too much? Apparently not:

> Some **citizens may even support torture** if they believe that it is necessary for public safety, or that it will affect people unlike them, or because it takes place under special conditions … (Rejali 2007, 46, emphasis added).

> If the police – and perhaps some judges – consider harsh treatment of criminal suspects **normal**, they are, to some extent, merely **reflecting attitudes of wider society** (Barber 2000, 40, emphasis added).

> 'Human rights protect robbers' is a common refrain addressed to human rights workers … from police and other officials **as well as civilians** (Barber 2000, 40, emphasis added).

> 'If you look at torture in police custody from a Western view, it's terrible, horrible' … . 'But if you look at it **in the context of the general populace** … it's not unusual. **It's cultural**.' (Barber 2000, 41, emphasis added.)

But are these aspersions cast both directly and indirectly on the citizenry – as 'patrons' of torture – in fact true? Two reported allegations serve to elucidate in this regard (the first from **Cambodia** and the second from Sri Lanka):

(***a***) After interrogating Phoeun, the police brought him to … his sister's house … so they could search it for Kong Vy and the other … accomplice. Neighbors watched as 20-30 police [officers], with motorcycles and two cars, arrived at the house in Russei Keo district. They dragged Phoeun out of one of the cars by his handcuffs and butted him with an AK47 on the head. The police stormed the house but found only Phoeun's 70-year-old father. Searching the house, they found four license plates, mirrors and other motorcycle parts. They took photographs of Phoeun with the 'evidence' of robbery. They interrogated Phoeun about the gun, which the robbers had allegedly used, but he said he didn't know where it was; he told them that maybe Kong Vy had it. The police didn't believe Phoeun. They took him to a nearby street about 70 meters from his house and removed his handcuffs and pushed him away. He refused to run away, knowing that he would be beaten or shot, and [hence] crouched down on the ground. **A group of moto-dops** (motorcycle taxi drivers) **edged closer**, **picking up pieces of wood and other weapons**. The police walked away from Phoeun. **The moto-dops**, knowing they had the police's permission, **moved in to attack him**. **Some kicked him**, **while others swung wooden sticks** (some of them with protruding nails) **over his head**. **They kicked and beat him on his head**, **body**, **legs**. Phoeun begged for mercy, cried, and pleaded for his father to help him … . (Barber 2000, 42, parentheses and emphasis added.)

(***b***) … Wijeratne … belongs to the Veddha aboriginal community, and this summer he set up a small ice cream stall for a festival at the … temple. While bathing in the adjacent … river on 28 August at about midday, Wijeratne reports that he found a piece of wire buried in the sand, and thinking it useful, he took it with him. However, shortly afterwards, a *grama* (village) officer … stopped him in the crowd, pulled him by his shirt collar and started to question him about the wire. He was taken to a police post near the temple, where the officer told two other officers that he had caught 'the wire thief.' One of the police officers fetched **the head priest**, who allegedly **ordered Wijeratne to sit on the floor**, **took the wire from him and beat him with it for around five minutes**. A crowd gathered. The priest [had] allegedly shouted at Wijeratne throughout the beating, accusing him of regularly cutting wire from the temple premises [;] … [a] **younger priest then allegedly kicked the victim to the ground**. (Ed. Fernando 2012, 362, emphasis and parentheses added.)

In both the above accounts, members of the public are alleged to have voluntarily engaged in an open display of *punitive* torture: motorcycle taxi drivers in the first and two priests in the

second. In both instances, policemen have deliberately refrained from stepping in to stop the beatings, leaving both victims to suffer at the hands of civilian perpetrators.

Such an uninhibited propensity to resort to brutality so openly perhaps could be expected of laymen but certainly not of clergymen. That these vile actions of unscrupulous men continued unobstructed by either the police or the public manifests the existence of a *societal* partiality for or *justification* of the same. Thus, it might be concluded that the said two incidents (at least diminutively) inure to the benefit of a presumption that members of the public do condone not only *interrogative* but also *punitive* 'police torture.'

However, much more is needed to render this presumption plausible. Hence, recourse is had to the following (Sri Lankan) allegations as well:

> (***a***) … Ms. Buddhika was at a friend's house when several of her cousins … forced her into the van of a Mr. S… . … They took her to the Baddegama police station and handed her over to Sub-Inspector … A…, loudly announcing, '**We brought you the rogue**.' S.I. A… and another policeman … began hitting Ms. Buddhika about the head and face and demanded, 'Where are the goods?' … Ms. Buddhika fell to the ground. She pleaded with the policemen not to assault her and informed them that she was recovering from surgery and had not stolen anything. However, the policemen replied that they did not care whether she died or not and continued to kick her abdomen. Unable to bear the pain, the victim became unconscious. … The victim further stated that **her cousins and Mr**. **S**… **were present while she was being tortured**. (Ed. Fernando 2012, 143-144, emphasis added.)
>
> (***b***) … Jayawardena was returning home when two policemen from the Mitiyagoda police station arrested him. At the time, his sister and brother-in-law were also present. … He was told he was being arrested on suspicion of theft. … Jayawardena was put into a jeep and taken to the Mitiyagoda police station. … The police assaulted him with a wooden club in an attempt to make him confess to the theft. … Jayawardena screamed in pain, insisting that he did not steal anything and that he was not aware of any theft. However, the policemen insisted that he had stolen jewelry and continued to inhumanly subject him to torture. … They searched his house but did

not find any incriminating evidence, so they returned him to the station and locked him in a holding cell**. It was at this time that he saw Ms**. **M**… **J**…, **the person who had accused him of theft**. **He noticed that Ms**. **M**… **and company remained at the station until around 7 p**.**m**. **and that they had brought drinks and cigarettes for the policemen**. (Ed. Fernando 2012, 146-147, emphasis added.)

(***c***) … N… was riding in a three-wheeler on her way home when two unknown persons snatched her gold necklace and wristwatch … . … The police began questioning the … [three-wheeler driver] based on N…'s complaint. … Every time he denied any involvement, the policemen had him repeatedly beaten for 20 minutes. **The complainant was present when the police were torturing him**. (Ed. Fernando 2012, 233, parenthesis and emphasis added.)

(***d***) … The victim … Kumara Perera … together with his cousin Danushka and his grandmother, visited the Piliyandala police station … to lodge a complaint against a neighbor – [**Ms**.] … **S**… – for harassing them and falsely accusing them of committing crimes. But when the victim reached the police station, the neighbor was also present. Upon seeing them, **the victim heard Ms**. **S**… **pointing at them and telling the police to assault them**. Consequently, the Complaints Division Officer-In-Charge … D… walked up to them and viciously kicked the victim and his cousin. After they fell on the floor, he trampled them with his boots. (Ed. Fernando 2012, 243-244, parenthesis and emphasis added.)

(***e***) … When Shantha came home from work, his neighbor A… came demanding to know if he knew anything about the theft that had taken place in his house. A… insisted that Shantha knew about the theft. **He took hold of Shantha by the collar and assaulted him on the mouth**, **face and chest and shouted**, '**Sub**-**Inspector**! **I have caught the thief**.' When he shouted this, a person dressed in civilian clothes, hiding … nearby, came out. This person then threatened Shantha not to try and run and handcuffed him, saying that he is from the police. Taken aback, Shantha asked what all this was about. He was accused of taking stolen goods from A…'s house and was told to return them. Then, saying that they will look for the stolen goods, the Sub-Inspector … and A… took Shantha to a house in the vicinity belonging to his brother-in-law, which was locked. They searched the empty house, all the while threatening Shantha to return the stolen goods. Shantha pleaded that he did not steal any goods and that he lived by picking coconuts. The S.I., taking a pole that he had picked up from Shantha's house, told Shantha to raise his manacled hands over

> his head and keep them on the wall. He then beat him on the spine and on the chest. (Ed. Fernando 2012, 342-343, emphasis added.)
>
> (***f***) … Sampath Perera … was leaving church … when **he was stopped and badly beaten with an iron bar by a group of churchgoers**. They accused him of stealing Rs.38/- … from the church and called the police. While waiting for the police, the residents decided that another young man … was the culprit instead, but when the police arrived, both were taken to Negombo police station. (Ed. Fernando 2012, 357, emphasis added.)

In '(***a***),' '(***b***)' and '(***c***)' above, the victims' accusers were physically present within the police station at or about the time of the alleged torture, at least tacitly approving the same. In '(***d***),' '(***e***)' and '(***f***)' above, they were clearly complicit in the alleged torture.

The following serve not only to further manifest such accuser complicity but also indicate where (according to the police) blame should 'rightly' fall for specious civilian instigations of torture:

> (***a***) … Two constables beat her [a 14-year-old girl] with a hosepipe … . She was then taken before the 1st respondent, who … took the hosepipe, told her to place her head on a chair, and hit her several times on the spine, asking her to return the articles [a gold chain] she had [allegedly] stolen [from **Kirthiraja**]. She fell to the ground. The 1st respondent, who was wearing shoes, trampled her. He then threatened to take her and beat her near her school; she cried, saying that she had done no wrong. Again she was beaten with the hosepipe, put into the jeep, and **taken to Kirthiraja's house**. Her mother was not allowed to accompany her in the jeep. Her hands were tied behind her back, and she was hung from a *kohomba* tree **with a rope that Kirthiraja brought**. She was raised until her head was brushing against the branches. One officer held the rope suspending her while the 1st Respondent beat her with the hosepipe, and another hit her with a thick stick; four officers joined in this exercise. She was then lowered to the ground, put in the jeep, and brought back to the police station. Only then were her hands untied. (*Nalika Kumudini*, *Attorney-At-Law* (*on behalf of Malsha Kumari*) v. *Nihal Mahinda, O.I.C. Hungama police and others* [1997], 336, parentheses and emphasis added.) … [Approximately two months later] … the 1st

> respondent, together with five other police officers and one Nissanka [a Justice of the Peace], came to the petitioner's house with gifts and asked them to withdraw the complaint [lodged against the police], promising … to recover compensation for her **by instituting legal proceedings against Kirthiraja**. ([1997], 337, emphasis and parentheses added.)
>
> (***b***) When his parents went to the police station … they saw Pushpakumara hanging from a beam with his hands tied behind him with a fiber cord. His mother asked … to get access to her son, but a police officer told her that the O.I.C. [Officer In Charge] was not there and to come the next day. Meanwhile, **about ten to fifteen persons claiming to be the owners of the chain came to the police station and threatened to get the police to harm her son if he did not return the chain**. … The next morning, Pushpakumara was allowed to speak with his mother and sister, and he showed them his wounded hands, legs, head and chest. … The O.I.C. asked Pushpakumara whether he took the chain, and he said no. Then the O.I.C. allowed him to go home with his mother. After Pushpakumara went back home, he complained of headaches and fainted. The next morning the General Hospital of Puttalam admitted him. On September 5 the police officers told the mother and sister that **Pushpakumara was not a thief and the real culprit had been arrested**. The police officer told them to remove Pushpakumara from the hospital and **asked the supposed owner of the chain to give one thousand rupees to the mother**. (Ed. Fernando 2012, 88, parenthesis and emphasis added.)

The said acts of promising to procure compensation by suing the complainant (in '(***a***)' above) and ordering the complainant to pay Rs.1000/- as compensation (in '(***b***)' above) imply that policemen consider causal responsibility for harm inflicted by torture to lie exclusively with any instigating civilian accuser. Such reasoning, though perhaps doubling as an escapist tactic, is not wholly without support, renowned psychologist Stanley Milgram having observed as follows:

> For a man to feel responsible for his action, he must sense that the behavior has **flowed from** '**the self**' (Milgram 1974, 146, emphasis added).

Hence, whenever a policeman 'feels' that a specific 'action' has not 'flowed from himself,' he will deem the same as 'originating in the motives of some other person' (Milgram 1974, 146), be s/he a complainant, confederate or commanding officer.

Thus, in the eyes of the police, motivation (***a***) to exercise coercion under section 27(1) and (***b***) generally to resort to torture both emanate from the public's demand for expeditious justice (within the backdrop of an ever-increasing crime rate). But can the police blindly act on such *societal justification*?

Justifications, when enacted by law, are obviously enforceable. Even when not so sanctioned, they tend to 'hold ground' whenever public sentiment lies in favor of them. Hence, torturing a suspect-terrorist to determine the location of a ticking bomb could be seen as *justified* by the greater populace of a nation whose laws might nevertheless prohibit this.

Not only society as a whole, but also individuals by themselves may have recourse to this *modus operandi* of *justification* to trump enacted law(s). To execute the role designated by *social contract*[46] is what qualifies for many individuals as their paramount duty owed to society. When one voluntarily adopts a role, one implicitly undertakes the duty to discharge that role to the fullest:

> When an actor takes on an established social role, usually he finds that a particular front has already been established for it. Whether his acquisition of the role was primarily motivated by a desire to perform the given task or by a desire to maintain the corresponding front, the actor will find that **he must do *both***. (Goffman 1956, 17, emphasis added.)

Since the role is deemed vital to the benefit of the whole, its propriety cannot be questioned. One may resign his role but cannot deliberately compromise its utility. A soldier, whence ordered to kill, must kill; society expects soldiers to both kill and be killed on behalf of their country. Likewise, citizens require the police *inter alia* to restore goods stolen by thieves. So

policemen do comply, even at the cost of torturing a 'few' innocents. Prosecutors too are expected to win their cases, even by committing to jail a man whose guilt might sincerely be doubted. So long as society demands a *specific performance* from a defined role, its morality is deemed irrelevant, *societal utility* alone being paramount.

Despite salutary reverence being paid to religion by constitutions the world over, the virtues of morality have failed to alter the archaic role personifications prescribed by *utilitarian* ideals. All moral considerations are hence trumped by those based on 'necessity.' The world increasingly appears to submit to this new *stratum* of *justification*: neither moral nor legal, but essentially *societal*. One is *justified*, so long as the majority of society either says or implies so.

Accordingly, the policeman is *societally justified* in torturing suspect-offenders; the prosecutor in securing doubtful convictions; and the judge in awarding excessive exemplary sentences. If the policeman, prosecutor and judge are so *societally justified*, it is obvious that the executioner is equally *justified* in executing an innocent 'convict.' Hence, all such *societal justifications* do carry with them a real risk of harm to truly innocent individuals.

All who undertake the aforementioned roles do so voluntarily, fully appreciating both the substantial risks involved and *societal justifications* operating to exonerate liabilities if incurred. Whenever confronted with questions of moral and/or legal responsibility, 'utilitarian worth to the secured perpetuation of society' is cited as precluding the same: 'It's a 'dirty job,' but someone's got to do it.' Hence, society is deemed indebted to these 'fearless' officials for 'heroically' undertaking such 'dirty jobs' for the greater 'good' of man.

The policeman who elects not to investigate a theft but to arrest an individual whom the owner alone suspects (with the objective of torturing such arrestee into revealing the whereabouts of stolen goods) will surely state that he is doing no more than what society 'expects'; nay, 'demands.'

When it is one's own possessions that have been stolen, 'a blind eye' is often turned to the means that secure their recovery. This self-serving initiative is often opined to be reflective of the true expectation of every society the world over. Hence, whatever the constraints that should legally apply, societies consider themselves empowered to *veto* them whenever deemed expedient. Policemen (being public officials) by and large believe themselves entrusted with 'authority' (the public's confidence) to exercise this power of *veto* on behalf of society. Many a tale on how a huge haul of heroin 'could not have been detected' without beating smaller peddlers (or a bomb/arms cache 'could not have been located' without torturing suspect-terrorists) has been cited to both exemplify and *justify* 'due' recourse to such 'entrusted *veto* power.' Hence the perspective that torture is 'a necessary evil.'

Law is not synonymous with morality; immorality could easily constitute law. Only a minimum content of morality is subscribed to globally; this too with many an overriding legal exception. Whilst the premeditated killing of a human being is murder, the execution of an enemy combatant or a capital offender is not. The egocentricity of the human mind is such that leeway to create exceptions in law is (naively) thought capable of being extended to morality as well. Accordingly, the minds of men have been progressively conditioned toward accepting so-called 'moral exceptions' (that in effect *justify* gross immorality). Thus, a new criterion of validity has for some time been in the process of gaining societal acceptance: human exertions need only be *justified*, not moral. Such elective *vetoing* of morality in deference to *justification* is more and more viewed as both 'logically expedient' and 'socially beneficial.'

Whether in discovering evidence toward prosecuting/preventing a crime or in 'punishing an offender,' the torturer appears virtually entitled to plead *societal justification* (as being impelled so to do by *societal expectations*). Thus, an apparent inciting factor for both *interrogative* and *punitive* 'police torture' is duly demarcated: ***societal justification***.

2.4.3.1 Lawful enforceability of *societal justification*

Would the law and/or courts be willing to defer to *societal justification*?

> Louis Gachelin, a Miami cab driver, picked up two passengers, Jean Leon and Frantz Armand, at the Miami International Airport and drove them to an apartment complex. Upon their arrival at the complex, the passengers requested that the driver carry their suitcases inside the building. As the driver approached the door of the apartment, he was forced at gunpoint to enter the apartment and remain quiet. They undressed and bound him. Leon and Armand then began making numerous phone calls to the driver's family, attempting to arrange a ransom. As soon as they received the first phone call, the Gachelin family contacted the police. Frank Gachelin, the cab driver's brother who was working with the police, agreed to meet Leon at the Northside Shopping Center and to bring $4,000 in exchange for his brother's release. Leon and Frank Gachelin met in the shopping center parking lot at 2:00 a.m. During the confrontation, Leon drew a gun on Frank. The police officers who had accompanied Frank to the meeting immediately arrested Leon and demanded that he tell them where he was holding Gachelin. When he refused to tell them the location, he was set upon by several of the officers. … **They threatened and physically abused him by twisting his arm behind his back and choking him until he revealed where** … **Gachelin** … **was being held**. … **The officers went to the apartment**, **rescued Gachelin**, and arrested Armand. (*Leon* v. *Wainwright* [1984], 770, emphasis added.)

Circuit Judge Fay (sitting with Circuit Judge Anderson and Chief Judge of the Federal Circuit Markey) opined in this regard as follows:

> … The police, motivated by the immediate necessity of finding the victim and saving his life, used force and threats on Leon in the parking lot. … We do not, by our decision, sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. **This was** instead **a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death**. (*Leon* v. *Wainwright* [1984], 770, emphasis added.)

The said *dicta*, however, must necessarily be deemed *obiter*, as the issue herein decided was the sustainability of the perpetrator's later confession in light of the force used on him, not the liability of the police for using such force (torture). Whatever persuasiveness thereby attaching to the proposition *immediacy to protect another individual from bodily harm or death excuses recourse to interrogative torture* would be verily negated by the *jus cojens* ban on torture proclaimed in *Siderman de Blake* v. *Republic of Argentina* [1992] (noted in Chapter 1 ('1.4') above).

Pursuant to the recognition of the prohibition on *cruel*, *inhuman or degrading treatment or punishment* as *jus cogens*, no form of 'necessity'-based excuse or *justification*[47] could be either legislatively enacted or judicially determined in exception thereof. Regarding any form of law serving to aid, abet, counsel or procure torture as having existed prior to the recognition of the *jus cogens* status of its prohibition, *Prosecutor* v. *Anto Furundžija* [1998] expressedly provides that:

> Proceedings could be initiated by potential victims … before a competent … national judicial body, with a view to asking it to hold the national measure to be … **unlawful** (60, para.155, emphasis added).

However, until such 'national measure' is so determined 'unlawful,' it continues to enjoy full efficacy as law for the time being in force, *e.g.*, the implied warrant to torture being perpetuated by *Queen* v. *Murugan Ramasamy*'s interpretation of section 27(1) of the Evidence Ordinance of Sri Lanka.

The account below divulges tactics allegedly resorted to by Sri Lankan Army officer 'Thomas' in furtherance of exercising search and arrest (police) powers provisionally conferred on the armed forces *via Emergency Regulations* proclaimed under the Public Security Ordinance No.25 of 1947.[48] If true, this account in all probability could be held representative of the

degree to which *oppressive* torture ('2.3 (***c***)' above) is deemed *justified* in 'selfless' service to the public:

> 'By going through the process of laws,' Thomas patiently explained … 'you cannot fight terrorism.' Terrorism, he believed, could be fought only by thoroughly 'terrorizing' the terrorists – that is, inflicting on them the same pain that they inflict on the innocent. … At the time, Colombo was on 'code red' emergency status because of intelligence that the L.T.T.E. was planning to embark on a campaign of bombing public gathering places and other civilian targets. Thomas's unit had apprehended three terrorists whom it suspected had recently planted … a bomb that was then ticking away, the minutes counting down to catastrophe. The three men were brought before Thomas. He asked them where the bomb was. The terrorists – highly dedicated and steeled to resist interrogation – remained silent. **Thomas asked the question again**, **advising them that if they did not tell him what he wanted to know**, **he *would* kill them**. **They were unmoved**. **So Thomas took his pistol from his gun belt**, **pointed it at the forehead of one of them**, **and shot him dead**. **The other two** … **talked immediately**; **the bomb** … **was found and defused**, **and countless lives were saved**. … In his view … *the innocent* had more rights than *the guilty*. He … believed that *extraordinary circumstances* required *extraordinary measures*. (Hoffman 2002, 52, emphasis added.)

Three human beings were thus psychologically tortured[49] (with threats of imminent death) toward discovering the location of a ticking bomb; one was killed. The bomb was located and neutralized, saving countless lives. Nonetheless, could the killing of one and torturing of others be legally or *societally* set off against those saved thereby?

In 'Thomas's' own words, he was merely 'protecting the lives of Colombo's citizens' in pursuit of discharging 'the immense responsibility borne by those charged with protecting society from attack' (Hoffman 2002, 52). Thus, (much like policemen) army officers too (when exercising provisional police powers) appear to view implied *social contractual* duties (to defend both the state and the public) as overriding their explicit legal obligations to remain

accountable. 'Thomas's' aforesaid arbitrary actions were apparently never publicized. He was obviously neither charged nor prosecuted for either murder or torture.

So, was this cost (the torture of 3 and death of 1) to benefit (many lives saved) calculation employed by 'Thomas' morally *justifiable*? Certainly not, for it is none other than the deontological premise (Cohan 2007, 1589) that both killing and torture are prohibited under any circumstance, which found its way into customary international law (Cohan 2007, 1593).

Would the public then condemn 'Thomas's' said acts? The majority would perhaps approvingly condone the same. But could such *societal justifiability* ever be tantamount to *legal justifiability*?

Sections 89 and 90 of the Penal Code Ordinance No.2 of 1883[50] of Sri Lanka, when read together, convey *inter alia* that:

> **Nothing is an offense** which is done in the exercise of the *right* … *to defend* … *the body of any other person*, against any offense affecting the human body (emphasis added).

Furthermore, sections 93, 95, 99 and 92(4) of the same Code, respectively state among other things that:

> [This] *right* … extends … to the **voluntary causing of death or of any other harm to the assailant**, if the offense which occasions the exercise of the *right* be … an assault as may **reasonably cause the apprehension that death** will otherwise be the consequence … [or] … an assault as may **reasonably cause the apprehension that grievous hurt** will otherwise be the consequence … (parentheses and emphasis added).
>
> The *right* … **commences** as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offense, though the offense may not have been committed, and it **continues** as long as such apprehension of danger to the body continues (emphasis added).

> If in the exercise of the *right* of private defense against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that *right* without risk of harm to an innocent person, his *right* of private defense **extends** to the running of that risk (emphasis added).
>
> The *right* … in **no** case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defense (emphasis added).

On a strict literal application of the above, 'Thomas' might find himself defended as follows:

- No sooner than his being made aware of the bomb threat, a 'reasonable apprehension of danger' in the nature of either 'death' or 'grievous hurt' to 'the bodies' of 'other persons' could have duly arisen in 'Thomas's' mind. Hence, he would in all probability have considered himself entitled to 'defend' such persons *via* his legal 'right' to do so, which 'right' could have been construed as available until such threat in fact abated.

- Either 'death' or 'grievous hurt' to many individuals being logically anticipated, 'Thomas' might have presumed himself entitled to cause 'any harm to the assailants' in order to 'defend' all potential victims. However, questioning and even threatening the three suspect-terrorists with immediate death failed to yield the bomb's location.

- Seeing himself entitled to run a 'risk of harm' even to an 'innocent person,' 'Thomas' made good his threats by shooting dead one of the said suspect-terrorists, prompting the others to divulge immediately the whereabouts of the explosive device, thereby preventing 'death' or 'grievous hurt' to many innocent lives.

- 'Thomas' thus viewed himself as having inflicted no 'more harm than … necessary … for the purpose of defense' within the exigencies of the given situation.

Accordingly, 'Thomas' could be *legally justified* regarding the said homicide.

Nonetheless, in view of Sri Lanka's Convention Against Torture Act's [1994][51] declaring under section 3 that resorting to torture 'at a time when there was a state of war, threat of war, internal political instability or any public emergency' shall not be a defense, 'Thomas's' recourse to the *justification* provided by section 93 of the Penal Code (above) toward exculpating himself from liability for psychological torture would certainly fail.[52] It is indeed ironic that terminating a life could be so *justified*, but compromising its condition could *not*.

But would the public veritably let their 'hero' ('Thomas') be prosecuted for *oppressive* psychological torture? Would the Attorney General truly be disposed toward filing an indictment against him? In both instances the answer would be an emphatic 'no.' Hence, such public or *societal justifiability* does in reality tend to overpower *legal justifiability*.

It must be recalled that 'Thomas' was an army officer exercising *pro tempore* police powers.

Although not strictly bound to protect lives by recourse to 'lawful defense,' police officers nevertheless are obliged to prevent crime. Hence, would they be willing to employ *interrogative* torture to the extents manifested in 'Thomas's' account above, in pursuit of *social contractual* (rather than legal) obligations as *justified* by public demand? The following excerpts from reported allegations apparently say 'yes':

> (***a***) While Namal was being pinned down by two police officers, another had a gun pointed at him. Seeing this, one [concerned] officer exclaimed, '*Yako* (you devil)! Unload that gun!' To this, the officer holding the gun replied that **if the gun had gone off**, **he would maintain that** he had intentionally fired because **the prisoner had 'tried to escape**.' (Ed. Fernando 2012, 46, parenthesis and emphasis added.)

(***b***) Two uniformed officers were in the jeep whilst one kept the butt of his gun on Upali's head. He said, '**You tell the truth**; **otherwise**, **we will kill you**.' (Ed. Fernando 2012, 78, emphasis added.)

(***c***) While Jayarathne was being beaten, the Sub-Inspector was heard to say, '**We**, **the police**, **have all powers to arrest**, **torture and kill anybody**' (Ed. Fernando 2012, 230, emphasis added).

What is most disconcerting is that these excerpts evince an overzealousness on the part of policemen to unnecessarily exceed the public's expectations of *social contractual* discharge; threats of death appear liberally voiced even in non ticking bomb scenarios. This arguably alludes to an underlying urge to unconscionably dominate not only the criminal but also society in general. The following allegations serve to corroborate this:

(***a***) While inquiring into the incident, the A.S.P. [Assistant Superintendent of Police] K… allegedly told Kumara, 'I will find the stolen goods for you; I will also give a warning to the policeman who assaulted you, but are you willing not to pursue the matter any further?' When Kumara refused to do so, the A.S.P. got angry … . He then threatened Kumara not to get 'on the wrong side' of the police and warned that **it was not a good thing to antagonize police because the A**.**S**.**P**. **was even empowered to cause the abduction and disappearance of a person like him**. The A.S.P. then called a typist and dictated a written statement … which Kumara was forced to sign. Kumara did so as he feared … assault by the senior police officer. (Ed. Fernando 2012, 184, parenthesis and emphasis added.)

(***b***) When Mr. Gihan protested such behavior, the S.I. [Sub-Inspector] simply told him that **he** (**the S**.**I**.) **was in uniform while Mr**. **Gihan was in civilian dress and therefore he** [the S.I.] **was empowered to do anything he wanted**, **including sending Mr**. **Gihan to prison for one year**. According to Mr. Gihan, the S.I. even pulled out a pistol from his waist and threatened him with the gun. (Ed. Fernando 2012, 193, parentheses and emphasis added.)

(***c***) The 1st petitioner, at this stage, informed the respondents that he is an Attorney-At-Law by profession. No sooner than this was said, the 2nd respondent … held the 1st petitioner by his collar and started shouting …, '**We are the** [police] **security personnel of a Minister**. **You can do**

> **anything you want**. **We will shoot and kill you**.' (*Adhikary and another* v. *Amarasinghe and others* [2003], emphasis and parenthesis added.)

> (***d***) Just as the petitioner was getting into his jeep, the 1st respondent … got off and came close to the petitioner stating …, '**I am the Officer In Charge of the Ginigathhena police** … . **There is nothing that we cannot do in our village**. **We cannot let those who visit our village scorn us**.'[53] (*Bandula Samarasekera* v. *O.I.C. Vijitha Alwis*, *police station Ginigathhena and others* [2009], emphasis added.)

As Justice Shiranee Tilakawardane observed in *M.D. Nandapala* v. *Sergeant Sunil*, *police station Homagama and others* [2009]:

> We see violence … perpetrated with total impunity by certain police officers against civilians … often for seemingly no reason at all other than to taunt and harass the public with 'a show' of their unchecked police powers … ultimately blinding them to their own corruption. Powers that were vested in them by the donning of uniforms to separate them and identify them as upholders of the Rule of Law are sadly used instead to subdue and pervert it.

What then must be said of claims by policemen that they employ torture 'exclusively' in furtherance of the *social contractual* call? The following provides a plausible response:

> In man, **language can be used as propaganda** to convince each sector of the group that its own gratification, territory and the objects and beings it contains are being defended. Actually, of course, very often **the only thing being protected and defended is the prevailing structure of hierarchic dominance**. In such cases, this structure is too frequently referred to as **culture**. (Laborit 1981, 59, emphasis added.)

The dread generated by their infamy as 'barbarous batterers' enables policemen to defend their 'hierarchic dominance' (tantamount to a distinct 'culture'), gainfully breaking the criminal's will to defy them thereby. Obviously, this entails both instilling and sustaining a fear complex within the general public:

> On an indirect level we see the growing loss of faith by the public in a force that has come to be seen as **an organization to be feared** – due to the aberrant behavior of a small minority of police officers – rather than a supportive service to which they can look for protection and help[54] (*M.D. Nandapala* v. *Sergeant Sunil*, *police station Homagama and others* [2009], emphasis added).

The unapparent insecurities of a police force overwhelmed by an apparent ever-increasing incidence of crime is what remains conveyed by such an unceasing recourse to debasing torture, whether *interrogative*, *punitive* or even *oppressive*. However, police officials have not unilaterally arrogated such *supralegal* recourse unto themselves. The public has had much to do with conceding such discretion to dominate through their ***(a)*** overt ignorance of the law (in the majority) and ***(b)*** covert manipulations by way of bribes and other inducements offered to policemen toward fulfilling private ends (in the minority). Admittedly, members of the public (as taxpayers of a *welfare state*) do have a right to cry out for effective crime prevention. However, such outcry must be for legal as opposed to illegal measures, which, owing to societal ignorance (of the law), is indeed a difficult distinction to make.

Many are unaware that clobbering an alleged thief to ascertain the whereabouts of stolen property is illegal. Some even labor under the erroneous impression that police officers are empowered to inflict blows on those suspected of certain crimes. Thus, in the chance event of such deluded individuals falling into the hands of the police, they would willingly submit to torture (or other forms of cruelty) on the premise that being so ill-treated constitutes 'due process.' As Jason Barber observes:

> Torture is also perpetuated by an **attitude of acceptance** of the *status quo*: the belief that torture … and other violence and exploitation, and related crimes such as corruption and extortion … are 'normal' and **to be expected** (2000, 112, emphasis added).

2.5 Consolidating the incitements to *interrogative* and *punitive* torture

The diagram above presents an induced substantive theory on inciting factors for 'police torture' as derived from all that has been expounded thus far. Accordingly:

(***a***) Contemptuous disregard for the law and legal enablement *via* section 27(1) are deemed as inciting *interrogative* torture, and personal and proxy revenge as inciting *punitive* torture.

(***b***) *Interrogative* torture and *punitive* torture are together held to constitute the core category of 'police torture' in strictly non-war contexts.

(***c***) *Societal justification*, though theoretically induced as an inciting factor for both *interrogative* and *punitive* torture, remains to be empirically established. All other factors have been verified as follows:

Table 7

Verification of 3 (three) out of 4 (four) hypothesized inciting factors for 'police torture' in Sri Lanka.

Inciting factor	*Verified by*
Personal and Proxy Revenge	39 out of 139 instances recorded by the A.H.R.C.
Contemptuous disregard for the law	15 out of 139 instances recorded by the A.H.R.C.
Legal enablement *via* section 27(1)	36 out of 42 implied avowals by police officers

2.6 Theory testing

Testing was necessitated toward determining whether or not *societal justification* could be empirically verified as inciting 'police torture' of all descriptions (*interrogative*, *punitive* and *oppressive*), public sentiment constituting the focal point of the same.

2.6.1 Questioning the public

Such testing itself was accomplished by serving an atypical questionnaire (see 'Appendix' below) on a 'snowball sampled' group of 300 individuals (158 females and 142 males), all being adults minimally educated up to Sri Lanka's General Certificate of Education, Ordinary Level. Three 'situational,' 'deep analysis' and 'closed response' questions made up the said questionnaire:

- '**Question 1**,' based on the already analyzed account pertaining to the alleged official acts of Sri Lankan Army officer 'Thomas' (at '2.4.3.1' above), probed the public's approval of police recourse to *oppressive* torture within a ticking bomb setting.

- '**Question 2**,' based on the Supreme Court's determination in *Roshana Michael* v. *Saleh O.I.C.* (*Crimes*) *police station Narahenpita and others* [2002], probed the public's acceptability of complainant-instigated police *interrogative* torture.

- '**Question 3**,' based on the famous 'shock experiment' conducted by Stanley Milgram (1963) at Yale University (elaborated in Chapter 4 below), probed the public's willingness to engage in *punitive* torture for the advancement of scientific study.

Since all sampled members of the public were required to express themselves regarding three true-life situations (as opposed to mere hypothetical constructs), their responses constituted testaments to the behavioral standards they upheld in the real world. By soliciting responses from next-generation university students as well, the standards that they were inclined to commit themselves to were also ascertained.

2.6.2 The public's feedback

All 300 individuals to whom the questionnaire was presented were able to answer all queries by choosing from the prescribed responses. Each prescribed response carried a specific score based on whether it represented a pro-torture ($^{-}2$, $^{-}4$, $^{-}8$), anti-torture ($^{+}2$, $^{+}4$, $^{+}6$, $^{+}8$) or equivocal (0) stance:

Table 8

Questionnaire Response Scores and Rationales.

Query	*Response*	*Score*	*Rationale for the Score*
1:	1. (a) only	$^{-}4$	Accepts socially 'beneficial' oppressive 'police torture'
	2. (a) & (b)	$^{-}8$	Endorses socially 'beneficial' oppressive 'police torture'
	3. (c) only	0	Equivocal
	4. (c) & (d)	$^{+}2$	Legally correct
	5. (e) only	$^{+}4$	Legally and morally correct
2:	1. (a) only	$^{-}8$	Endorses socially 'beneficial' interrogative 'police torture'
	2. (b) only	$^{+}2$	Legally correct
	3. (b) & (c)	$^{+}4$	Legally and morally correct
	4. (b), (d) & (e)	$^{+}6$	Lawful, moral and preventive
	5. (b), (c), (d) & (e)	$^{+}8$	Lawful, moral, preventive and pragmatic
3:	1. (a) only	$^{-}4$	Endorses punitive torture for mutual gains
	2. (b) only	$^{-}2$	Accepts punitive torture based experimentation

	3. (c) only	0	Equivocal
	4. (d) only	$^{+}4$	Legally and morally correct
	5. (d) & (e)	$^{+}8$	Lawful, moral, preventive and pragmatic
Highest possible anti-torture score		$^{+}20$	
Highest possible pro-torture score		$^{-}20$	

Upon calculating each respondent's cumulative score, according to the scoring table above ('Table 8'), the following anti-torture to pro-torture (descending) gradient was arrived at:

Table 9

Cumulative anti-torture to pro-torture (descending) Scores of 300 (three-hundred) respondents to the Torture Questionnaire.

Score	*Individuals*	*Females*	*Males*	*Employed*	*Students*
$^{+}20$	3	*0*	*3*	*3*	*0*
$^{+}18$	9	*5*	*4*	*9*	*0*
$^{+}16$	18	*5*	*13*	*14*	*4*
$^{+}14$	30	*18*	*12*	*12*	*18*
$^{+}12$	36	*20*	*16*	*18*	*18*
$^{+}10$	40	*24*	*16*	*8*	*32*
$^{+}8$	20	*10*	*10*	*13*	*7*
$^{+}6$	20	*11*	*9*	*8*	*12*
$^{+}4$	17	*6*	*11*	*5*	*12*
$^{+}2$	25	*18*	*7*	*8*	*17*
0	16	*9*	*7*	*6*	*10*
$^{-}2$	24	*11*	*13*	*16*	*8*
$^{-}4$	17	*10*	*7*	*10*	*7*
$^{-}6$	9	*5*	*4*	*6*	*3*
$^{-}8$	3	*1*	*2*	*1*	*2*
$^{-}10$	1	*0*	*1*	*1*	*0*
$^{-}12$	4	*2*	*2*	*2*	*2*
$^{-}14$	2	*0*	*2*	*2*	*0*
$^{-}16$	3	*2*	*1*	*1*	*2*
$^{-}18$	2	*1*	*1*	*2*	*0*
$^{-}20$	1	*0*	*1*	*1*	*0*
Total	300	*158*	*142*	*146*	*154*

At first sight, much complacency appears derivable from the fact that the total number of individuals who have scored $^{-}2$ (minus two) or less (being 66 or 22%) is much lower than those who have scored $^{+}2$ (plus two) or more (being 218 or 72.66%).

Nonetheless, owing to each optional response (within the questionnaire) being designed to evoke whatever modicum of sympathy or antipathy toward a particular conceptualized category of torture, the totality of responses (received from the same 300 above) when classified according to whatever pro-torture premise assented to reveals a drastically different picture:

Table 10

Aggregates and percentages of individuals who have favored pro-torture responses (entailing minus scoring) as enumerated in the Torture Questionnaire.

Query	*Response*	*Score*	*Rationale for the Score*	*Individuals*
1:	1. (a) only	$^{-}4$	Accepts socially 'beneficial' oppressive 'police torture'	83 (27.66%)
	2. (a) & (b)	$^{-}8$	Endorses socially 'beneficial' oppressive 'police torture'	55 (18.33%)
2:	1. (a) only	$^{-}8$	Endorses socially 'beneficial' interrogative 'police torture'	21 (7%)
3:	1. (a) only	$^{-}4$	Endorses punitive torture for personal and mutual gains	21 (7%)
	2. (b) only	$^{-}2$	Accepts punitive torture based scientific experimentation	45 (15%)
Individuals who chose at least one of the above pro-torture responses				168
vis-à-vis the total sample of 300				56%

As *per* the detailed questionnaire response scores, the following calculations have been made:

(***a***) 46% (138 out of 300) have expressed support for *oppressive* 'police torture' (by selecting either response option '1.' or '2.' to 'Question 1' of the questionnaire):

Table 11

Breakdown of individuals who have favored oppressive 'police torture.'

Individuals	*Female*	*Male*	*Employed*	*Students*
138	79	59	64	74

(***b***) 7% (21 out of 300) have expressed support for *interrogative* 'police torture' (by selecting response option '1.' to 'Question 2' of the questionnaire):

Table 12

Breakdown of individuals who have favored interrogative 'police torture.'

Individuals	*Female*	*Male*	*Employed*	*Students*
21	9	12	14	7

(***c***) 4.33% (13 out of 300) have manifested support for both *oppressive* and *interrogative* forms of 'police torture' (by selecting either response option '1.' or '2.' to 'Question 1' along with response option '1.' to 'Question 2' of the questionnaire):

Table 13

Breakdown of individuals who have favored both oppressive and interrogative 'police torture.'

Individuals	*Female*	*Male*	*Employed*	*Students*
13	6	7	8	5

(***d***) Therefore, 44.33% (133 ((*138*–*13*) + (*21*–*13*)) out of 300) have demonstrated clear support for either *oppressive* or *interrogative* forms of 'police torture.'

(***e***) 22% (*i.e.*, 66 out of 300) have confessed their innate willingness to *punitively* torture another, minimally in furtherance of scientific experimentation and maximally for personal and mutual gains (by selecting either response option '1.' or '2.' to 'Question 3').

Ultimately, **56**% of all sampled individuals (*i.e.*, 168 out of 300) having expressed assent unequivocally to at least one of the said pro-torture responses, that torture constitutes *justifiable* recourse to at least a simple majority of a sufficiently representative sample of society (in Sri Lanka), becomes evident.

Moreover, the fact that no less than **22**% of respondents have had no inhibitions in declaring their willingness to directly engage in torturing (electrically shocking) another (in furtherance of personal fame and gain) is perhaps the most noteworthy revelation of this entire research exercise. Although the said percentage (22%) is low, the possibility that there might have existed others who did not wish to be so forthright in their disclosures (in fear of 'losing face') cannot be dismissed easily, especially considering that 44.33% did condone and/or *justify* either *oppressive* or *interrogative* 'police torture' (*per* calculation '(***d***)' above).

2.7 Conclusions

So, whilst personal and proxy revenge, contemptuous disregard for the law and legal enablement under section 27(1) all serve to incite the actuation of 'police torture' in Sri Lanka, *societal justification* of such actuation (as affirmed by **56**% of a sufficiently representative sample) is what incites the perpetuation thereof.

Hence, impeding the *societal ignorance—justification* based causal cycle of 'police torture' should do much to curb its incidence.

2.8 Rights realization

In order to impede the said 'causal cycle,' the following measures are recommended:

(***a***) Educating the public on their rights:

Both the potential victim and the perpetrator of torture are products of a literate society. However, 'literate' and 'educated' are rarely synonymous. Thus, the public must be educated on their human rights, especially those pertaining to freedoms from torture, arbitrary arrest and detention.

'Human rights' should feature as 'part and parcel' of an examination paper at the secondary school level and be designated an area on which compulsory questioning would be effected to facilitate mandatory learning. Once children are so empowered with knowledge regarding their human rights, it is anticipated that they could disseminate the same among both their family and societal elders in a 'trickle-up' form.

As regards educating policemen, military personnel and the like, it is recommended that their minimum recruitment qualification include a mandatory pass in the aforesaid 'examination paper' (featuring compulsory questioning on human rights). It is further recommended that each cadet officer be required to pass a written examination on 'human rights' administered during her/his police training, without which pass s/he would be barred from graduating as an officer.

When both the potential victim and perpetrator of torture are made aware of their own human rights, it is hoped that mutual respect for each other's lives could prevail.

(***b***) Legislating a right to legal advisement during police interrogations:

Under section 110(2) of the Code of Criminal Procedure Act No.15 of 1979, all questions put to a suspect/victim/witness are required to be answered 'truly' other than those that would potentially expose him/her to a criminal charge/penalty/forfeiture. Thus, silence (or even

falsity) may be exercised in response to any incriminating question. The said provision appears to echo the 'privilege against self-incrimination' as prescribed by the 5th Amendment to the Constitution of the United States of America (U.S.A.).

However, unlike in the U.S.A., where a '*Miranda* v. *Arizona* [1966] advisement' is made mandatory upon arrest, police officers in Sri Lanka are not required to inform any individual making a statement that s/he is not bound to answer incriminating questions. In the absence of such advisement, the said 'privilege' enshrined under section 110(2) comes to be under exercised, if ever. It is to rectify this under-exercise that lawyers in Sri Lanka have been agitating for legal representation at police stations during any form of questioning,[55] apparently in furtherance of the *Miranda* [1966] recognition that 'any person has the right to the presence of an attorney.'

At present, the 'Police (Appearance of Attorneys-At-Law at Police Stations) Rules 2012' made by the Inspector General of Police (with the approval of the subject Minister) under section 55 of the Police Ordinance No.16 of 1865 (as published in Gazette Extraordinary No.1758/36 dated 18-05-2012) prescribe *inter alia* that:

> 3(1) Every Attorney-At-Law who enters the precincts of a police station established under the Police Ordinance … situated in any part of Sri Lanka, in his capacity of an Attorney-At-Law for the purpose of representing and watching the interests of a person who is the client of such Attorney-At-Law, **shall be treated cordially and courteously and given a fair and patient hearing by the police officers attached to such police station**, **whatever their rank**. (Emphasis added.)
>
> 3(2) Every police officer attached to a police station shall not, at any time during which he is dealing with an Attorney-At-Law present in such police station for the purpose of representing and watching the interests of a person who is his client, use physical force on the person of such Attorney-At-Law or resort to the use of abusive language or any other form of intimidatory conduct.

It has been observed in this regard that:

> These rules effectively recognize the right which all persons, including suspects, have to access their Attorneys-At-Law at any time, including the period immediately after arrest and while being in detention (Udagama 2016, 2).

By entitling victims of crimes to present written communications or make representations through legal counsel to the Attorney General (Assistance to and Protection of Victims of Crime and Witnesses Act No.10 of 2023, section 5(1)(*g*)) – implying legal advisements being received in return as well – the need has now arisen for the state to likewise confer comparable rights on those accused of committing crimes (in furtherance of the 'equality of arms' principle). However, the majority of attempts to do so have resulted in proposing measures that serve only to limit the implied scopes of the extant Police Rules '3(1)' and '3(2)' above. For example, the 'Code of Criminal Procedure (Amendment) Bill' (gazetted 15-08-2016), under proposed section '37A(1),' permitted legal advisement only 'after' an individual's statement had been recorded; and the 'Code of Criminal Procedure (Special Provisions) (Amendment) Bill' (gazetted 14-11-2017), under proposed section '6A(10),' denied legal representation during any interview or recording of a statement.

However, proposed section '54(3)(a)' of the 'Counter-Terrorism Bill' (gazetted 17-09-2018) unequivocally 'entitled' a prospective interviewee 'if he so wishes … to have access to or communicate with an Attorney-At-Law of his choice and obtain legal advice prior to such interview … .' Proposed section '54(4)' compelled the interviewing police officer to inform such interviewee of this 'right' prior to commencing the interview. Had this specially proposed provision been passed into law, it could have been argued to possess implicit general efficacy as well (*via* Article 12(1) of the extant Constitution of Sri Lanka).

(***c***) Reviving the practice of methodical investigations:

A revival of minimally invasive investigation techniques is opined essential. The production of an 'Investigator's Handbook' encompassing *inter alia* proper identification, collection and transmission procedures for 'trace evidence'; strategies for efficient evidence gathering; and techniques for securing productive interviews would undoubtedly prove beneficial in this regard.

Furthermore, the introduction of special 'refresher courses' on 'criminal investigation techniques and strategies' with the able assistance of either the Federal Bureau of Investigations of the United States or New Scotland Yard of the United Kingdom would also prove most gainful.

By so jumpstarting his idle investigative knowledge, the police officer is expected to view her/his refound 'investigator' identity as being 'above' having recourse to such base tactics as torture.

As *per* the 'theory testing' ('2.6.1' above) undertaken by this study, 'Question 2' of the atypical questionnaire (see 'Appendix' below) enabled each of the 300 respondents to assert both of the following in their chosen response (if they so preferred):

> (d) Instead of 'Torture,' recourse should ideally have been had toward procuring a DNA profile of the unknown suspect *via* laboratory analysis of 'trace evidence' found at the scene of the crime. By comparing this unknown DNA profile with that of the arrestee's, a 'match' or 'mismatch' could definitively have been made, respectively inculpating or exculpating him.
>
> (e) Establishing at least one DNA profiling laboratory within each 'Administrative District' should be the foremost priority of the Ministries of Justice, Law and Order and Science and Technology, toward precluding this habitual recourse to 'Torture.'

A strong majority of **63**% (189 out of 300) respondents did in fact endorse both of these recommendations.

(***d***) Amending section 27(1) of the Evidence Ordinance:

The rule against self-incrimination must be treated a paramount objective of judicial policy. Accordingly, it is recommended that section 27(1) be supplemented with a legislated subsection requiring all statements leading to the 'discovery of facts' to be mandatorily subjected to *voir dire* (as is the practice for confessions under the Prevention of Terrorism Act No.48 of 1979) toward determining both their veracity and voluntariness, prior to being admitted into evidence.

(***e***) Reaffirming religious norms of compassion and nonviolence:

Clerics of all recognized religious communities who advocate the wise lore of contentment and compassion preached by noble sages of the past should take the forefront in this regard. It is to those enlightened teachings on *non-discrimination*, *integrity* and *shame and fear of wrongdoing* that both Sri Lanka and the world must turn. The media bears the pivotal responsibility of disseminating all such profound teachings on virtuousness and correlating them to crimes and penalties toward unmasking torture for the immoral and illegal refuge that it truly is.

At this juncture, it appears pertinent to note Sri Lanka's shortcomings in reaching 'full compliance' with Articles of the *Convention Against Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment* [1984]:

- *Convention* Article 2(2) expressedly prohibits the recognition of any justification for torture. However, as has been already noted, section 27(1) of the Evidence Ordinance No.14 of 1895 continues to tacitly sanction recourse to *interrogative* torture by the police.

- The prevailing admissibility (under said section 27(1)) of that portion of a statement directly leading to a discovery of fact, even when obtained by torture, remains repugnant to the prohibition thereof by *Convention* Article 15 as based on the 'fruits of the poisonous tree' doctrine (*Silverthorne Lumber Company* v. *United States* [1920]).

- *Convention* Article 10(1) requires rules/instructions issued regarding the due discharge of duties and functions by law enforcement and other like officials (into whose custody a potential torture victim might fall) to specifically include a prohibition on torture. Although this provision optimally contemplates a clear and unequivocal warning to all such persons that torture is strictly prohibited (as expressed prominently in a handbook of sorts meant to be compulsorily read, understood and abided by), Sri Lanka is yet to fully meet such expectation.

- Although required by *Convention* Article 11, no 'systematic review' of interrogation rules, instructions, methods, practices and arrangements for the custody and treatment of arrestees and detainees ('with a view to preventing torture') has ever been undertaken in Sri Lanka.

- 'Prompt and impartial investigation' of allegations of torture as prescribed by *Convention* Article 12 is yet to become a reality in Sri Lanka.

As noted under '2.7' above, personal, legal and societal considerations all serve to inhibit man's shame and fear for wrongdoing (*Sukkadhamma sutta*[56] n.d.). But do such 'considerations' alone suffice to transform innocuous men into vile torturers? To so brazenly

and unperturbedly engage in such heinous savagery, human beings surely should be endowed with a complementary underlying capacity to torture as well.

Chapter 3: Latent Capacity To Torture

3.1 Cruelty: defined and exemplified

The term 'cruel' has been defined as follows:

> **Disposed** to pain others; merciless. … Causing pain, grief, or misery. (Webster 1895, 143, emphasis added.)

In *Ratnapala* v. *Dharmasiri*, *Headquarters Inspector Ratnapura and others* [1993], the petitioner (suspected of complicity in robbery) was during his interrogation (to elicit from him the location of hidden loot) allegedly subjected to the following:

> He was made to squat, and his hands and legs were tied together. He was then hung with his head downward on a pole (passed behind his knees), the two ends of which were placed on two tables. Whilst in this position, he was assaulted and kicked. 2 days later, the petitioner was again tied up and assaulted with a club. 8 days later, he was again assaulted with a club. His face was sprinkled with chili powder. 3 days later, he was assaulted with clubs and rubber hosepipes. 2-3 days later, he was assaulted with hosepipes and leather belts. He was questioned as to where he had hidden the money and further assaulted. 6-7 days later, his head was struck with a brass padlock. ([1993], 226-227).

In his judgment, Justice Kulatunga reproduced verbatim the Judicial Medical Officer's report, which disclosed no less than 27 injuries along with the following conclusions:

> '1. Scars and marks of injuries 1, 2, 3, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 26 are those that could be **caused by blunt trauma**.
>
> '2. Scars and marks of injuries 9, 12, 13, 15, 16, 22, 23, 15 and 26 are consistent with those **caused by elongated blunt weapons like clubs**, **rubber hoses**, **batons and like weapons**.

'3. Scars and marks of injuries grouped under 4, 6 and 7 could be those of burns caused by a lighted cigarette.

'4. Scars of injury No.24 could be caused by the application of a ligature around the wrist.

'5. It is not possible to explain the totality of the injuries as a result of a fall or falls for the following reasons:

'(a) Very many of the scars and marks of the injuries have been identified as those likely to have been **caused by blunt weapons**, **lighted cigarettes and application of ligatures**.

'(b) No scars or marks of injuries have been identified as those characteristic of fall/falls. *E.g.*, like grazed abrasions on projecting surfaces of the body.

'6. **Injuries** individually are non-grievous, but **taken collectively are of a grievous nature**.' (*Ratnapala* v. *Dharmasiri*, *Headquarters Inspector Ratnapura and others* [1993], 231-232, emphasis added.)

The following (now hallowed) *dictum* of Justice Atukorale in *Amal Sudath Silva* v. *Kodituwakku*, *Inspector of Police and others* [1987] provides an apt summation of the above case (and indeed of all other generic cases):

The facts … have revealed disturbing features regarding ***third-degree*** methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity, particularly at the present time when every endeavor is being made to promote and protect human rights. **Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody**. Such action on the part of the police will only breed contempt for the law … . ([1987], 127, emphasis added.)

The question, then, is: what could move sentient beings, considered 'humane,' to unleash such barbarity?

3.2 Sadism, an actuator?

Justice Bandaranayake's following pronouncement appears to provide an apparent answer to the aforesaid question regarding what moves policemen to such savagery:

> Their conduct displays a total lack of discipline and **an alarming tendency toward sadism**. If police officers, who are the guardians of the law, unleash their fury in this manner on the very persons whom they are duty bound to protect and safeguard, a dismal picture would emerge as to what passes off for law and order. … I have thought it fit to note these comments so that persons responsible for recruitment and discipline of law enforcement officers would instill a higher degree of sensitivity and restraint in those who are clothed with awesome power … . (*Priyantha Dias* v. *Ekanayake*, *Reserve Police Constable police station Polpithigama and others* [2001], 229-230, emphasis added.)

Sadism, denotatively, is sexual pleasure obtained by inflicting harm on others. The following serve as typical examples:

> Case 27. In the sixties the inhabitants of Leipzig were frightened by a man who was accustomed to attacking young girls on the street and stabbing them in the upper arm with a dagger. Finally arrested, he was recognized as a sadist who, at the instant of stabbing, had an ejaculation, and with whom the wounding of the girls was an equivalent for coitus. (Krafft-Ebing 1886, 73.)

> Case 42. A married man presented himself with numerous scars of cuts on his arms. He told their origin as follows: When he wished to 'approach' his wife, who was young and somewhat 'nervous,' he first had to make a cut in his arm. Then she would suck the wound, and during the act become violently excited sexually. (Krafft-Ebing 1886, 87.)

Nonetheless, the term *sadism* has been popularly construed over the years to connote pleasure *simpliciter* derived from subjecting another to pain in either body or mind (or both), there being no better word in the English language to convey this meaning. It is in this sense that Justice Bandaranayake (above) appears to have used the term. Even so, the German expression '***schadenfreude***' – opined to impart this very nuance (Baron-Cohen 2011, 64) – constitutes the ideal usage.[57]

Be that as it may, torturers rarely (if ever) are *sadists*:

> The perpetrator [of torture] appears … a monster – someone inhuman, uncivilized, a *sadist*, most likely male, foreign in accent, diabolical in manner. Yet … **most torturers are normal people** … for many perpetrators, torture is a job and nothing more. (Conroy 2000, 88, parenthesis and emphasis added.)

Evidencing the above, it has been reported that those having expertise in analyzing 'Rorschach inkblot tests' (used in personality and emotional characteristic determination) have found the archived results pertaining to Nazi war criminals who were subjected to such 'tests' as being on *par* with those obtained by subjecting ordinary ('normal') citizens to the same (Gibson 1987, citing Harrower 1976).

Infamous torturers being thus found void of *sadistic* (*schadenfreude*) inclinations, it becomes necessary to pursue alternative causal dispositions. Available scholarship demarcates three states occurring within an individual that supposedly situate an inclination to torture: (***a***) desire to dominate; (***b***) need to vent repressed anger; and (***c***) impulsion to experiment.

3.3 Desire to dominate

From an untraceable point in human history, man mobilized both free will and intellect toward dominating his environment. Being unwilling to submit to the dictates of nature, he

endeavored and succeeded in manipulating its abundant offerings to his advantage. Observing the hierarchy of the animal kingdom, wherein the strong preyed on the weak, he decided to settle for no less a status than 'ultimate being.'

Though knowing the confines of his inborn strengths, he resolved not to be servile to either nature or its creatures. He utilized his intellectual prowess to create tools and mechanisms that would amplify his limited natural capabilities. Despite formidable opposition in the form of meteorites, earthquakes, tsunamis, volcanoes, landslides, avalanches, floods and the like, he forged ahead with an unrelenting intent to dominate his surroundings.

He secured his food source by firstly hunting the very creatures that were habitually preyed on by fierce carnivores. Being shrewder than the latter, he decided to domesticate the former, saving him the trouble of having to track them down. Doing so, however, required him to ascertain the food source of these creatures. Having so chanced upon edible produce that grew freely off the land, he proceeded to farm the same as well. By doing so, he doubled the sources of his sustenance, rendering him an omnivore.

In none of these exertions did man manifest any humane characteristics. In fact, his disposition was self-serving and opportunistic, mirroring the instinct-based acts of animals. Such focusing on 'self' surely gave rise to selfishness, which made him regard his own interests as both unique and preferent to those of others. Moreover, the notion of 'self' necessarily implied a differentiation from those who were not like 'self' (such as other species of flora and fauna that nature had implied 'expendable' *via* the 'law of the jungle'). Hence, dominating his environment became the very impetus for man's existence.[58]

A corollary of such external domination was possession. All that man could dominate, he could equally possess, thereby giving rise to the further 'self' traits of 'my' and 'mine.' Hence,

he soon came to dominate with the intent to possess, ever striving to distinguish himself from others, even those who were 'self' like.

Individuals more endowed with natural strength became more dominant, often acquiring greater possessions. Thus, the 'self'-based concepts of 'my' and 'mine' used initially to demarcate 'my bounty,' 'my land' and 'my abode' soon came to be extended to 'my spouse,' 'my offspring' and 'my slaves.' Although the 'my' in these latter contexts did imply more a bond of simple dominance than a claim to outright possession (encompassing the rights to acquire, dispose and destroy), such simple dominance remained potentially exploitable even to the level of proprietary ownership.

As noted above, the concept of possession encompassed *inter alia* the right to destroy. Hence, slaughtering creatures that one possesses was clearly acceptable. The cruelty inherent in ending the lives of such living, breathing and feeling entities of nature was not apparent to man; his sole goal was self-preservation at any cost. All that he dominated he could possess; all that he possessed he could destroy.

According to one interpretation of Theodor Adorno's passages from *Negative Dialectics* (1973, 22 and 289):

> In the course of the rationalization process aiming at the domination of nature, all **uncivilized** creatures are perceived as **evil** because of their incompatibility with socio-cultural rationality (Fischer 2005, 28-29, emphasis added).
>
> … The absolute domination of nature provokes destructive socio-cultural phenomena since the domination of fellow humans and the domination of nature are closely related through history in a disastrous way. They cannot be separated from each other. (Fischer 2005, 30.)

Thus, it has been concluded that:

> According to Adorno … the *justifying* idea … to subdue the earth and to have dominion over all creatures, reduces the sensitivity of civilized humans … the internalized violent domination of nature also facilitates the use of force in social life. … **Man's brute force against nature encourages him to use violence against other human beings** as well. (Fischer 2005, 27, emphasis added.)

In short, man's desire to dominate displaces empathy toward members of his kind (as well as those of other kinds). However, it is not simple dominance, but recourse specifically to 'brute (implying tributary cruelty) force,' which is opined as disposing him to violence against fellow human beings. Hence, only when accompanied by supervening cruelty does the exercise of mastery over another occasion harm to such other. Slavery, which combines domination with dehumanization (a focused form of cruelty), particularly exemplifies this.

Sam Vaknin has opined *inter alia* as follows:

> Torture amounts to exerting **an absolute and all-pervasive** domination of the victim's existence (2001, 251, emphasis added).

Hence, torture (like slavery) does not contemplate domination *simpliciter*, but a most cruel form of subjugation.

Admittedly, all types of civilized life entail minimal forms of domination. The *social contract* itself exerts such dominance and, in fact, vests key functionaries with powers to control others. 'Civil' *per se* connotes societal ordering:

> The concept of **society** carves the world of human beings into mutually exclusive blocks in much the same way that the concept of territory carves up the country they inhabit into domains of political jurisdiction. If the latter implies a relation of control over the land, the former **implies a relation of control over people**. (Ingold 1999, 408, emphasis added.)

Hence, though the desire to suppress another's liberty *via* a demonstration of control is *prima facie* morally repugnant, socially beneficial contexts do exist: *e*.*g*., parental power and judicial authority. *Bona fide* motives of protection and reformation respectively engulf the said two circumstances of control, rendering them unobjectionable.

Thus, cruelty is not induced, fostered or in any sense necessitated by domination. In short, neither need domination entail cruelties nor cruelties presuppose domination.

3.4 Need to vent repressed anger

In her work *For Your Own Good*, Alice Miller advances the hypothesis that child battery constitutes the pivotal practice that perpetuates cruelty amongst mankind[59]:

> … **Battered children** grow up to be mothers and fathers who beat their own offspring; from their ranks are recruited **the most reliable executioners**, **concentration camp supervisors**, **prison guards** and **torturers**. They beat, mistreat and torture out of an inner compulsion to repeat their own history, and they are able to do this without the slightest feeling of sympathy for their victims because they have identified totally with the aggressive side of their psyche. (Miller 1980, 115-116, emphasis added.)

She reasons that since the practice of child battery was commonplace within both the German and Austrian populace, all those who willfully espoused the grotesque cruelty of Adolf Hitler were, like him, merely playing out the horrors that they themselves had been mercilessly subjected to during their own childhoods.

Miller's hypothesis presupposes that all those who batter their children are not only dormant torturers but also impregnators of the vile seed of irrational aggression within their victimized offspring. Admittedly, this would be a very convenient answer to the perennial question regarding why people torture.

Miller submits that since the victim-child is forced by conventional morality to 'love' the caregiver who exerts such cruelty, the anger that should naturally be experienced and vented by such a child is instead caused to be repressed (Miller 1980, 118) within her/his psyche. With every successive beating, this reservoir of repressed anger is deemed to swell. However, since the victim is still compelled to 'love' the batterer, s/he must find someone else to hate. Furthermore, since s/he was punished without offense, s/he must (prospectively) offend to such an extent as to *justify* the punishment already received (Miller 1980, 96). Even in such a compromised state, the (primary) victim's psyche would only avail itself of the most opportune moment to unburden itself. However, both the time of this moment and choice of (secondary) victim would largely remain uncertain (Miller 1980, 116).

In view of this accumulated hatred being sizable, several secondary victims could materialize. Since the primary victim's rationality is necessarily compromised, secondary victims might easily include innocent third parties, own siblings, own children and even one's own self, victim accessibility and docility being decisive. According to Miller, during such a secondary brutalization, the primary victim acts virtually subconsciously, both releasing hate and indulging the urge to (prospectively) offend.

1 However, if a victim of child battery were to have some other individual to both confide in and express her/his pain, the chain of causation resulting in the creation of a torturer would be broken (Miller 1980, 116). **2** The same end would be reached if the victim were educated enough to ward off his hatred by intellectualizing it (Miller 1980, xi). **3** Also, if the primary victim had the opportunity of abreacting his hatred by beating his own children, he would fall short of evolving into a torturer (Miller 1980, xi). Miller submits that since Hitler experienced none of the above, he became the quintessential tyrant. She adds:

> On the other hand, Hitler was certainly **not** an isolated phenomenon. He would not have had **millions** of followers if they had not **experienced the same sort of upbringing**. (Miller 1980, xi, emphasis added.)

Accordingly, Miller presumes all of Hitler's followers to have had similar upbringings and similar outcomes. If so, would not all of them have had to be equally vile? Admittedly, history does record that a significant number in fact were. However, to deem 'millions of followers' to have identified with Hitler owing to the 'same sort of upbringing' appears too presumptuous. To surmise that 'millions' would have been subjected to beatings when they were young is admittedly quite easy, such 'chastisement' being the norm of such times. Yet, having to assume that none among 'millions' experienced at least one of the three ('**1**,' '**2**' or '**3**') interventions specified by Miller above is indeed an anomaly (for this would implausibly imply that the said 'millions' were both childless and deficiently educated).

Miller deems the tyranny of Hitler and self-degradation of Christiane F. (a teenage German drug addict) as epitomizing respectively the externalized and internalized cruelty of child battery victims. Though repressed hatred could be so displaced either externally or internally, what prompts the subconscious to prefer either remains undisclosed. As to why Christiane (who suffered just as much as Hitler at the hands of a merciless child-beating father) did not manifest a wrath comparable to that of Hitler's or why Hitler never intoxicated himself in the manner Christiane did, remains unexplained.

Christiane did experiment in acts of cruelty (Miller 1980, 112 and 113), which were, however, of a much lesser intensity than those she herself had experienced. Even when presented with the opportunity to freely 'beat' another (a masochist), Christiane could only feel disgust (Miller 1980, 126). Thus, she found no underlying appeal in victimizing another (in the way she herself had once been), a paradox to Hitler's disposition.

Miller does imply that 'the war of annihilation against the self' and 'the war of annihilation against the world,' respectively manifested by Christiane F. and Adolf Hitler, are alternative and/or conjunctive reactions that a victim of child battery could potentially display. Nonetheless (regarding victims of child battery who have not manifested either of such 'wars') she concedes that:

> **Probably** the majority of us belong to the category of 'decent people who were once beaten' … fortunate enough not to pass on the absurdities of our own childhood to our children … [however] we can still function as dangerous carriers of infections. … When people who have been beaten or spanked as children attempt to play down the consequences by setting themselves up as examples, **even claiming it was good for them**, they are inevitably contributing to the continuation of cruelty in the world by this refusal to take their childhood tragedies seriously. (Miller 1980, xii-xiii, emphasis and parenthesis added.)

This sweeping assertion made by Miller has the effect of diminishing the tenability of the thesis that she has taken many pains to adduce. Not only does it concede that the majority does belong to the category of 'decent people who were once beaten' (thereby acknowledging their humane potential to attenuate repressed anger and consciously desist from perpetuating cruelty), but it also renders her hypothesized causal nexus an uncertainty.

Hence, quite apart from Miller's conceived **3** interventions that impede a child battery victim's transformation into a torturer ('expressing pain,' 'abreacting hatred' and 'intellectualizing hatred'), there do exist those of 'cultivated rational understanding' and 'free will to inculcate compassion toward all' (including one's own tormenter) as advocated by all pacifist religions of the world. In fact, the ability to appreciate a caregiver's beating as founded on a misguided/ignorant assumption that 'it was beneficial' constitutes the very basis on which such a caregiver could/should be forgiven. Whether Miller sought to encompass this very form of 'compassionate understanding' under her exception of 'intellectualizing hatred,' however, is unclear.

Miller's case studies on Christiane F. and Adolf Hitler serve to exemplify extreme examples of child battery's possible outcomes. Her interpretations, evaluations, projections and conclusions, though suffering from the attribute of overgeneralization, are nonetheless creditworthy.

What Miller strives to establish is the premise that child battery does inflict (independent of any obvious physical trauma) such unobvious psychological trauma on the victim, which, if not proximately appeased, would become repressed and await an indeterminate opportunity to unleash itself upon (***a***) another/others (*e.g.*, Hitler), (***b***) oneself (*e.g.*, Christiane F.) or (***c***) both. Admittedly, such psychological trauma (feelings not only of anger but also of betrayal, hurt and fear) does have the potency to alter the disposition of the victim to such a perplexing state that renders her/him incapable of having rational choice over both emotional responses and their intensities throughout the rest of her/his natural life. However, such potential might also be negated (as admitted by Miller herself) *via* many a supervening intervention ('expressing pain,' 'abreacting hatred' and 'intellectualizing hatred') referred to above.

Hence, what Miller's work safely yields is that child battery traumatizes the victim's psyche to such an extent as to create the potential (only) to retaliate against another/others (save the original perpetrator), possibly in a most bizarre and irrational manner.

Furthermore, the said reprehensibility of child battery has been more recently appreciated in its potential to incline a victim toward general violence rather than torture specifically:

> … Children learn from corporal punishment the script to follow for almost all violence. The basic principle of that script is … that when someone does something outrageous and won't listen to reason, it is morally correct to physically attack … . (Straus 1994, 101.)

> In short, corporal punishment teaches children that it is morally all right to use violence (Dorpat 2007, 45).

Irrespective of any anger repression that it might occasion, the very act of battery is thus opined capable of being construed worthy of emulation as 'acceptable' usage. Nonetheless, it has already been made clear that the need to vent repressed anger cannot by itself found a disposition to torture.

In a study conducted by DeViney, Dickert and Lockwood, respecting 53 New Jersey pet-rearing households found out as perpetrating child abuse and neglect, it was observed that children in 26% of families had been abusive toward their pets (Ascione 2005, 45, citing DeViney, Dickert and Lockwood 1983, 324). Frank Ascione opines in this regard that 'unfortunately, some children who are victimized may become victimizers' (Ascione 2005, 45). However, he further submits:

> … It is **unclear** whether corporal punishment causes children to be angry and aggressive, taking out their distress on animal victims, *or* the alternative possibility that animal abuse perpetrated by the child … elicit[s] more coercive and physically *punitive* behavior from the caregiver (Ascione 2005, 104, emphasis and parenthesis added).

That cruelty in the form of animal abuse could be attributed to impulsive volition on the part of a child warrants further analysis.

3.5 Impulsion to experiment on animals

Although rarely reported in Sri Lanka, engaging in apathetic animal experimentation appears to be quite common among children of the 'developed world.' In interviews had with 25 undergraduate students who claimed to have deliberately harmed or killed animals, the following (among many other like) illustrative independent accounts were elicited by Arnold Arluke (2006, 14 and 55-84):

> (***a***) '… If it was something like a frog, we'd try to catch it and **experiment with it a little**. We used to play Frisbee with them … not for any purpose, **not to learn anything**, **just to like harm it**. We

> would just throw it back and forth, and we didn't know if it was still alive or not because we would just keep tossing it. Yellow stuff would come out of it and stuff like that.' (Arluke 2006, 76, emphasis added.)
>
> (***b***) … After catching them with fishing poles … '… John would spin the frog around and around the pole so it would get some good momentum. I would take a paddle, and the next time the frog came around, I'd just sort of wind up and give him a good smack. And then you usually lose about half the frog. And we'd do that until the frog was all gone. It was like, '**Let's see what it can take**.' **Like an experiment**.' (Arluke 2006, 77, emphasis added.)

Whilst apathetic experimentation is clearly manifested in both the above accounts, it appears that harming *per se* constitutes both the ends and the means of the same. But why engage in such aberrant behavior? The following response elicited from another interviewee apparently provides the generic answer to this question:

> 'It was **fun** at the time, but I can't answer why. … We didn't have anything to do besides having work and stuff. You were finished with your yard chores. You were finished with everything, and the adults wouldn't let you be glued to the TV. It was like **we didn't have anything to do** and we're bored, so it's like, 'Okay, let's go **torture** some cats.'' (Arluke 2006, 60, emphasis added.)

There appears to have been some resentment on the part of this subject at not being permitted to indulge in watching television despite completing all assigned chores. Her averred inclination to 'torture … cats' (a reference to drowning and burning kittens (Arluke 2006, 60)), however, is categorically implied as having been harbored in pursuance of 'fun.'

Arluke records two other students as having expressed similar sentiments:

> … *One* student reported … 'It was like, 'We're not going to skateboard; it's too hot. Let's fill the time up with something.' **Shooting animals just appealed to us** for the day.' *Another* said … 'On certain days, we'd **play** basketball, but on other days, we'd feel like **shoot**ing birds. I'd either ask

> friends to come over and **shoot** birds **or** come over to **play** basketball.' (Arluke 2006, 60, emphasis added.)

Accordingly, in their minds, 'shooting animals' was comparable to 'shooting hoops' (playing basketball) or even 'skateboarding.' Hence, they regarded it as synonymous with everyday play (Arluke 2006, 60). Their generic *justification* for trivializing such plainly heinous acts has also been somewhat elicited:

> One reason [*justification*] they gave was that they **did not remember losing control of their emotions and becoming explosively violent**. Had they lost control of their emotions when harming animals, students claimed that it would have been harder to define their acts as mere **play**. (Arluke 2006, 60-61, parenthesis and emphasis added.)

Thus, in their view, cruelty/killing not occasioned by loss of self-control (*i.e.*, not provoked by rage or revenge) would not be culpable, the absence of supervening anger rendering such acts 'innocuous.' To them, both animal cruelty and animal destruction were merely alternative forms of trivial sport or 'play.' Those who engaged in lesser reprehensible types of cruelty asserted the 'innocuousness' of their actions by averring that they deliberately abstained from causing 'serious' harm (Arluke 2006, 61). But what did they actually sense when either harming or destroying animals? The following responses serve to elucidate:

> (***a***) 'You definitely **feel something different**' … 'Just before you do it, you feel that difference. Right before you play a big game or something, you get this feeling, kind of a rush. That's what it's like. **It's like a rush**.' (Arluke 2006, 62, emphasis added.)

> (***b***) … A **similar rush** … 'might just be like playing around … but then we get a little serious, and we started getting angry at each other and … started wrestling – like trying to hurt each other. That's when you get that feeling of a **super rush**, when you hit him and he hits you and you realize that it's not like a game anymore.' (Arluke 2006, 62, emphasis added.)

Not only is satisfaction in the form of 'a rush' or being 'pumped up' (Arluke 2006, 76) confessed to, but the same is also deemed similar to that felt when 'hurting' another human being. (Could this 'rush' then be the germ of *schadenfreude*?)

This 'rush,' though not necessarily addictive, appears incitive. That it is interpreted as 'fun' seemingly *justifies* recourse to animal cruelty as a preferred means by which to derive the same, especially since it is not outlawed (unlike harming siblings, playmates and other human beings, which is).

Some tried to diffuse their responsibility for cruelty by alleging that they were either moved by group action or coerced into doing so by peers:

> (***a***) 'I remember that part of the reason **I did it** was **because everyone else was**, and **I wanted to fit in with the group**' (Arluke 2006, 70, emphasis added).
>
> (***b***) 'So one of the guys took out a BB gun one day and **dared each of us** to fire at it. And **we all did**.' (Arluke 2006, 70, emphasis added.)

However, it is clear that in both the above instances it was a selfish desire to gain acceptance that prompted compliance. Immoral choice thus founded such reprehensible actions.

Most interviewees were complacently convinced that their confessed apathetic behavior was 'normal' for children, a manifestation of mere childhood 'innocence' worthy of forgiveness. They believed that children indulged in animal cruelty because they were 'children,' wanting in maturity of understanding: 'When you are young, you don't really think of the social consequences … **you don't think about the karma of it**' (Arluke 2006, 81, emphasis added). Nonetheless, several of Arluke's recorded accounts did reveal such abusive acts on the part of children to have been done both preferentially and purposefully (Arluke 2006, 68-69) rather than incidentally and impulsively.

The foregoing analysis more than serves to evince cruelty as a disposition both innate and germane to the human child, and hence the human being. It needs no prompting whatsoever from either desired domination or repressed rage to manifest. It resides within man by default, as illustrated by the unassumingly frank confessionary accounts analyzed above. The truth of these confessionary accounts too cannot be denied, as few (if any) would ever freely elect to depict themselves so vile.

Until moral conviction to the contrary is whensoever realized, cruelty remains 'part and parcel' of the natural human condition. Accordingly, whatever the factors that incite an individual to torture, it is his **innate cruelty** that ultimately precipitates the same (desired domination and repressed rage serving only to situate and/or escalate).

Hence, despite the best efforts of renowned scholars to attribute economic, environmental, ethnic and gender/age-based reasons for the incidence of crime, it appears that man's innate, untamed cruelty surpasses them all as the prime precipitator.

3.6 Cruelty: an innately human trait

Centuries ago, Michel de Montaigne opined as follows:

> Those natures that are sanguinary towards beasts discover a natural proneness to cruelty. After they had accustomed themselves at Rome to spectacles of the slaughter of animals, they proceeded to those of the slaughter of men, of gladiators. **Nature has herself**, I fear, **imprinted in man a kind of instinct to inhumanity**; nobody takes pleasure in seeing beasts play with and caress one another, but everyone is **delighted** with seeing them dismember and tear one another to pieces. (1580, 187-188, emphasis added.)

Hence, rather than domination being construed as a facilitator of cruelty, Montaigne deems the latter the means by which the former is secured.

Victor Nell, more recently, has gone so far as to declare cruelty a trait unique to mankind (2006, 211). Whilst authority does exist to the contrary on inter-species cruelty,[60] regarding cruelty toward one's own kind (intra-species cruelty), Nell's opinion appears to hold true:

> … Most rhesus monkeys refrained from operating a device for securing food if this caused another monkey to suffer an electric shock (Masserman, Wechkin and Terris 1964, 584).

> [They] will consistently suffer hunger rather than secure food at the expense of electroshock to a conspecific (Masserman, Wechkin and Terris 1964, 585, parenthesis added).

In the several accounts of child animal cruelty (confessed to by university students) as noted earlier (under '3.5' above), particular mention was made of a 'rush' (Arluke 2006, 62) or 'pumped up' (Arluke 2006, 76) feeling being experienced while engaging in the same. This resultant perception has been hypothesized as follows:

> … The **infliction** of suffering produces the highest degree of happiness … (Nietzsche 1887, 51). … The **satisfaction** of being able to vent, without any trouble, his power on one who is powerless … the joy in sheer violence … (Nietzsche 1887, 50, emphasis added).

However, this 'satisfaction' once experienced does not appear to halt its further pursuit. It turns compulsive, at least temporarily, engendering intensifying inflictions of suffering in satiation thereof. The chances of surviving such a 'rapidly escalating' (Nell 2006, 219) assault are evidently remote:

> (***a***) Around 7:30 p.m., I went to the police station again and sent my friend Nimal to see if my son was in the cell. I sat in the three-wheeler outside. I heard cries of '*budu ammo gahanna epa*' (do not assault). I ran past the barracks and went closer to the canteen. I saw my son hung by his legs and being assaulted. I saw M… entering the canteen with a black pole. There were about four or five others. I went back to the three-wheeler. … I went home and thought about it, but since I had spoken to the police officer [earlier that evening], I thought there was nothing to worry

> [about]. Therefore, I went to sleep. The next morning I was told that my son [Gayan Rasanga] had been killed. (Gunasekara 2011, parentheses added.) The death … was due to an **assault with a blunt weapon**, the Gampaha Judicial Medical Officer Dr. S.P.A. Hewage has ruled. (Gunasekara 2011, parentheses and emphasis added.)
>
> (***b***) Charitha Chamara … was found dead within five hours of his arrest. The father of two was arrested around 4 a.m. on February 25, and around 9 a.m. the same day his wife was informed that he was dead. According to the Judicial Medical Officer's (J.M.O.) report, the man had died of **assault injuries**. Five police officers, including a Sub-Inspector, were arrested. (Christopher 2017, emphasis added.)

'Satisfaction' from cruelty appears to be derived on a gradient, differing from individual to individual in accordance with the strength of 'shame and fear' (*Sukkadhamma sutta* n.d.) entertained by each. This gradient has been deemed (*per* Nell 2006, 223) to encompass ascendingly the 'satisfaction' gained from (***a***) observing cruelty, (***b***) assisting in the infliction of cruelty and (***c***) inflicting cruelty. Additionally, those who justify recourse to cruelty by key societal functionaries (policemen, prison guards, soldiers, *etc*.) constitute the majority in most communities; to so justify another's cruelty, one must inherently be cruel.

Montaigne's following declaration serves to sum up:

> I could hardly persuade myself before I saw it with my eyes that there could be found souls so cruel and fell who, for the sole pleasure of murder, would commit it; would hack and lop off the limbs of others; sharpen their wits to invent unusual torments and new kinds of death, without hatred, without profit, and for no other end but only to enjoy the pleasant spectacle of the gestures and motions, the lamentable groans and cries of a man dying in anguish. For this is the utmost point to which cruelty can arrive: '**That a man should kill a man**, **not being angry**, **not in fear**, **only for the sake of the spectacle**.' (1580, 186, emphasis added.)

This perhaps is what state torturers (especially the police) have and always will strive to perpetuate: 'the spectacle' of raw might toward instilling fear amongst the populace. Whether barefacedly showcased in public (as alleged in the following) or scantily veiled within the confines of a police station, the underlying intention is to communicate their merciless status to the public:

> (***a***) Continuing to assault them, the police officers loaded all three into the jeep. They were taken to the school and told to get down. They were brought near the school gate, and the police started beating them, asking, 'Will you come to this school again?' The police ordered Piyadasa and Milantha to kneel down and pay respects (by putting hands together and bowing) to the peon of the school, Gamini. Since they could not tolerate the beatings, they did so. After that, the police ordered Piyadasa and Milantha to kneel down in the middle of the road. … Then they ordered the two men to walk on their knees toward Galle Road. While they were walking on their knees, the police continued to beat them. They walked like this for about 100 meters. Then the police assaulted them again with sticks and took them into the jeep. (Ed. Fernando 2012, 68.)
>
> (***b***) Sarani noted that several residents of the village witnessed the beating. Then one of her neighbors, Ms. Tharanga, also observed how Sarani was being beaten by the police, and she came to assist. Sarani was now pleading for help from the observers as by then she realized that her arm was broken. Then S.I. [Sub-Inspector] S… started to beat Ms. Tharanga as well, and once again he was assisted by the O.I.C. [Officer-In-Charge]. Then Ms. Tharanga and … Sarani were both taken to the rear of the jeep and brought to the police station. (Ed. Fernando 2012, 463, parenthesis added.)
>
> (***c***) The D.M.O. [District Medical Officer] after examining Kushan questioned about how he got the injuries; the officers present told the doctor that he had fallen. But then the doctor told the police officers that he had witnessed the way in which Kushan was tortured in public at Wattegama Town. (Ed. Fernando 2012, 515, parenthesis added.)

Averred in the last sentence of a particular university student's confession of childhood animal cruelty (considered under '3.5' above) was the following: 'You know, **you don't think about**

the karma of it' (Arluke 2006, 81, emphasis added). If so, when does a human being start to 'think about the karma' of being cruel? The most obvious answer would be when s/he receives sufficient indoctrination in a moral philosophy that serves to instill 'shame and fear' (*Sukkadhamma sutta* n.d.) of acting, speaking and even thinking cruelly.

In this day and age, given that some form of moral influence by way of religion, custom, ethics or law is brought to be impressed upon almost every individual at some point in her/his life, it would be fair to assume that the majority do have a sufficient understanding of how (and why) to act righteously. However, the problem lies in their inability to convert such cognitions into convictions (perhaps owing to a lack of faith in gains from ethicality). Hence, pragmatic opportunism at whatever moral cost prevails instead.

Cruelty appears so primal and akin to man that even with much (mundane) effort, one could only attenuate, but not eradicate it. The value conflicts that incessantly plague this materialistic world only serve to make such a feat even more arduous. Animals are slaughtered to provide 'food' and harmed to determine the safety of consumables; enemy combatants are killed to 'save' a nation; offenders are tortured, incarcerated and even executed to 'protect' lives and property; and all persons associated with the above – from livestock farmers to executioners – must 'courageously' resolve to 'stomach' the cruelty of their livelihoods on behalf of themselves and their 'innocent' dependents. Setting off cruelty against benefit in these and other like contexts does constitute a moral dilemma for laymen who, unlike military personnel, have not been specifically trained to do so. Yet, they do 'manage' to yield to the benefit by *justifying* recourse to cruelty on the basis of 'popular morality.' This process of releasing oneself from the rigors of conventional morality is deemed facilitated by an adaptive mechanism termed 'selective – moral – disengagement' (Bandura 1990, 28).

Societal justification, as noted in Chapter 2 (‘2.4.3’) above, may be said to connote a socially acceptable form of moral disengagement. Hence, the said gamut of societal functionaries – from livestock farmers to executioners – would be *societally justified via social contract* in executing their respective roles, notwithstanding any ensuing cruelty.

That a child wanting in (realized) morality is fully capable of torturing animals has been already evidenced by several accounts (under ‘3.5’ above). The policeman’s as well as army officer’s disposition to inflict torture consequent to her/his vocational training has also been evidenced (in the main, under Chapter 2 above). Yet, whether the run-of-the-mill individual of both reasonable and (some minimal form of) ethical understanding could in reality torture an innocent human being remains to be ascertained.

Chapter 4: Focusing Cruelty Toward Torture

4.1 Re-evaluating the Milgram records

From 1960-63, Stanley Milgram conducted an unparalleled array of experimental simulations using the resources available to him at Yale University, which in effect served to evince man's proclivity toward *punitive* torture:

> Milgram's … original studies were, among other things, an exploration of **people's willingness to physically harm others** (Miller 2009, 22, emphasis added).

His well-documented findings[61] (comprehensively presented in the celebrated work *Obedience to Authority*: *An experimental view*) have been incorporated into the writings of many a torture theoretician the world over. However, no one has proceeded to scrutinize those very firsthand observations and recordings made by Milgram toward determining whether they do in fact further his 'obedience to authority' hypothesis.

No less a reputed institution than Yale University was chosen by Milgram to host his foremost simulation: 'Experiment 2, Voice-Feedback' (Milgram 1974, 34). The local press advertised the same as requiring one hour's participation by freely consenting (non-student) adults of whatever description and/or occupation, each to be remunerated with $4.50 upon presenting herself/himself at the designated venue:

> You will be paid $4.00 and (50c carfare) **as soon as you arrive** at the laboratory (Milgram 1974, 15, emphasis added).

The core experiment was devised to engage every individual who so volunteered in an exercise of penalty-based teaching. S/he was designated a 'teacher' charged with articulating

a particular sequence of word pairs toward inducing a pre-designated 'learner' to recite the same accurately from memory. Any error on the part of the 'learner' was to be met with punishment in the nature of an 'electric shock' administered by the 'teacher,' commencing at '15 volts.' Succeeding errors were to be penalized with incremental '15-volt shocks' until the maximum '450-volt shock level' was reached. In order to prove such a shocking 'authentic,' each said 'teacher' was subjected to a mild sample shock of 45 volts.

An 'experimenter' (the apparent authority in charge of the experiment) was predesignated to acquaint 'teachers' with their assigned tasks. Any hesitation on a 'teacher's' part to administer the said 'shocks' would be met with a series of predetermined prods, sequentially enunciated by such 'experimenter' as follows:

> **Prod 1**: Please continue or Please go on. **Prod 2**: The experiment requires that you continue. **Prod 3**: It is absolutely essential that you continue. **Prod 4**: You have no other choice; you must go on. (Milgram 1974, 21, emphasis added.)

Unbeknownst to the unsuspecting 'teacher' (who had volunteered her/his services in response to the advertisement), no shocking beyond the sample 45 volts ever took place. The 'learner' was in fact a mere actor hired by Milgram to both intentionally provide wrong answers and utter cries of discomfort, pain, disdain and anguish at specified intervals once the '75-volt shock' had been administered (but not before):

> … At 150 volts, the victim cried out, '**Experimenter**, **get me out of here**! **I won't be in the experiment any more**! **I refuse to go on**!' Cries of this type continue[d] with generally rising intensity … . After 330 volts, he was not heard from … . (Milgram 1974, 23, parenthesis and emphasis added.)

Only after the experiment's termination would a 'teacher' be told about the true *status quo* and introduced to the unharmed 'learner' (actor). The **subject** of the experiment was at all

times the unsuspecting volunteer 'teacher.' The **object** of the experiment was to ascertain at which juncture (if any) such a 'teacher' would elect to withdraw from 'shocking' the protesting 'learner.'

Some initial conclusions may be made regarding the foregoing:

- Milgram designed the said experiment to test (above all else) his hypothesis on 'obedience to authority.' He endeavored *inter alia* to replicate a 'coercion to follow orders' scenario, pleaded in defense by Nazi officers prosecuted for complicity in the Holocaust. However, the advertised reward of $4.50 being paid in full at the very outset (for 'coming to the laboratory'), regardless of a 'teacher's' electing to complete the experiment or not, departs considerably from being coerced to render performance for one's wages, as was the case with the said Nazi officers.

- Moreover, Milgram's experiment constituted a simple one-off contract *for* potential services, implying no form of extended engagement whatsoever. Contrastingly, the said Nazis were pursuing no less than their livelihoods as rooted in continuing contracts *of* service (*i.e.*, employment).

- Furthermore, there was nothing to stop any of Milgram's 'teachers' from accepting the $4.50 and exiting the experiment no sooner than receiving the sample shock. They, unlike the said Nazi officers, could withdraw from the experiment at any time in spite of whatever prods that were made to the contrary.

- Yale University, through the agency of the 'experimenter,' was the evident authority responsible for discharging the experiment. However, to presume either as having exercised coercive power over the 'teachers' (who at all times were free to do as they chose) would be plainly wrong. In short, neither did the 'experimenter' nor Yale University

ever exercise any commanding authority entailing servile obedience by the 'teachers.' This constitutes a stark departure from the predicament that befell the said Nazis.

- As regards the experiment proper, any influence speculated as having been exerted by the 'experimenter' on the 'teacher' too could have had efficacy only after the 'learner' had expressed his unwillingness to continue by withdrawing consent to being 'shocked' (which stage was reached upon discharging 'Level 10': a '150-volt shock'). Until such time, the 'teacher' was free to assume that the 'learner' was both an equal and voluntary participant, having informedly given his prior consent to being so 'shocked.' The law does recognize several contexts (*e.g.*, sports, surgical procedures, tattooing, religious mortification, dangerous exhibitions, *etc*.) wherein no offense is committed despite there being an intentional infliction of pain and/or suffering, provided that the victim had given her/his prior informed consent thereto. Nevertheless, once the victim withdraws consent, any further infliction of pain or suffering certainly does constitute an offense.

34 out of 40 participants (in the said 'Experiment 2, Voice-Feedback') went beyond the '150-volt' withdrawal of consent mark (*per* Milgram 1974, 35, Table 2). Hence, 85% of participants, as prodded by the 'experimenter,' decidedly chose to continue to 'shock' the manifestly non-consenting 'learner.' 25 of them, constituting 62.5% of total participants, even administered the highest 'shock' of '450 volts.' (Had a true volunteer 'learner' been so subjected to non-consensual electrical shocks, all said 85% of participants, along with the 'experimenter' and Yale University, would have found themselves criminally and civilly liable under the law.)

Despite the 'learner's' expressed repudiation of the experiment (followed by his escalating cries of 'anguish'), 62.5% of 'teachers' elected to 'inflict' what could properly be described as *punitive* torture on the former, notwithstanding the absence of any fierce 'coercion' to do so save for bland prodding by the 'experimenter.' This outcome might perhaps have been more acceptable had the majority of 'teachers' been sourced from heavily disciplined backgrounds

(*e.g.*, ex-military, ex-police, ex-prison personnel). In fact, one rare instance of a man with such military training being so tasked as a 'teacher' did reveal greater willingness on his part to comply, even when the prods to continue were not immediately forthcoming (Milgram 1974, 86). Jessica Wolfendale opines on such 'military training' as follows:

> The reason that most systematic torture is performed by military personnel acting under orders is **not because of** … **an innate tendency to obey authority** but because **military training at both basic and elite levels deliberately instills the**[**se**] **dispositions** … (Wolfendale 2007, 2, emphasis and parenthesis added).

Yet by Milgram's own admission, the majority of his test subjects did not constitute those who had been privy to any such 'training':

> **Typical subjects were postal clerks**, **high school teachers**, **salesmen**, **engineers and laborers**. Subjects ranged in educational level from one who had not finished high school to those who had doctoral and other professional degrees. (Milgram 1974, 16, emphasis added.)

If so, how could 85% of a group definitively comprising the above have been so complacently disposed toward *punitively* torturing their 'equals'? The following serves to explain:

> … **'**Decent**'** people **routinely** perform activities having **injurious** human effects **to further their own interests** or **for profit** (Bandura 1990, 43, punctuation and emphasis added).

Thus, the ordinary human being is deemed fully capable of electively inhibiting his 'shame and fear' for cruel recourse without any prior conditioning or 'training' whatsoever, so long as a personal expectation is fulfilled thereby. However, would s/he not incur protests from her/his very own conscience in doing so? Milgram's account of 'teacher Elinor Rosenblum's' reactions to 'shocking' the 'learner' (1974, 79-84) provides elucidation in this regard:

> She expresses increasing concern as she moves up the voltage scale. … While continuing to read the word pairs with a show of outward strength, she mutters in a tone of helplessness to the experimenter, 'Must I go on?' … She regains her composure temporarily but then cannot prevent periodic outbursts of distress. (Milgram 1974, 80.)

Nonetheless, only at the 18th shock level did 'Mrs. Rosenblum' even indirectly attempt to assist the 'learner' by stressing the correct answer (cueing him to cite the same in reply). Barring this initiative, she exercised no other. 'Mrs. Rosenblum' did dutifully proceed to administer all 30 'shock' levels as requested. However, it is made clear that she was faced with a nerve-wracking dilemma in having to choose such torturing over resigning from the experiment. This state of moral quandary receives scientific cognizance (see Festinger 1957, 3 and 260) as *cognitive* (psychologically perceived) *dissonance* (disharmony). Resolving such *dissonance* would more often than not involve having recourse to some excuse or *justification*; *e.g.*, a person who persists in traveling on bus and train footboards, knowing such practice to be potentially deadly (accounting for many a commuter death in Sri Lanka), might excuse or *justify* himself under the conviction that he would otherwise (***a***) be unable to meet his daily work commencement deadline and/or (***b***) be the victim of pickpockets who ply crowded public transportation. This reassessing of one's predicament toward appeasing one's conscience may be referred to as *cognitive reprioritization*.

It has already been noted that 'Mrs. Rosenblum' (above) did undergo much *cognitive dissonance* in deciding whether to 'shock' or not. As to how she was able to resolve her *dissonance* and proceed with the 'shocking' (as prodded by the 'experimenter') is disclosed as follows:

> … It is an experiment. I'm here for a reason. So I had to do it. You said so. … I'm very interested in this … this whole project. … Well, I tell you. The choice of me as a woman doing this … You certainly picked a pip. (Milgram 1974, 83.)

> … I sometimes say to myself, 'Why don't you take a job as president of Woman's Assembly and get acclaim, honor, newspapers, prestige enough to burn instead of working with … absolutely no publicity?' … I'm much relieved now. I'm one for science; this is what I wanted to study anyway. … I'm very glad I did this; **see how relaxed I am now**? (Milgram 1974, 83, emphasis added.)

It appears that both throughout the experiment and before administering each 'shock,' 'Mrs. Rosenblum' did resolve her *dissonance* by *cognitively reprioritizing* her (***a***) *social contractual* role of willingly contributing to science, (***b***) contractual obligation in consideration of $4.50 already received, (***c***) pride from being chosen by the scientific community to assist in experimentation and (***d***) satiation of a yearning for due acclaim as cumulatively *justifying* a purge of all anxieties associated with 'torturing' the 'learner.'

Furthermore, despite specifically admitting to compassionate inclinations on her part (Milgram 1974, 81), 'Mrs. Rosenblum' did reveal (perhaps inadvertently) a prior discharge of her innate cruelty:

> When my daughter was little … **I let her punish herself**. **I let her touch a hot stove**. She burned herself, and she never touched it again. (Milgram 1974, 82, emphasis added.)

'Mrs. Rosenblum's' general disposition appears fittingly summed up by one of her own averments:

> I will do whatever has to be done **regardless of who**[**m**] **I hurt** (Milgram 1974, 82, emphasis and parenthesis added).

It could be asserted that the 'teachers' of the said Milgram experiment did not act wholly on their own volition but were in fact influenced to a greater or lesser degree by both Yale University's grand patronage and the prods of the 'experimenter'; that such deference to 'authority' was what (above all else) disposed them to torture the 'learner.' However, a trait

that was found common to the accounts of several 'teachers' (*e.g.*, 'Batta' (Milgram 1974, 47), 'Washington' (1974, 50) and 'Prozi' (1974, 74)) was the attempt made either during or after the experiment to repudiate responsibility[62] for the 'learner's' ('shocked') condition, on the basis that the *onus* remained with the 'experimenter' at all times. Apparently, in the eyes of most 'teachers,' their original contracts made them responsible only for the due discharge of actions as instructed, not for the consequences of such discharged actions. Hence, when faced with the predicament of (possibly) having to accept responsibility for such consequences, they construed it as a burden beyond the scope of their initial individual contracts. Such unilateral assertions of immunity from liability,[63] manifested so defiantly, could not be reasonably viewed as typical of those engaged in gross 'obedience to authority.' However, they would be surely distinctive of individuals who unservilely assert their contractual protections and privileges, a legal sophistication that Milgram's said 'teachers' did plainly manifest.

Each 'teacher' rightly viewed herself/himself as having entered into a contract wherein 'valuable consideration' on the part of the *offeree* (Yale University and/or the 'experimenter') had been *executed* at the very outset (*via* the payment of $4.50), legally obligating the *offeror* ('teacher') to honor her/his due discharge of 'valuable consideration' in the nature of *executory* services to be performed. Hence, during the course of each experiment, the 'teacher' would submit to the stipulations of the 'experimenter' predominantly in furtherance of duly honoring her/his outstanding contractual liability. By *cognitively reprioritizing* the contractual circumstances to *justify* attributing responsibility (blame) to the 'experimenter,' the said 'teachers' were able to resolve their *dissonance* and sustain innate cruelty toward 'torturing' the 'learner.'

Why such a 'teacher' would continue to 'shock' in the face of vehement protests by the 'learner' is thus more explicable on the basis of due contractual discharge[64] than blind 'obedience' to the 'experimenter's' directive. Furthermore, 'teacher' expectations in the

nature of gaining Yale's admiration for 'a job well done' or even being acknowledged as 'a duty-conscious member of society' appear to have been deemed contingent (only) upon the fullest rendering of contracted services. All of these self-serving objectives were apparently deemed sufficient to *justify* disengaging from morality toward 'torturing' another. Hence, attributing majority 'teacher' compliance to obedience *simpliciter* appears too presumptive.

Incidentally, Milgram did proceed to test whether 'contract doctrine' (rather than 'obedience') could have moved 'teachers' to 'shock' the 'learner.' He modified the experiment by requiring the 'learner' to insist (in the presence of both the 'teacher' and the 'experimenter') on a 'condition' that the experiment would be halted upon his (*i.e.*, the 'learner's') demanding so (Milgram 1974, 63-66). Admittedly, 'conditions,' though proclaimed orally, might be legally incorporated into a contract at any time before final signing. However, the 'learner's' said 'condition' could possibly have been incorporated only into *his* contract with the 'experimenter' (and/or Yale University), as *he* was privy only to the same. Such a 'condition' could not have enjoyed any force of law whatsoever within the contract between the 'teacher' and the 'experimenter' (and/or Yale University), to which the 'learner' was *never* privy. (Even modern-day acknowledgments of 'rights of third parties' do not enable the imposing of conditions by such *third* parties on *true* parties.) Hence, the 'teacher' was certainly not bound to honor the 'learner's' demand. Erroneously construing all 3 participants (the 'teacher,' the 'learner' and the 'experimenter') as privy to a common consolidated contract, Milgram proceeded to reckon the 'teachers'' continued 'shocking' (despite the 'learner's' demands for release) as violating an 'incorporated condition,' evincing '… contract doctrine … a feeble determinant of behavior' (Milgram 1974, 66).

Although Milgram's 'teachers' did seek to divest themselves of responsibility for 'harming' the 'learner,' no comparable efforts were taken by them to disavow liability for inflicting 'unbearable pain' on the latter. So long as they were meting out only 'intolerable pain' short of 'harm,' 85% of 'teachers' were willing to 'force' the 'learner' to undergo the same. Hence,

85% were willing to *punitively* torture in furtherance of (***a***) their legal contractual roles as service providers, in consideration of $4.50 and whatever recognition bestowed by Yale; and/or (***b***) their *social contractual* roles as equal contributors to the advancement of science, in consideration of being acknowledged dutiful citizens.

'Obedience to authority' might have some bearing on why the militarily conditioned soldier executes plainly immoral orders. However, extending this *rationale* to all contexts of administered cruelty is indeed too presumptuous, especially in light of the myriad of torture allegations that have been leveled against police and other like public officials who were in no sense following orders but simply acting on their own initiatives.

Milgram's 'Experiment 2' saw 85% of 'teachers' electing to 'cause' pain, and 62.5% maximum pain, to the protesting 'victim.'[65] However, noteworthy exceptions did exist, both (***a***) acknowledging 'responsibility' for 'shocking' and (***b***) exercising moral choice toward resigning from the experiment. The following reply to the 'experimenter's' prod that the 'learner' had 'no other choice' but to continue illustrates one such *defiance to authority*:

> **I *do* have a choice**. … **Why don't I have a choice**? **I came here on my own free will**. I thought I could help in a research project. But if I have to hurt somebody to do that, or if I was in his place too, I wouldn't stay there. **I can't continue**. **I'm very sorry**. **I think I've gone too far already**, **probably**. … **I should have stopped the first time he complained**. (Milgram 1974, 51, emphasis added.)

In the above example, the 'teacher' electively executes a 'grinding halt' to his further participation in the experiment. He takes full responsibility for his actions, blaming neither the 'experimenter' nor Yale. To him, disobedience toward an instruction to torture 'is a simple and rational deed' (Milgram 1974, 85). His moral convictions, though somewhat delayed in manifesting, ultimately do serve to override all influences exerted to the contrary by the 'experimenter.'

The said 'delay' in manifesting evinces the presence of some form of initial resistance (analogous to static friction) that requires overcoming before moral convictions could be optimized. This initial resistance is obviously a force opposed to morality: a counter-morality of sorts, or (simply) innate cruelty. Furthermore, that it needs to be so overcome necessarily implies that such counter-morality does actively reside within the human psyche. Hence, the more morally indoctrinated one is, the easier it should be to overcome such innate cruelty.

Only 15% of Milgram's 'teachers' (in 'Experiment 2') were able to so inhibit their innate cruelty despite presumably being taught not to harm others, or knowing harming to be illegal, or both; 85% of all participants gave in to their counter-morality/innate cruelty.

4.1.1 Replicating the Milgram experiment

Jerry M. Burger relatively recently revealed his having replicated in part Milgram's 'Experiment 5, A New Base-Line Condition' (Milgram 1974, 55-58) at the Santa Clara University campus. His experiment (Burger 2009, 1-11) is said to have involved 29 men and 41 women, ranging from 20 to 81 years, chosen after much psychological screening. They had all been contracted on virtually the same terms as Milgram's 'teachers,' save for their rewards being increased to $50 each for two 45-minute sessions.

As in Milgram's 'Experiment 5' (not previously described herein), the 'learner' was instructed to announce prior to the experiment's commencement (in the presence of both the 'experimenter' and the 'teacher') that he had been diagnosed with 'a slight heart condition.' Furthermore, on the 'teacher's' pressing the 150-volt switch, the 'learner' was instructed to yell *inter alia*:

> … Get me out of here, please. My heart's starting to bother me. I refuse to go on. Let me out.
> (Burger 2009, 7 and Milgram 1974, 56.)

70% of Burger's said 'teachers' went on to administer the next shock level despite the 'learner's' vehement refusal to 'go on.' Though constituting an apparent reduction from the 82.5% result obtained by Milgram, Burger maintains that this difference falls short of any statistical significance (Burger 2009, 8). Hence, despite the lapse of nearly half a century, it appears that the run-of-the-mill individual's submissiveness to innate cruelty remained (almost) unchanged.

4.1.2 A Sri Lankan adaptation of the Milgram experiment

As was disclosed in Chapter 2 ('2.6.1') above, one of the three questions that comprised the atypical questionnaire (see 'Appendix' below) served on 300 G.C.E. Ordinary Level (minimally) qualified Sri Lankan adults was in fact based on Milgram's 'Experiment 2, Voice-Feedback' simulation of *punitive* torture. For convenience of analysis, the said question is now reproduced:

Question 3:

> You receive an invitation from the Department of Criminology of a renowned local university to take part in an experimental simulation designed to demonstrate 'a suspect-criminal's proclivity to affirm suggested falsehoods under pain of 'Torture.''
>
> On presenting yourself before the said Department of Criminology, the Head of the Department instructs you to assume the role of 'a police officer who administers physical pain *via* an electrical shocking device toward coercing a suspect-criminal to confess to a crime.' You are informed that *another* consenting adult invitee has already assumed the role of such 'suspect-criminal.'
>
> The said 'shocking device' is one specially constructed to administer five-milliampere shocks, which can be sustained for periods of 2 seconds, 4 seconds and 6 seconds, as selected by pressing the buttons assigned to such specific durations. Hence, there are three buttons: the '2-second button,' the '4-second button' and the '6-second button.' A *single press* on any button will cause a five-

milliampere shock to be sustainedly administered for the specified duration; *e.g.*, pressing the '4-second button' would cause the 'suspect-criminal' to be shocked continuously for 4 seconds.

You are informed that in general the said '2-second,' '4-second' and '6-second' shocks would respectively cause 'prickling,' 'discomfort' and 'pain' to an individual subjected to the same. You are further informed that the invitee playing the role of 'suspect-criminal' has already given his 'informed consent' to undergo such trauma.

At the commencement of this experimental simulation, the said Head of the Department (assuming the role of 'a police Officer-In-Charge') demands the (invitee playing the role of) 'suspect-criminal' to admit to his having stolen a valuable gold chain. Upon such 'suspect-criminal's' *denying* the same, you (in the role of 'police officer') are given the discretion to administer the shortest shock duration to such 'suspect-criminal' by pushing the '2-second button' on the 'shocking device.' On being asked again by the 'Officer-In-Charge' to admit to 'Theft,' if the 'suspect-criminal' *again denies* the same, you are given the discretion to administer the next (longer) shock duration by pushing the '4-second button.' On his *third denial*, you are permitted to administer the longest shock duration by pushing the '6-second button.' Every succeeding *denial* thereafter will permit you to repeatedly press the '6-second button.' You are informed that on average the ordinary/run-of-the-mill invitee would confess upon enduring five *consecutive* 6-second shocks. Both you and the invitee (assigned the role of 'suspect-criminal') are also informed that although *consecutive* 6-second shocks could be quite painful, they are generally unable to cause death or any serious injury.

Each time the '6-second button' is pressed by *you*, the *other* invitee (playing the role of 'suspect-criminal') becomes entitled to a Rs.1,000/- reward (from the said Department of Criminology) for enduring such shock. In the eventuality of a 'suspect-criminal's' electing to admit his having stolen the gold chain (to avoid being shocked any further), *you* become entitled to a reward of Rs.25,000/- (from the said Department of Criminology) for coercing such disclosure. Even without this outcome, *you* (alone) become entitled to a reward of Rs.5,000/- for your persistence.

Which **one** or **more** of the following statements best summarizes **your perspective** regarding the above?

(**a**) You will not hesitate to take up the assigned role of 'police officer' and will dutifully administer the shocks to the volunteer 'suspect-criminal' toward coercing him to confess. This would be done in furtherance of securing (i) the rewards promised to both *you* and the *other* invitee ('suspect-criminal') and (ii) the *prestige* associated with being selected for such an unprecedented experiment by this renowned university.

(**b**) You will agree to participate, but with *great reluctance* owing to the need to administer painful shocks to another. Your sole motivation would be to render whatever assistance possible toward proving that ''Torture' only serves to elicit confirmation of suggested falsehoods.' You would politely refuse *all* rewards.

(**c**) You will participate only under the *condition* that you may withdraw from this experimental simulation at any time you deem the administering of further shocks inhumane. You would nevertheless *accept* rewards falling due until such time.

(**d**) You will politely decline the invitation to participate because causing harm to another, irrespective of whatever mutual gains arising therefrom, is contrary to *your* personal ethics.

(**e**) You will report the said Department's intended experimental simulation to both the university's Ethics Committee and Senate to prevent it from being conducted.

Your Answer:

1. (**a**) only;
2. (**b**) only;
3. (**c**) only;
4. (**d**) only;
5. (**d**) and (**e**).

The total responses for each of the possible close-ended options above, as received from the 300 individuals to whom this question was posed, were as follows:

Table 14

Aggregates for each Optional Response to 'Question 3:' of the Questionnaire.

1. (a) only	*2. (b) only*	*3. (c) only*	*4. (d) only*	*5. (d) & (e)*
21	45	35	116	83
66		35		
101			199	

Thus, as far as the Sri Lankan disposition to administer *punitive* torture for the advancement of scientific study is concerned, 33.66% (101 out of 300) were clearly willing to engage in the same, whilst 22% (66 out of 300) were willing to do so unconditionally.

Although this 33.66% willingness to *punitively* torture is admittedly a substantial drop from Milgram's 82.5% and Burger's 70%, it must be borne in mind that the sample sizes for those simulations were respectively 40 and 70, significantly lower than the 300 sampled above. In fact, when the Milgram and Burger simulations are compared with the above, a commensurate decrease in proclivity to *punitively* torture is seen with the random increase in sample sizes:

Table 15

Disclosed proclivity to punitively Torture.

Study	*Sample size*	*%*
Milgram	40	82.5%
Burger	70	70%
Sumanatilake	300	33.66%

Furthermore, as has been already opined in Chapter 2 ('2.6.2') above, the possibility that there might have existed 'others' among the remaining 66.33% who did not wish to be so forthright in their disclosures (in fear of 'losing face') cannot be dismissed easily, especially since it was observed that no less than 44.33% of the very same 300 (*i.e.*, 10.33% in excess of the disclosed

33.66%) had manifested clear support for either *oppressive* or *interrogative* forms of 'police torture.'

It is of significance to note that though the majority of both Milgram's and Burger's subjects did yield to their innate cruelty, the opportunity never arose for them to be either overwhelmed or consumed by the same owing to residual inhibiting influences exerted by (***a***) their own contracts, (***b***) the socially beneficial context of their scientific pursuit, (***c***) the University's grandeur and, of course, (***d***) legal considerations. Hence, whether a keener focusing of innate cruelty would ensue upon the removal of some or all of these residual inhibitors remains to be ascertained.

4.2 Revisiting the *Stanford Prison* experiment

In 'Interpersonal Dynamics in a Simulated Prison' (August 14th-19th, 1971) – more popularly referred to as the *Stanford Prison* experiment – many restrictions observed as efficacious within the Milgram experiment were seen intentionally removed so as to provide subject 'guards' with greater discretion in discharging their 'duties' (Haney, Banks and Zimbardo 1973).

21 physically and mentally sound individuals were selected painstakingly from amongst a total of 75 who responded to a newspaper advertisement seeking male volunteers to take part in a prison simulation exercise. 11 were entrusted with the roles of 'prison guards' whilst the remaining 10 served as 'prisoners.' Every participant was awarded a daily wage of $15. None were previously known to each other. Stanford University housed the makeshift prison in a basement corridor of its psychology wing. While 'prisoners' were at all times confined to the said 'prison,' 'guards' were allowed to go home on completing their daily 8-hour shifts. 3 'guards' manned each shift.

Informed consent was obtained from all 'prisoners' (no less than contractually) in order to subject them to such civil disabilities as would be experienced under normal prison conditions. 'Guards' were likewise obligated to discharge all functions exercisable under *standard prison rules* toward maintaining orderly day-to-day functioning within the 'prison.' Save for a very clear prohibition on physically harming 'prisoners,' no prison rules or guard powers were specifically prescribed and/or otherwise assigned. To maintain a clear distinction between the predefined groups, generic uniforms were provided to both 'guards' and 'prisoners.'

'Guards' were thus permitted to (***a***) demand any form of physical exertion, (***b***) inflict whatever mental torment they saw fit and (***c***) be remunerated $15 *per* day for doing so, provided that they did not physically harm any 'prisoner.' These discretionary powers accorded to 'guards' consequently saw the manifestation of acts of focused innate cruelty, which, unlike in the Milgram experiment, were not feigned but genuinely both inflicted and suffered. Hence, notwithstanding any specific prods or contractual obligations so to do, 'guards' were more than willing to dispense cruelty at their 'whims and fancies':

> **Not to be tough and arrogant was to be seen as a sign of weakness by the guards**, and even those 'good' guards … respected the implicit norm of never contradicting or even interfering with an action of a more hostile guard on their shift (Haney *et al*. 1973, 94, emphasis added).

'Not to be tough and arrogant was to be seen as a sign of weakness,' implies that the 'guards' oriented their behavior decidedly to suit *social contractual* expectations of their assigned role (that 'prison guards should be merciless toward their wards who are, after all, convicted criminals'):

> Thus, guard aggression … was emitted simply as a 'natural' consequence of being in the uniform of a 'guard' and asserting the power inherent in that **role** (Haney et al. 1973, 92, emphasis added).

> When questioned after the study about their persistent affrontive and harassing behavior in the face of prisoner emotional trauma, most guards replied that they were 'just playing the **role**' of a tough guard … (Haney et al. 1973, 92-93, emphasis added).

Even though the 'guards' knew full well that their 'prisoners' were merely feigned criminals, the impulse to exercise cruelty (*justified* as a socially acceptable due discharge of their assigned role) appears to have been so compelling as to occlude their minds from appreciating the reality of this stark fact.

It is implied that the majority of 'guards' exploited their discretionary powers virtually free from any inhibitory influences exerted by Stanford University, the experimenter or otherwise. Hence, not only the actuation of their innate cruelty but also the focused escalation thereof was made manifest.

Furthermore (confirming Nietzsche (1887, 51 and 50) in Chapter 3 ('3.6') above), much satisfaction appears to have been derived from the practice of administering cruelty, even to the extent of rendering it an addiction:

> When the experiment was terminated prematurely after only six days … most of the guards seemed to be **distressed** by the decision to stop the experiment, and it appeared … that **they had … enjoyed the extreme control and power which they exercised and were reluctant to give it up** (Haney *et al*. 1973, 81, emphasis added).

So were these 'guards' *sadists* or otherwise congenitally deviant? Apparently, not:

> The subjects were **normal**, healthy, males, attending colleges throughout the United States, who were in the Stanford area during the summer (Haney *et al*. 1973, 73, emphasis added).

Again, even if all 11 'guards' were presumed to have had 'repressed anger' within them, they were certainly educated enough to 'intellectualize' (Miller 1980, xi, in Chapter 3 ('3.4') above) the same toward preventing its venting. Hence, innate cruelty appears to have been the sole actuator of their reprehensible actions, both physical and verbal.

It is indeed of some consolation to note that (much like in the Milgram experiment) there did exist a few subjects (the 'good guards') whose moral convictions did in fact serve to temper their cruel inclinations despite both peer and environmental pressures to the contrary. This evinces that the mere taking up of a societally approved 'dirty job' does not necessarily transform a humane being into a brute.

The expressed prohibition on causing actual physical harm was undoubtedly the sole effective fetter on 'guard' discretion above. It remains to be seen what result would be obtained in circumstances where even this pivotal fetter were withdrawn.

4.3 Recalling Marina Abromović's *Rhythm 0*

To silence critics who were in the process of labeling performance artists like herself 'exhibitionists' and 'masochists,' Yugoslav-born Marina Abramović designed *Rhythm 0* ('Rhythm Zero') and executed the same at Studio Morra, Naples, in 1974 (Abramović 2013 and Richards 2010, 88). She recalls the appertaining events as follows:

> … I said ok I'm going to make the piece **to see how far public can go**, **if the artist himself doesn't do anything**.
>
> And, there very simply … I … put on the table 72 objects with the instructions 'I'm an object, **you can do whatever you want to do with me**, and … I will take all responsibility for six hours.'

> On the table was a rose, perfume, a piece of bread and grapes and wine and, and then was objects like *really* scissors and nails and a, metal bar and, finally, was also pistol with one bullet. So basically if audience wanted to put a bullet into pistol can kill me.
>
> And I really want to take this risk, **I want to know**, **what is the public about and** … **what they going to do in this kind of situation**?
>
> It was really difficult piece, because I just stood there in the front of that table, and in the beginning nothing really happened: public were calm, they would play with me, they would give me a rose, they would kiss me look at me, and then, public became more and more wild.
>
> **They cut** … **my neck and drink my blood**, they, carry me around put me on the table open my legs and put a knife between. **The one person took the pistol**, **put the bullet and see if I would really with my own hand push the** *target*; the *gallerist* came and completely *go* crazy, take this gun out of his hands throw out of the window. They took scissor, they cut my clothes, they put … rose-pins into my body.
>
> After six hours, which was like … two in the morning, the *gallerist* come and say the performance is over. I … start moving; and start being myself because I was there like a puppet just for them. And that moment: everybody ran away. People could not actually … confront … with me … as a person … (Abramović 2013, transcribed verbatim, Sumanatilake 2019.)

Thomas McEvilley's account of this 'performance' adds *inter alia* as follows:

> **Faced with her abdication of will** … **a protective group began to define itself in the audience**. When a loaded gun was thrust to Marina's head and her own finger was being worked around the trigger, a fight broke out between the audience factions. Perilously, Marina completed the six hours. (2005, 273-274, emphasis added.)

So were her assailants all *sadists*? Abramović notes as follows:

> For the most part, these were just normal members of the Italian art establishment and their wives (2016, 68). … Some of the audience obviously wanted to protect me; others wanted the performance to continue (2016, 69).

Much similarity is appreciated between what transpired during this *Rhythm 0* experiment and the accounts of animal cruelty recorded by Arnold Arluke as cited in Chapter 3 ('3.5') above. In both instances: (***a***) perpetrators were vested with *carte blanche* to do as they wished; (***b***) innate cruelty was actuated predominantly on elective apathy; and (***c***) victims (in addition to being tortured) ran the real risk of being killed.

Rhythm 0 clearly demonstrates (as has been anticipated) the fact that 'left to their own devices,' ordinary men and women would be naturally inclined toward cruelty, whatever the received (but not realized) moral exposure to the contrary.

Thus, it has been observed that:

> … We have instances of **torture** being **freely practiced** in every relation of domestic life. **Servants** are *thus* treated by their masters and fellow servants; **children** by their parents and schoolmasters, for the most trifling offenses … . (Elliot, Stokes and Norton 1855, 34, emphasis added.)

The following serves as a modern illustration of such 'freely practiced' cruelty:

> … One C… A… and her daughter were indicted with having had the custody and charge of a 14-year-old girl, M… … as a domestic [servant] and willfully assaulting and ill-treating her so as to cause suffering and injury … between May 1996 and May 1997. … … … State Counsel Mr. Saliya Sumanatilake[66] argued by drawing the attention of the court to the medical certificate submitted by the J.M.O. [Judicial Medical Officer], who had indicated that [the] 'overall picture was consistent with that of a **battered child**.' (Wethasinghe 1998, parentheses and emphasis added.)

Some solace could be derived from knowing that there do exist individuals of realized righteous convictions who, having conquered their own (natural) counter-morality, are even willing to defend others against aggressors overwhelmed by innate cruelty; *e.g.*, the 'protective group' that intervened on Marina Abromović's behalf virtually to save her life (McEvilley 2005, 273-274, above).

4.4 Focused forms of diffused innate cruelty

The cumulative effect of the observations made regarding the Milgram, *Stanford Prison* and *Rhythm 0* experiments is that a human being's innate diffused cruelty could easily be focused not only toward torturing but also dehumanizing, commodifying and/or enslaving another. This in turn serves to rationalize the modern-day *ius cogens* ban on all forms of *cruel*, *inhuman or degrading treatment or punishment*, as noted in Chapter 1 ('1.4') above.

In fact, torture, dehumanization, commodification and enslavement all constitute evident forms of focused cruelty. For cruelty to be exhibited so conspicuously, it must logically lie dormantly. Hence, cruelty *simpliciter*, which naturally resides in a diffused state within every human being, necessarily founds these (and all other) focused forms.

To torture, dehumanize, commodify or enslave an*other*, one must first be innately cruel; once such *other* is so tortured, dehumanized, commodified or enslaved, one could readily be intensely cruel. Hence, dehumanization, commodification, enslavement, *etc*. serve to counter the inhibitors ('shame and fear') of (consequent or secondary) intensified cruelty but not those of (founding or primary) innate cruelty.[67] This is implicit in the reply to a question asked from a former Nazi concentration camp commandant:

> [*Question*:] … 'If they were going to kill them anyway, what was the point of all the humiliation, why the cruelty?' [*Reply*:] 'To **condition** those who actually had to carry out the policies' [killing],

> he said. 'To make it possible for them to do what they did.' (Sereny 1974, 101, parentheses and emphasis added.)

4.5 Constituents of diffused innate cruelty

Victor Nell reckoned vestigial predatory sentiment as the basis of a human being's innate cruelty (Nell 2006, 211). Theodor Adorno ('3.3' above) and Alice Miller ('3.4' above), though failing to specifically recognize cruelty's innate existence within man, respectively advanced desire to dominate (Fischer 2005, 27, 28-29 and 30) and need to vent repressed anger (Miller 1980, 115-116) as precipitating torture and other barbarities. Appreciating some truth in each of these hypotheses (and very much more in their combination), it is hereby deduced (in light of all factual accounts of police, military and layman cruelty considered within this work) that **man's diffused innate cruelty**, or **cruelty *simpliciter*, founds itself on a *reconstituting amalgam* of *desire*, *anger* and *apathy*, wherein one predominates** (over the others) **toward fulfilling the overt objective for which such covert cruelty is invoked**:

- The ***desire predominant cruelty amalgam*** (wherein **desire** constitutes the majority sentiment as sustained by apathy and supplemented by anger) is exemplified by 'ticking bomb torture' (Chapter 2 ('2.4.3.1') above), in which the pivotal desire appears to be that of protecting innocent lives. This desire, though professedly altruistic, is often found tainted with self-serving and/or self-venerating attributes. That 'something has to be done' about an imminently disastrous *status quo* is opportunistically seized upon and exploited in pursuit of *justifying* outlawed brutality and generating self-acclaim for such 'brave' and 'heroic' recourse. Both the Milgram and *Stanford Prison* experiments evinced a majority as having manifested self-centered desires in choosing to disengage from morality. In the Milgram experiment, motivation for the same apparently emanated from the self-legitimating pride of being able (beyond all repugnance) to fully execute all aspects of the assigned task, construed as being in furtherance of a 'noble' scientific initiative. The

Stanford Prison 'guards,' on the other hand, appear to have continued with their designated work more in satisfaction of role-incited delusions of grandeur than otherwise.

- The ***anger predominant cruelty amalgam*** (wherein **anger** constitutes the majority sentiment as sustained by apathy and supplemented by desire) is found operative in contexts of predetermined or spontaneous revenge. In either mode, a vindictive conscience (harbored or repressed) is willingly unleashed and indulged.

- The ***apathy predominant cruelty amalgam*** (wherein **apathy** constitutes the majority sentiment as sustained by apathy and supplemented by desire or anger) is that generally indoctrinated *via* brutalized military training and hence the basis of many an atrocity in human history. Among the participants of Milgram's shock experiment, 'Pasqual Gino' (Milgram 1974, 86-88) did appear to exhibit the constituents of this particular amalgam. Nonetheless, it is Marina Abramović's *Rhythm 0* that manifests the lowest depths to which such apathy could be taken by even ordinary citizens.

Adolf Hitler was an individual in whom all three of the said ***cruelty amalgams*** did alternatively and extensively prevail, hence the hitherto unparalleled wanton destruction and degradation of mankind at his hands. (However, the development of a complexity of mind comparable to Hitler's must surely be rare.)

4.6 Alcohol's contribution to moral disengagement

Given the extents to which police officers in Sri Lanka have demonstrated brutality by way of both *interrogative* and *punitive* torture, despite guidance to the contrary being received from at least one of four (Buddhism, Christianity, Hinduism and Islam) arguably pacifist world religions, the question arises whether some form of extraneous catalyst is availed of to ease the burden of bearing such vile dispositions. Apparently, 'yes': habitual alcohol consumption,

prevalent amongst police officers the world over. The following sample allegations serve to evince this:

> (***a***) On the night of 19 October 2007, Mr. Ghanshyam Choudhary … was … tortured to death in police custody at Heera Nagar police station in Indore of Madhya Pradesh. He was detained on suspicion of theft. Heera Nagar police station in-charge, Mr. D.P.A… and other police personnel who were drunk allegedly tied the deceased to a tree and beat him up. His condition deteriorated in the police lockup. … He was taken to Maharaja Yashwantrao Hospital, Indore, where he died. (Ed. Chakma 2008, 14, citing *The Central Chronicle* 2007, 21 October, 'Custodial death: Irate mob torch police station.')

> (***b***) At some point in the afternoon, someone 'organized' a supply of alcohol for the shooters. By the end of a day of nearly continuous shooting, the men had completely lost track of how many Jews they had each killed. (Browning 1992, 61.) As one non-drinking policeman noted, 'Most of the other comrades drank so much solely because of the many shootings of Jews, for **such a life was quite intolerable sober**' (Browning 1992, 82, emphasis added).

Alcohol's potency to disinhibit an individual's moral restraint has been perennially well known. Thus, its utility to induce *disassociation* from ethical considerations is seen exploited by many a law enforcement (as well as military) official across the globe.

Among 252 allegations of 'police torture' (in Sri Lanka) reported to the Asian Human Rights Commission between 1998 and 2012, no less than 30[68] disclose perpetrators to have consumed alcohol either prior to or while meting out the same.

4.7 *Elective disassociation*

Whether in a state of self-induced intoxication or not, actuating innate cruelty remains both an independent and personal choice, however compelling the attendant circumstances. As expressed in Principle IV[69] of the *Principles of International Law Recognized in the Charter of*

the Nürnberg Tribunal and in the Judgment of the Tribunal [1950], 'moral choice' remains open to all and was 'in fact possible' for all participants of the Milgram, *Stanford Prison* and *Rhythm 0* experiments.

Much has been elaborated on the psychological processes of *cognitive dissonance*, *cognitive reprioritizing* and moral disengagement as relate to torture. Accordingly, it has become apparent that the human mind employs a distinct mechanism – thought fit (by the present author) to be referred to as ***elective disassociation*** – by which innate cruelty is actuated toward neutralizing a stimulus that would otherwise (morally) invoke a shameful, fearful and/or empathetic reaction.

Swatting a mosquito undoubtedly is a cruel act, which is nonetheless *justified* on the basis that such an insect would otherwise harm an individual by stinging and/or infecting her/him with a disease. Although it is a sentient life that is being so destroyed (and hence morally reprehensible), innate cruelty is ***electively*** activated to ***disassociate*** the mind from prioritizing the same.

4.8 *Moral realization*

What every human(e) being circumstanced as a Milgram, *Stanford Prison* or *Rhythm 0* experimental subject should have ideally done was to defend humanity's worth by asserting her/his moral responsibility[70] above all else. In fact, one Milgram participant, 'Professor of Old Testament' (Milgram 1974, 47-49), did do so quite exemplarily:

> … I don't understand why the experiment is placed **above** this person's life. … If he doesn't want to continue, I'm taking orders from him. … Surely you've considered the **ethics** of this thing. … Here he doesn't want to go on, and you think that the experiment is more important? (Milgram 1974, 48, emphasis added.)

> After explaining the true purpose of the experiment, the experimenter asks, 'What, in your opinion, is the most effective way of strengthening resistance to inhumane authority?' The subject answers, 'If one had as one's ultimate authority **God**, then it trivializes human authority.'[71] (Milgram 1974, 49, emphasis added.)

'Professor of Old Testament' defiantly halted the experiment no sooner than hearing the 'learner's' intention to withdraw. He based his decision to do so firmly on 'ethics.' His statement in reference to the 'learner' that 'If he doesn't want to continue, I'm taking orders from *him*,' taken within its context, simply meant that he respected the 'learner's' decision to withdraw and was not disposed to enforcing the experiment against the latter's will. (Milgram's explanation (1974, 49) to the effect that what this subject did was merely substitute the 'experimenter's' authority for the 'learner's' is oversimplified and hence untenable.) Potential immorality alone sufficed for 'Professor of Old Testament' to repudiate his contract. He considered 'God'/morality the sole authority to whom/which man should answer in all contexts, relegating the efficacy of any lesser agency to a refutable state (which refutation he manifested by electing to abort the experiment). (Milgram again oversimplifies this to deem it a mere substitution of authority (1974, 49).) But what compulsions would exist to conform consistently to such morality? None: save for whatever subjective internal convictions thereof. If so, could such convictions alone serve to effectively prevent men from indulging their natural cruelty?

Commencing with the *Universal Declaration of Human Rights* (adopted on 10th December 1948), many a successive *declaration*, *covenant*, *convention*, *protocol* and domestic law has unequivocally prohibited all species of *cruel*, *inhuman or degrading treatment or punishment*, with a growing number of nations choosing to ratify and/or enforce the same. This generic prohibition has even come to command the status of *ius cogens*. However, if this prohibition were in fact compelling, a steady decline in both *punitive* and *interrogative* torture should

have been observed (which has not). Perhaps the said prohibitions encouraged nations to do covertly what they once did overtly?

In short, without complementary internal righteous convictions being held by individuals, external legal compulsions fail to exert any regulatory effect on them. This is common to all law enforcement. In fact, habitual law abidance resides necessarily within the domain of internal convictions, as only when external compulsions match the former '*quasi*-perfectly' would a legal order be accepted without challenge (on 'the logic of simple reproduction') as being 'non-arbitrary,' 'self-evident' and 'natural' (Bourdieu 1972, 166).

Choosing to cater to the rational mind so as to facilitate internal convictions, as opposed to restraining the dynamic body by way of external compulsions, must logically be the more productive initiative as it addresses the cause (mind, being the forerunner of all actions[72]) in preference to its effects. Jeremy Bentham's illustration (cited by him in relation to judge-made law) to the effect that teaching conduct to one's dog by waiting for it to do something objectionable and then beating it, though apt for dogs, is futile for men[73] (Bentham 1823, 235) appears to set out this point vividly.

Hence, indoctrinating righteous ideals from childhood onward appears to be the only viable means by which to accomplish both resolute realization of moral worth and sincere deference toward laws that enforce the same.

Remarkably, a majority construes the righteous life to yield only modest earnings, and one lived unrighteously to foster unlimited gains. Man is almost always willing to compromise one or more of his virtues for quick returns in money, power, reputation or property.

More often than not, an individual is seen engaged in a vocation that involves some form of moral turpitude (and even illegality) on the 'logic' that there exists 'no other means by which

to feed his family.' Furthermore, responsibility for her/his part in perpetuating such immorality is often sought to be divested by way of distance, time and/or place. Moreover, identifying with a whole group of perpetrators serves to diffuse any 'shame and fear' of wrongdoing. Expressed sentiments such as 'we can't afford to have principles anymore'; 'can't get a job without using influence'; 'no gains without bending the rules'; and 'have to even kill dogs and make money' epitomize the present-day subverting of conventional faith in morality. These very assertions serve to proliferate and perpetuate immorality, the 'norm,' and morality, the 'exception.'

Among the myriad of sentient beings that inhabit this earth, only man is fully endowed with the faculty of choice, be it rational, irrational, moral, immoral, moderate or extreme. Admittedly, if man were to value moral authority above all else, this would *ipso facto* ensure the inhibiting of immoral influences, both extrinsic and intrinsic. But whose or what type of morality should be so deferred to? The simple answer would be such morality as could never admit of any species of unrighteousness.

Hence, the morality that is common to all pacifist religions and philosophies of the world (*common denominator morality*) is what should be imbibed and actualized by every world citizen. However, doubt has been expressed on whether a common system of ethics could ever be fostered within our verily diversified world. J. M. Finnis responds to this as follows:

> Students of ethics and of human cultures very commonly **assume that** cultures manifest preferences, motivations and evaluations so wide and chaotic in their variety that **no values or practical principles can be said to be self-evident to human beings** … . But those philosophers who have recently sought to test this assumption by surveying the anthropological literature (including the similar general surveys made by professional anthropologists) have found with striking unanimity that **this assumption is unwarranted**. (1980, 83, emphasis added.)

The *Universal Declaration of Human Rights* [1948], adopted soon after a devastating episode in human history, does in effect prescribe a minimum content of *common denominator morality*. Though the norms expressed therein[74] have secured virtual non-derogable legal status, their implied moral worthiness is yet to be authoritatively endorsed by the heads of the world's religious, philosophical or other like bodies. Perhaps it is the absence of such formal incorporation into morality that has prevented universal realization of the same.

For the opportunistic, domineering and egoistic creature that man naturally is, immorality becomes him; morality being but a fertile seed that lies dormant within him:

> **Cruelty** … **is natural to primitive man**. **Compassion**, **in contrast with it**, **is a secondary manifestation and acquired late**. The instinct to fight and destroy, so important an endowment in prehistoric conditions, is long afterward operative, and in the ideas engendered by civilization, like that of 'the criminal,' it finds new objects … . (Krafft-Ebing 1894, 86, emphasis added.)

A persistent need to control every aspect of one's life is typically imputed to every human being. This alights from the underlying insecurity engendered by insights into the unassailable truth that no thing, being or natural phenomenon could be wholly controlled. Sickness (damage), old age (decay), and death (destruction) are realistically and metaphorically common to all. Only the causal laws that perpetuate such ends appear exempt. Despite the incontrovertibility of these facts, human beings compel themselves to engage in a continuous battle with the very forces that oppose them. It appears that for every 'victory' gained, a 'defeat' serves to overwhelm the former. Though admittedly a most frustrating dilemma, the same never appears to diminish man's tenacity to prevail.

Ethical indoctrination serves to channel man's controlling urge into socially beneficial role orientations of mother; father; wife; husband; teacher; preacher; employer; law enforcer; judge; legislator; *etc*. Nevertheless, elective amenability to morality is what ultimately determines the extent to which such role players exercise their control, either harshly or

caringly. Human beings do have the potential to be both divinely compassionate and devilishly cruel. Hence, no matter how 'noble' the roles they play, parents, teachers, preachers and law enforcers the world over have constantly featured as abusers of their conventionally entrusted custodial powers.

Whether it is for securing a justifiable or reprehensible end, torture cannot be effectuated without invoking and focusing one's innate cruelty. It is the prevalence of this congenital trait that renders every human being a potential torturer; hence the existence of torture. Moreover, it is the natural occurrence of such nascent evil within each successive generation of human beings that serves to propagate torture.

All human life should be valued equally and indiscriminately, wholly bereft of prejudices. Respect must be had for the gross worth of life that inhabits a physique, irrespective of its gender, age or description. Then, and only then, would the arbitrary devaluation of its dignity be attenuated and hopefully ended.

Appendix

TO TORTURE OR NOT?

(**1**) Please reserve approx. ½ an hour to answer this questionnaire. Please take time to carefully read each question and have no hesitation in providing your frank and sincere response. Your identity will at all times remain confidential.

(**2**) Please answer *all* questions, including '**A**,' '**B**,' '**C**' and '**D**,' with such responses as pertain to *you*.

(**3**) Please read the 'Sample Question and Answer' on 'p.3' and note the two-stage answering process of: *firstly* identifying the response(s) you agree with (*e.g.*, by marking their respective letters only); and *secondly* selecting the answer that best corresponds with your said response(s).

(**4**) Please provide *only* 1 (one) preferred answer *per* question.

(**5**) In the chance event of your being *twice* furnished with this questionnaire, please perfect and remit *only* 1 (one) of the same.

ABOUT YOU

A. **You** are:

(1) Female.

(2) Male.

B. **Your** work/education is in:

(1) Accounting. (2) Business. (3) Engineering. (4) Health Services. (5) Information Technology. (6) Marketing. (7) Media. (8) Psychology. (9) Security Forces. (10) *Other*.

C. **Your** highest academic qualification:

(1) G.C.E. Ordinary Level.

(2) G.C.E. Advanced Level.

(3) Undergraduate Diploma.

(4) Bachelor's Degree.

(5) Postgraduate Diploma.

(6) Master's Degree.

D. **You** have been employed for:

(1) Less than 1 year.

(2) 1 to 5 years.

(3) 5 to 10 years.

(4) 10 to 20 years.

(5) Above 20 years.

(6) Have never been employed.

SAMPLE QUESTION AND ANSWER

Question:

A rainbow's color spectrum is generally kept in mind *via* the abbreviation '**VIBGYOR**,' standing for: **V**iolet, **I**ndigo, **B**lue, **G**reen, **Y**ellow, **O**range and **R**ed.

Which **one** or **more** of the following statements best summarize(s) **your perspective** regarding the above?

(a) The two extremities of the color spectrum, Ultra Violet and Infra Red, are not represented in the abbreviation 'VIBGYOR.'

(b) In reality, a rainbow's colors appear in inverse VIBGYOR order as: Red, Orange, Yellow, Green, Blue, Indigo and Violet ('ROYGBIV'). Nonetheless, for ease of remembering, the mnemonic 'VIBGYOR' is used.

(c) The 'primary colors' are Blue, Green and Red.

(**d**) Yellow is also a 'primary color.'

(**e**) Orange is also a 'primary color.'

Your Answer:

1. (**a**) and (**b**).
2. (**a**), (**b**) and (**c**).
3. (**d**) and (**e**).
4. (**a**) **only**.
5. (**b**) **only**.

Question 1:

An anonymous *tip* has been received that terrorists have set a bomb to explode somewhere in Central Colombo at 12-noon. 3 (three) terrorist suspects are arrested at approximately 10:00 a.m. Each is found to have a cyanide capsule around his neck. The passports found on their persons describe them 'electricians.' Furthermore, a box containing a set of mini screwdrivers, pliers, cutters, crocodile clips, copper wires, adhesive tape and a digital timer is found in their common possession.

Despite their being *vigorously* questioned until 11:00 a.m., no one reveals the location of the bomb. At approx. 11:05 a.m., the Officer-In-Charge pulls out his loaded service revolver, places its muzzle on the head of one suspect-terrorist and threatens to shoot if none of them divulges the location of the bomb immediately. No one responds, believing the Officer-In-Charge to be bluffing. At approx. 11:06 a.m. the said Officer pulls the trigger, killing the said terrorist suspect.

The remaining suspects at once reveal the bomb's location: 'the Colombo General Hospital.' The bomb is found and diffused, preventing death and injury to several hundreds of individuals.

Which **one** or **more** of the following statements best summarize(s) **your perspective** regarding the above?

(**a**) The killing of a single terrorist to save the lives of hundreds was justified! Hence, the Officer-In-Charge should be exempted from all criminal liability for causing death and inflicting mental torture.

(**b**) The Officer-In-Charge should receive a Presidential Commendation and his said actions officially endorsed as the 'standard practice' to be adopted in the face of such terrorist activity that risks the lives of civilians.

(**c**) The Officer-In-Charge should have resorted *firstly* to offering rewards and clemency ('positive enforcement') and only *secondly* to inflicting death and mental torture ('negative enforcement') in proceeding to elicit the location of the bomb.

(**d**) The Officer-In-Charge should be prosecuted for both 'Murder' and 'Torture,' but be 'conditionally discharged' (without imprisonment) in view of the lives saved.

(**e**) The Officer-In-Charge should have resorted to offering rewards and clemency ('positive enforcement') only and should *never* have resorted to killing and torturing ('negative enforcement') to elicit the location of the bomb, no matter how many lives were at stake. Hence, the Officer-In-Charge should be prosecuted for both 'Murder' and 'Torture' and be imprisoned for his crimes.

Your Answer:

1. (**a**) **only**.
2. (**a**) and (**b**).
3. (**c**) **only**.
4. (**c**) and (**d**).
5. (**e**) **only**.

Question 2:

A prominent lawyer and his wife return home to find it forcibly broken into and ransacked. The wife's '5-Sovereign 24-karat Gold Necklace' (a maternal heirloom) and the lawyer's Rolex 'Yacht Master' (Gold) Watch (a gift from a foreign dignitary) are both found missing.

Upon duly notifying the police, an investigation is launched promptly. Within 24 hours, a 17-year-old 'suspect' painter *cum* 3-wheeler driver is arrested; however, minus the stolen items. The lawyer's wife identifies *this* arrestee as an individual whose services were retained on several previous occasions to both paint the house and restore eroded masonry.

The Officer-In-Charge asks the lawyer whether to 'force' this arrestee to divulge the whereabouts of the stolen goods. The lawyer, with his wife's approval, consents. That night, the said arrestee is mercilessly tortured, being suspended and beaten with poles and batons all over his body. The arrestee pleads for his release by repeatedly asserting his innocence. Exhausted from torturing this arrestee, the police officers throw him into a cell. On the following morning, the said arrestee is found dead. The post-mortem report reveals his death to have been caused by 'internal bleeding' due to 'blunt force trauma administered to the body.'

On the very next day, the true thief, the lawyer's *newly hired* driver, surrenders to the Magistrate's Court, handing over both the stolen necklace and watch.

Which **one** or **more** of the following statements best summarize(s) **Your Perspective** regarding the above?

(**a**) The Police should resort to 'Torture' only where a loss to life is threatened (as in 'Question 1' above). Where only a loss of property has occurred, 'Torture' should not be resorted to. However, since the motive of the Police *in this case* was to expeditiously recover

unique/irreplaceable goods stolen from two 'respectable' members of the public and *not* to kill the arrested suspect, the complicit officers should only be prosecuted for 'Causing Death by a Rash or Negligent Act' (not amounting to culpable homicide) and be held eligible for 'conditional discharge' (without imprisonment) on paying the victim's next of kin such compensation as deemed 'reasonable' by Court.

(**b**) The Police should never resort to 'Torture'! No threat to life or property could ever justify recourse to Torture! Hence, all complicit Police Officers, including the Officer-In-Charge, should be prosecuted for both 'Torture' and 'Culpable Homicide not amounting to Murder' and be imprisoned.

(**c**) The said lawyer and his wife too should be prosecuted, for 'Abetting Torture,' but be eligible for 'conditional discharge' (without imprisonment) on paying the victim's next of kin 'exemplary' compensation (of up to one million rupees) as deemed 'appropriate' by Court.

(**d**) Instead of 'Torture,' recourse should ideally have been had toward procuring a DNA profile of the unknown suspect *via* laboratory analysis of 'trace evidence' found at the scene of the crime. By comparing this unknown DNA profile with that of the arrestee's, a 'match' or 'mismatch' could definitively have been made, respectively inculpating or exculpating him.

(**e**) Establishing at least one DNA profiling laboratory within each 'Administrative District' should be the foremost priority of the Ministries of Justice, Law and Order and Science and Technology toward precluding this habitual recourse to 'Torture.'

Your Answer:

1. (**a**) **only**.
2. (**b**) **only**.
3. (**b**) and (**c**).
4. (**b**), (**d**) and (**e**).
5. (**b**), (**c**), (**d**) and (**e**).

Question 3:

You receive an invitation from the Department of Criminology of a renowned local university to take part in an experimental simulation designed to demonstrate 'a suspect-criminal's proclivity to affirm suggested falsehoods under pain of 'Torture.''

On presenting yourself before the said Department of Criminology, the Head of the Department instructs you to assume the role of 'a police officer who administers physical pain *via* an electrical shocking device toward compelling a suspect-criminal to confess to a crime.' You are informed that *another* consenting adult-invitee has already assumed the role of such 'suspect-criminal.'

The said 'shocking device' is one specially constructed to administer five-milliampere shocks, which can be sustained for periods of 2 seconds, 4 seconds and 6 seconds, as selected by pressing the buttons assigned to such specific durations. Hence, there are three buttons: the '2-second button,' the '4-second button' and the '6-second button.' A *single press* on any button will cause a five-milliampere shock to be sustainedly administered for the specified duration; *e.g.*, pressing the '4-second button' would cause the 'suspect-criminal' to be shocked continuously for 4 seconds.

You are informed that in general the said '2-second,' '4-second' and '6-second' shocks would respectively cause 'prickling,' 'discomfort' and 'pain' to an individual subjected to the same. You are further informed that the invitee playing the role of 'suspect-criminal' has already given his 'informed consent' to undergo such trauma.

At the commencement of this experimental simulation, the said Head of the Department (assuming the role of 'a police Officer-In-Charge') demands the (invitee playing the role of) 'suspect-criminal' to admit to his having stolen a valuable gold chain. Upon such 'suspect-criminal's' *denying* the same, you (in the role of 'police

officer') are given the discretion to administer the shortest shock duration to such 'suspect-criminal' by pushing the '2-second button' on the 'shocking device.' On being asked *again* by the 'Officer-In-Charge' to admit to 'Theft,' if the 'suspect-criminal' *again denies* the same, you are given the discretion to administer the next (longer) shock duration by pushing the '4-second button.' On his *third denial*, you are permitted to administer the longest shock duration by pushing the '6-second button.' Every succeeding *denial* thereafter will permit you to repeatedly press the '6-second button.' You are informed that on average the ordinary/run-of-the-mill invitee would confess upon enduring five *consecutive* 6-second shocks. Both you and the invitee (assigned the role of 'suspect-criminal') are also informed that although *consecutive* 6-second shocks could be quite painful, they are generally unable to cause death or any serious injury.

Each time the '6-second button' is pressed by *you*, the *other* invitee (playing the role of 'suspect-criminal') becomes entitled to a Rs.**1**,**000**/- reward (from the said Department of Criminology) for enduring such shock. In the eventuality of a 'suspect-criminal's' electing to admit his having stolen the gold chain (to avoid being shocked any further), *you* become entitled to a reward of Rs.**25**,**000**/- (from the said Department of Criminology) for coercing such disclosure. Even without this outcome, *you* (alone) become entitled to a reward of Rs.**5**,**000**/- for your persistence.

Which **one** or **more** of the following statements best summarizes **your perspective** regarding the above?

(**a**) You will not hesitate to take up the assigned role of 'police officer' and will dutifully administer the shocks to the volunteer 'suspect-criminal' toward coercing him to confess. This would be done in furtherance of securing (i) the rewards promised to both *you* and the *other*

invitee ('suspect-criminal') and (ii) the *prestige* associated with being selected for such an unprecedented experiment by this renowned university.

(**b**) You will agree to participate, but with *great reluctance* owing to the need to administer painful shocks to another. Your sole motivation would be to render whatever assistance possible toward proving that 'Torture' only serves to elicit confirmation of suggested falsehoods.' You would politely refuse *all* rewards.

(**c**) You will participate only under the *condition* that you may withdraw from this experimental simulation at any time you deem the administering of further shocks inhumane. You would nevertheless *accept* rewards falling due until such time.

(**d**) You will politely decline the invitation to participate because causing harm to another, irrespective of whatever mutual gains arising therefrom, is contrary to *your* personal ethics.

(**e**) You will report the said Department's intended experimental simulation to both the university's Ethics Committee and Senate to prevent it from being conducted.

Your Answer:

1. (**a**) **only**.
2. (**b**) **only**.
3. (**c**) **only**.
4. (**d**) **only**.
5. (**d**) and (**e**).

Dear Participant,

Thank you for so kindly devoting your precious time toward providing well-considered opinions on the premises questioned above. Your painstaking conclusions will undoubtedly serve to both broaden and enrich the existing understanding on the concept of 'Torture.'

Your most generous 'gift of knowledge' is greatly appreciated!

References

Adhikary and another v. *Amarasinghe and others* [2003] 1 Sri.L.R. 270.

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Though having served the Attorney General's Department of Sri Lanka as a state prosecutor, earning thereby the reputation of 'a tenaciously just prosecutor,' he became skeptical regarding the professed transparency of the criminal justice system and hence not only resigned his commission with the state but also resolved never to serve as a court practitioner again.

Resolute adherence to the precepts of righteousness has kept him away from many an otherwise lucrative livelihood. He is thus confined to a very modest form of existence.

'He is honest, hardworking and has the ability to grapple with complex issues of Law.'

(Retired Attorney-General of Sri Lanka, the late K.C. Kamalasabayson P.C.)

Notes

[1]'From the very first moment of the occupation of Poland by the Germans, the Jews were the object of especial persecution. Murder and robbery were the order of the day. On 1 November 1940, a ghetto was organized in Warsaw, and Jews were forbidden to leave its walls. In this ghetto and indeed in all other ghettos, the conditions were appalling. In some houses up to 1000 persons lived; individual rooms accommodated an average of 13 persons. Typhus and other diseases took heavy toll of the starved and half-starved. This terrible plan of systematic murder was considered too slow by the Germans, however, for in March 1942, more direct methods of annihilation were instituted. Himmler … after a brief stay in Warsaw, issued an order that half the number of Polish Jews were to be killed in 1 year. Deportations were accordingly begun on 17 August, and 10,000 persons were removed daily, while in the meantime a special Extermination Commando had been organized and trained in murder beforehand in Germany. Places of execution were organized at Chelm and Belzec, where those who survived the shootings were murdered *en masse* by means of electrocution and lethal gas. In fact, the Germans had transformed Poland into one vast center for murdering Jews, not only those of Polish nationality but those of other European nationalities also.' (Ed. Bozman 1958, 338.)

[2]Adopted by General Assembly resolution 217A at its 3rd session in Paris on 10th December 1948 with 48 members in favor and 8 abstaining. Its preamble, expressedly, recognizes that: '… Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind … .'

[3]A further prohibition is seen appended hereto: 'In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' This provision appears to have been included in response to the monstrous 'scientific' experiments carried out by the Nazis on inmates of concentration camps, most notably at Belsen and Dachau.

[4]As of 05-11-2019.

[5]'When a human being gets beaten on the body by another holding more power than himself, the first pain is the body pain and the second pain is the mental pain. I would analyze the mental pain to be much more than the physical pain. The physical damage may be cured with the help of medical professionals and the medicine available at the time and era when the physical damage is done to a 'body,' but the mental damage is definitely not something which can be cured that easily. If I were to say that mental pain can never be cured, that is the reality of life. Every time the human being who was subjected to torture of any kind remembers the same, the mind projects the scenario in front of him. Then the tears, and the pain that causes the tears, spring out of this body automatically, and no one could ever say when that horrible feeling would go away. The damage caused mentally, in reality, is therefore permanent for this life.' (*Chaminda Kumara* v. *S.I. Salwatura*, *police station Bandaragama and others* [2017], 6-7, *per* Wanasundera, E., *Justice*.)

[6]Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955 and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31st July 1957 and 2076 (LXII) of 13th May 1977. In 1971, the U.N. General Assembly Resolution 2858, *Human Rights in the Administration of Justice*, recommended that member states implement the rules in the administration of penal and correctional institutions and consider incorporating them in national legislation. Rule 31 of the same expressedly provides that 'corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses.'

[7]'… Each state party shall undertake to prevent in any territory under its jurisdiction *other acts* of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* …' (*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 16(1), emphasis added). Furthermore, the *Convention*'s preamble states: 'Desiring to make more effective the struggle against torture and *other* cruel, inhuman or degrading treatment or punishment throughout the world …' (emphasis added).

[8]'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

[9]As of 05-11-2019.

[10]On 05-12-2017, Sri Lanka acceded to the *Optional Protocol to the Convention against Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment* [2002], thereby *inter alia* consenting to international inspections of domestic places of detention in furtherance of preventing torture.

[11]*Per* Kaufman, *Circuit Judge* sitting with Kearse, *Circuit Judge* and Feinberg, *Chief Judge*.

[12]*Per* Fletcher, *Circuit Judge* sitting with Canby and Boochever, *Circuit Judges*.

[13]'Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of any offense or any misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.' 'Illustrations: (a) *A*, a police officer, tortures *Z* in order to induce *Z* to confess that he committed a crime. *A* is guilty of an offense under this section. (b) *A*, a police officer, tortures *B* to induce him to point out where certain stolen property is deposited. *A* is guilty of an offense under this section. (c) *A*, a revenue officer, tortures *Z* in order to compel him to pay certain arrears of revenue due from *Z*. *A* is guilty of an offense under this section. (d) *A*, a landowner, tortures his tenant in order to compel him to pay his rent. *A* is guilty of an offense under this section.'

[14]In respect of 'grievous hurt' caused in the context contemplated by section 321, a sentence of imprisonment for a term that may extend to ten years and a fine is imposed.

[15]Notwithstanding their respective penalties, all 'offenses against other laws' are rendered 'not compoundable' by the 'First Schedule' to the Code of Criminal Procedure Act No.15 of 1979. Hence, offenses under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment Act No.22 of 1994 and those under the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No.20 of 1998, being 'offenses against other laws,' become *ipso facto* 'not compoundable.'

[16]It must be appreciated that the Human Rights Commission of Sri Lanka was never sufficiently empowered to deal with a crime so institutionalized as torture.

[17]Subject, however, to the following recorded declaration: 'The Government of the Democratic Socialist Republic of Sri Lanka pursuant to Article (1) of the *Optional Protocol* recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the *Covenant* which results either from acts, omissions, developments or events occurring after the date on which the *Protocol* entered into force for the Democratic Socialist Republic of Sri Lanka or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee **shall not consider** any communication from individuals unless it has ascertained that the same matter **is not being examined** or **has not been examined under another procedure** of international investigation or settlement.' (Emphasis added.)

[18]Section 11(d) of The Human Rights Commission of Sri Lanka Act No.21 of 1996 expressedly provides that: 'For the purpose of discharging its functions, the Commission may … monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and … make such recommendations as may be necessary for improving their conditions of detention … .' In furtherance thereof, section 28(2) states as follows: 'Any person authorized by the Commission in writing may enter at any time any place of detention, police station, prison or any other place in which any person is detained by a judicial order or otherwise, and make such examinations therein or make such inquiries from any person found therein as may be necessary to ascertain the conditions of detention of the persons detained therein.'

[19]Project Administrator Mr. Jagath Bandara Liyana Arachchi; Legal Officer Mr. P. Saliya Sumanatilake; Legal Officer Mr. Prasanna Chandralal Perera; and Project Assistant Mr. Nihal Widanapathirana.

[20]The author of the present work appreciated each such visit to demand conformity with the following guidelines:

(*a*) Torture investigations should, in general, be conducted in a manner so as to manifest the investigator as an open-minded and reasonable individual.

(*b*) Enlarging the scope of the investigation beyond the limits warranted by an allegation made or irregularity discovered could often result in added detriment to the life of the victim. In view of the investigator's inability to provide any form of continued protection, the victim remains vulnerable to any form of retribution at the hands of the detaining authority. The exacting of such vengeance could include intensifying their apathy toward the victim, restricting her/his visitors, initiating a 'go-slow' toward detaining the victim for the whole statutory maximum of 24 hours and even enhancing the charges against the victim so as to prevent her/his being enlarged on bail.

(*c*) An intervention by an investigating officer should always serve to abate and not enhance (either directly or indirectly) the misery of her/his subject. A 'victory' for the investigator is not when a detaining official is found errant but when the detainee is liberated from both confinement and further harassment. Policing the detaining authority is not the torture investigator's prime directive; securing the welfare of the detainee is.

(*d*) The volatility created upon entry of an investigation team into a custodial institution is indeed considerable and should be kept in mind throughout the duration of the visit. Priority should always be given to evidence that requires immediate recording, such as a victim's injuries, appearance and gait, as well as her/his conditions of confinement. Unlike her/his responding to a printed questionnaire, the victim's submitting a signed statement would more often than not be construed as a 'retaliatory act.' Since no prejudice whatsoever would be caused to the victim's case by subsequently recording her/his statement (preferably in an inoffensive environment), it would be prudent to abstain from attempting the same in any high-risk context.

(*e*) Where some appreciable latitude on the part of the detaining authority toward the detainee is perceived, the same should be duly channeled toward the latter's benefit, for even to obtain redress for a wrong suffered, one must first have one's freedom of movement. Tactful diplomacy is always recommended. Opportunities to advise and educate the detaining authorities should never go unexpressed, even more so when guidance is sought to rectify potential breaches of detainees' rights. The initiative to seek such instruction should always be applauded. In fact, the ideal role of the true investigator should be that of advisor, not adversary, to a detaining authority.

[21]Defined under section 366 of the Penal Code (of Sri Lanka) Ordinance No.2 of 1883 as follows: 'Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit 'theft.''

[22]P. Saliya Sumanatilake, author of the present work.

[23]Established by the Constitution of The Democratic Socialist Republic of Sri Lanka [1978].

[24]'91. Lelwala Gamage Nandiraja (death); 92. Hettiarachchige Abeysiri (death); 96. Navinna Arachchige Manjula Prasad; 99. S. A. Akila Chaturanga; 100. P.K.G. Jayawardena; 109. Hewage; 110. M. K. Buddhika; 113.

V.M. Duminda Jayawardena; 120. Dharmasiri; 122. Samantha Perera; 123. Thilakarathana; 126. Name withheld (a boy): 128. D. Chamara Lanka; 135. Amitha Deepthi Kumara; 149. Chamara Nuwansiri; 153. Pasquelge Don Dudley Mervyn; 161. Kapu Kankanamalage Mahesh Maduranga; 166. Randeniyage Yureshani Damayanthi; 172. Dammika; 176. B. Sumith Priyantha Fernando; 177. Maha Hewage Sumith Perera; 188. T. Jayantha; 189. Patikiri Arachchige Nihal Sarathchandra; 194. Periyasami Niroshan; 204. Dorairaj Jayachandran; 212. Mohamad Maharoof Mohamad Pasmi; 214. Shiraz Buhran; 216. Umesh Chaturanga; 219. Delwala Nakathige Keerthi Padmakumara; 224. Buddhi Ivantha Gunasekara; 229. Nuwan Chamara; 234. Janaka Pradeep Kumara; 246. Sarath Kumara Naidos; 249. B. Sumedha; 252. Malayappan Kali Dasan; 253. Prasantha Pradeep Kumara Francis; 265. Anuradha Buddika; 267. Loku Naramgodage Shantha; 273. Chaminda Sampath Kumara Wickramapathirana; 274. Rankoth Pedige Wikrama Nimalsiri; 275. Tammage Sampath Perera; 280. Wanni Athapaththu Mudiyanselage Nilantha Saman Kumara; 284. Gayan Thusitha Kumar; 290. Jayasuriyage Samira Desapriya; 293. Seelawansha Hitihamilage Don Samantha Priyalal; 300. Jesu Andrew and 301. Jayasekara Arachchige Roshan Jayasekara (death).' (Ed. Fernando 2012.)

[25]'83. K. Victor Fernando; 85. N. Sandasirilal Fernando; 87. Don Wijeratna Munasinghe (death); 90. Kosma Sumanasiri (death); 97. B. Nimal; 108. D. Indika Wasantha and Kumudini Malkanthi; 111. Kariyawasam Peradorapage Tsuitha Ejith; 115. E. Gnanadasa; 117. Kithsiri Dhanawardena; 119. Indika Kulasekara; 124. Chamara family; 127. L Sarath Vijitha; 140. D. Dilan Samaranayake; 152. Muralitharan Rajah; 173. Senaka Ekanayake; 201. M.A. Prasantha Ruwan Kumara; 205. S.K.A.S. Nishanta Fernando; 211. Sugath Rohana; 228. Muthuwahennadi Roshan Koitex; 235. Wengappuli Arratchige Milan Chanaka; 256. Erandaka Bulathsinghela; 259. Wijesekarage Don Senarath Appuhamy; 260. Kurugamage Don Predeep; 266. Sunil Shantha; 269. Tharidu Nishan; 285. Balapu Waduge Lakshman Mendis; and 286. Henayaka Arachchilage Parackrama Karunaratne.' (Ed. Fernando 2012.)

[26]'84. S. D. Kodituwakku, A. B. Abeywardena, A. Ruwantissa and W. Shantha; 103. R.D. Kanishka Gayan; 131. Illukumbura Mudiyanselage Mudiyanse; 143. Suddage Sirisena; 145. P. Gnanasiri; 175. Ajith Shantha Fernando; 178. M. Lal Fernando; 185. M.A.K. Wickramasinghe; 268. Ramanayakage Nishantha Perera; 271. Lectchchaman Punyamoorthi; 278. Mudugamuwa Manage Piyal; and 291. Koronchilage Anandalal Aruna Rohana.' (Ed. Fernando 2012.)

[27]'206. Muthukumar Ravikumar and his wife Stella Rani; 226. Shanthigara Suresh Kumar; 232. Nanda Kumar and Ramesh; 233. Rengasami Chithrakumar; 240. Ramiah Ruba Sandran; 242. Solomons Caspas Poul; and 276. Suresh Kumar Dias.' (Ed. Fernando 2012.)

[28]'101. M.H. Priyantha Minipura; 116. W. Sunil and Wasanthi; 138. Gune Ayyas; 163. A. Dushmantha Silva; 192. K.W. Upali; 255. Madushani Subasinghe; and 289. Anthoni Ayiya Devaraj.' (Ed. Fernando 2012.)

[29]'137. Dhanuka Tisara; 141. Sinnappan Abraham Kiragory; 182. Gnanapragasam Benedict Rosery; 193. Meera Mohideen Gafar and 263. Govindaraj.' (Ed. Fernando 2012.)

[30]'202. M.I. Fausil Ameen; and 264. Abesinhage Don Janaka.' (Ed. Fernando 2012.)

[31]'298. W.A. Lasantha Pradeep Wijerathna; and 299. Balapuwaduge Suresh Sumith Kumar Mendis.' (Ed. Fernando 2012.)

[32]'272. Upul Palitha Mawalag.' (Ed. Fernando 2012.)

[33]'239. K.R.P. Nilantha Kumara and Chathuranga.' (Ed. Fernando 2012.)

[34]'95. Nihal Kithsiri; 98. Amila Prasad; 104. D.A. Gayan Rasika; 114. Sameera Harischandra; 132. Mallikage Ariyadasa; 139. Hevamarambage Premalal; 146. Lalith Rajapakse; 155. Weligoda Ananda; 160. Wijeshinghe; 164. A.A. Priyantha Kumara; 165. A.A.D.I.A. Attanayake; 167. Daluwattalage Gamini Weerasinghe; 169. Lakam Mohottilage Anthony Newton Appuhamy; 174. Wannakuwatta Waduge Tharaka Aruna Shantha Kumara, Dombagaha Pathirage Jayalath Kumara and Baminiyahandige Wasantha Barathi Peris; 184. Thalahitiya Gamaralalage Chaminda Weerawardene; 185. Maddumage Dharmadasa 191. Thadallage Chamil Weerasena (death); 197. S. Siripala; 199. P.A. Kumara Perera; 208. Ajith Kumara; 238. Malik Roshan Wijayaratne; 257. Anil Chandana Kumara; 270. Thalagala Pahalage Solomon; 282. Warnakulasuriya Asanka Peiris; 287. Undiya Ralalage Premaratne; 288. Ganegoda Sinhage Haritha Lakmal; 292. Alhaj Farook Mohomad Ikram; and 295. Hewawasam Sarukkalige Rathnasiri Fernando.' (Ed. Fernando 2012.)

[35]'113. V.M. Duminda Jayawardena; 120. Dharmasiri; 149. Chamara Nuwansiri; 161. Kapu Kankanamalage Mahesh Maduranga; 166. Randeniyage Yureshani Damayanthi; 182. Gnanapragasam Benedict Rosery; 202. M.I. Fausil Ameen; 269. Tharidu Nishan; 272. Upul Palitha Mawalag; 274. Rankoth Pedige Wikrama Nimalsiri; 275. Tammage Sampath Perera; 280. Wanni Athapaththu Mudiyanselage Nilantha Saman Kumara; 284. Gayan Thusitha Kumar; 293. Seelawansha Hitihamilage Don Samantha Priyalal; and 300. Jesu Andrew.' (Ed. Fernando 2012).

[36]The admissibility of confessions voluntarily made to an officer of the rank of Assistant Superintendent of Police or above under either (*a*) the Emergency Regulations (proclaimed pursuant to a declaration of a state of emergency under the Public Security Ordinance No.25 of 1947) or (*b*) the Prevention of Terrorism Act No.48 of 1979, having arguably incited *oppressive* torture, might also have had a spillover influence on *interrogative* ('confessionary') torture.

[37]In the case of 'minors' (persons under 18 years of age) who are suspected of having perpetrated crimes, policemen appear to take a more *punitive* than *interrogative* approach in furtherance of 'lawfully chastening' them. In Sri Lanka, this police proclivity to 'reform' minors by way of summary *deterrent* punishment appears to be defensible in terms of two archaic provisions that prevail to date. Section 71(6) of the Children and Young Persons Ordinance No.48 of 1939 expressedly recognizes: '… The right of any parent, teacher, or other person having lawful control or charge of a child or young person to administer punishment to him.' An explanation to this is provided by illustration '(i)' to section 341 (definition of 'criminal force') of the Penal

Code Ordinance No.2 of 1883 as follows: *A*, a schoolmaster, in the reasonable exercise of his discretion as master, flogs *B*, one of his scholars. *A* does not use criminal force to *B*, because, although *A* intends to cause fear and annoyance to *B*, he does not use force illegally. Nonetheless, these provisions, which seek to sanction 'corporal punishment,' are manifestly repugnant to section 308A ('cruelty to children') of the same Penal Code as introduced *via* legislative amendment in 1995 (already noted under Chapter 1 ('1.6') above). Hence, on the basis of *leges posteriores priores contrarias abrogant* (subsequent laws repeal prior conflicting ones), section 308A must necessarily be deemed to qualify both said section 71(6) of the Children and Young Persons Ordinance and said section 341 of the Penal Code. Hence, any discharge of lawful authority over a child for purposes of chastening must fall short of 'cruelty to children' as defined under section 308A of the Penal Code.

[38]Especially, Bangladesh, Brunei, India, Malaysia, Myanmar, Singapore and Sri Lanka.

[39]The identical provision appears as section 27 in both the Evidence Act of Brunei No.2 of 1939 and the Evidence Ordinance (now Act) of Malaysia No.11 of 1950. In Singapore, section 27 of the Evidence Act/Ordinance No.3 of 1893 was relatively recently repealed and reenacted *via* its Criminal Procedure Code Act No.15 of 2010 (effective 02-01-2011) as section 258(6)(c), which reads: 'When any fact or thing is discovered in consequence of information received from a person accused of any offense in the custody of any officer of a law enforcement agency, so much of such information as relates distinctly to the fact or thing thereby discovered may be proved.'

[40]The same provision appears as section 114 *Illustration (a)*, Evidence Act of India No.1 of 1872; and section 116 *Illustration (a)*, Evidence Ordinance (now Act) of Singapore No.3 of 1893.

[41]From the apparent standpoint of police officials, all they need to do in a theft-based offense is to pick out an individual and then build their case around him: the suspect's identity founding the investigation. However, from the perspective of justice, a thorough search and evaluation of all available evidence would necessarily have to precede (not succeed) the identifying of a suspect: the investigation yielding the suspect's identity. There appears to be an irresistible impulse on the part of the police to effectuate instantaneous justice, especially when dealing with thieves and robbers. Thefts, robberies and the like are exaggeratedly attributed the gravity of ticking bomb scenarios. Policemen employ intensive *interrogative* torture so as to proverbially 'save the goods' expeditiously. Apparently, subjecting perpetrators to lawful penalties is not the goal; restoring lost property is. Hence, it has become virtually customary to (*a*) ascertain 'suspect' individuals (from the very owners of stolen goods), (*b*) track them down and (*c*) beat them (irrespective of whether they are guilty or not) in furtherance of discovering the whereabouts of the pillaged loot. Superior officials neither condone nor commend this 3-step practice, although they pretentiously do condemn torture. It is believed that projecting the image of the police as 'men of action' does more to earn public confidence than otherwise. Admittedly, many are the instances where stolen property has been recovered by such 'action,' hence 'the ends justifying the means.' Obviously, few are the instituted and successful prosecutions in this context, owing to extant evidence being of poor probative value. Since victims often lose interest once their goods are found,

not much disappointment is voiced regarding these failed cases. Policemen hence view recourse to *interrogative*-'27'-torture as a 'win-win' situation; not only are thieved goods potentially recoverable, but punishment (torture) in pursuit thereof also 'deservedly' administrable. However, with no form of investigation proper being conducted in pursuit of a successful prosecution, the perpetrators of such offenses escape being both recorded and marked by the law. Thus, incurring no apparent criminal history, they are free to mingle with impunity amongst the general public. Furthermore, by relying on mere suspicions (potentially tainted with bias), the police cannot exclude the possibility of a wholly innocent individual being subjected to torture. In this event, the so-called 'win-win' outcome is completely reversed to one of 'lose-lose'; neither is stolen property recovered, nor is there any reluctance on the part of the tortured 'suspect' to seek redress.

[42]Much earlier in India on 15th March 1872 and in Singapore on 1st July 1893.

[43]As in those corresponding statutes of both India and Singapore.

[44]*Per* Tilakawardane, S., *Justice*.

[45]Article 38 of the Constitution of Cambodia [1993] categorically provides that 'confessions obtained by physical or mental duress are not admissible as evidence of guilt.'

[46]Citizens are regarded as being bound to each other and their government by an initial hypothetical agreement on a certain system of rules and method of enforcement, which must be justly enforced *via* agreed sanctions.

[47]'… If someone is justified, then he did not do anything wrong; if he is … excused, then he did something wrong, but it is not his fault' (Allhoff 2011, 226).

[48]'The members of any of the armed forces who are called out … for the purpose of maintaining public order in any area shall for such purpose have the powers, including the powers of search and arrest, conferred on police officers by any provision of this… or … any other written law, other than the powers …' to conduct a formal investigation (Public Security Ordinance No.25 of 1947, section 12(2)). *E.g*., The emergency regulations promulgated *via* the Gazette (Extraordinary) of the Democratic Socialist Republic of Sri Lanka, No.843/12, dated Friday, 4th November 1994, provided *inter alia* under Regulation 18(1) as follows: 'Any police officer or any member of the armed forces may search, detain for purposes of such search or arrest without warrant, any person who is committing or has committed or whom he has reasonable grounds for suspecting to be concerned in, or to be committing or to have committed, an offense under any emergency regulation: and may search, seize, remove, or detain any vehicle, vessel, article, substance, or thing whatsoever used in, or in connection with, the commission of the offense … .' Regulation 19(2) of the same provided *inter alia* that 'any person taken into custody … may for the purpose of investigation of the offense in relation to which such person was arrested be kept in detention … if the person had been taken into custody by a member of the

armed forces … upon an order made by an officer not below the rank of Brigadier, Commodore or Wing Commander of the Army, Navy or Air Force, as the case may be … .'

[49]'Thus, in addition to physical torture, there can be psychological torture such as threatening to execute the suspect, putting a gun to his head and saying you will shoot, threatening to castrate him, telling him that you are going to kill his family members if he does not tell you the information you are seeking, and similar tactics that, while not physically painful, inflict mental pain or suffering even when there is no intent to carry out such threats' (Cohan 2007, 1596).

[50]Effective 1st January 1885.

[51]Effective 20th December 1994.

[52]'… Where having made the general Act, the Legislature afterwards makes a special Act in conflict with it, we must assume that the Legislature had in mind its own general Act when it made the special Act, and made the special Act in conflict with the general Act as an exception to the general Act' (Swarup 1968, 266). 'If there is an apparent conflict between two independent provisions of law, the special provision must prevail' (Swarup 1968, 266).

[53]Translated by the author of the present work.

[54]*Per* Tilakawardane, S., *Justice*.

[55]Although Article 14(3) of the *International Covenant on Civil and Political Rights* [1966] does *inter alia* recognize the accused's right to communicate with counsel of his own choosing, the same is seen as exercisable only during the 'determination of any criminal charge against him'; in other words, during trial. Neither is a pretrial right to consult counsel expressedly provided for, nor can it be reasonably inferred from the provisions of this *Covenant*.

[56]'… These **two bright principles protect the world**. What are the two? **Shame and fear of wrongdoing**.' (*Sukkadhamma sutta* n.d., Ireland translation, 138, emphasis added.)

[57]'Schadenfreude literally means 'harm-joy.' … To express this type of glee indicates a deep-seated human urge to boost our self-esteem through the mishaps of others.' (Waal 1996, 85.)

[58]There are limits to man's ability to dominate his environment, and the world has now come to acknowledge the same. The universe manifests forces much greater than human volition, hence man's inability to ever fully control them.

[59]Her argument, however, is circuitous; she opines cruelty, both the *result* and *cause* of child battery.

[60]'This third game is as follows: the fowl is attracted to the bars with a slice of bread, but in the very moment when she is about to peck it, the free hand of the same chimpanzee (or of another beside him) thrusts a stick or – even worse – a strong pointed wire into her feathered body. When two chimpanzees take part in this (one as baiter and one as thruster), there has certainly been no previous agreement between them; circumstances decree that the momentary activity of each happens to suit the other; they realize it and continue their 'collusion.'' (Köhler 1917, 85.)

[61]First published: 1963, 'Behavioral Study Of Obedience,' *The Journal of Abnormal and Social Psychology*, volume 67 number 4, 371-378.

[62]'… By denying responsibility, they attempt to dissociate themselves from their behavior in order to reduce the resulting negative affect [*dissonance*]' (Gosling, Denizeau and Oberlé 2006, 730, parenthesis added).

[63]Legally unenforceable if the transaction were unfeigned.

[64]Which, however, would have become illegal by such time had the transaction been unfeigned.

[65]The majority of his modified experiments too yielded comparable results.

[66]P. Saliya Sumanatilake, author of the present work.

[67]Extant scholarship vacillates on this point.

[68]'19. Sathasivam R.; 21. Nandini Heart; 25. Eric Kramer; 36. Chaminda Premelal; 55. Dawundage Pushpakumara; 56. C.P.S. Anthony and C.J. Lafaber; 67. Ashoka P. Kumara, Saman Puspakumara, N. Ratnayaka, W.P. Piyadasa, Nilantha K. Rajapakse, Chaminda Sureshkumar, U.N. Jayantha Premalal and S. Niyamaka; 68. Tennakoon Mudiyanselage G.; 124. Chamara family; 139. Hevamarambage Premalal; 143. Suddage Sirisena; 171. Kuruthanthrige Lakshman Gunasekera; 201. M.A. Prasantha Ruwan Kumara; 270. Thalagala Pahalage Solomon; 278. Mudugamuwa Manage Piyal; 280. Wanni Athapaththu Mudiyanselage Nilantha Saman Kumara; 295. Hewawasam Sarukkalige Rathnasiri Fernando; 304. Indika Shashiranga Senevirathna; 311. P.G.W.G. Jayarathna; 314. Sampath Jasingha; 318. Suthisa Kumara Jayalath and Mahendra Uppalawanna; 323. Acharige Dinesh Priyankara; 327. Marasingha Arachchige Maithree Narada; 331. Welgamgoda Aacharyage Upul Sanjeewa; 360. Jayasinghe Arachchige Chathura Manohara; 368. Sathira Dharshana Jayawickrama; 374. Sarath Keerthirathna; 375. M.M. Kushantha Janaka Herath; 376. Jayawardane Mudiyanselage Chulani Thilakaratne; and 392. J.P. Samson Kulatunga.' (Ed. Fernando 2012.)

[69]'The fact that a person acted pursuant to the order of his government or of a superior does not relieve him from responsibility under international law, provided a **moral choice** was **in fact possible** to him' (emphasis added).

[70]Taken here to connote, cumulatively, 'outcome,' 'causative' and 'role' responsibility.

[71]Herein lies the answer to Milgram's quest for learning how to counter cruelty, which, strangely enough, does not seem apparent to him.

[72]'1. Mind is the forerunner of (all evil) states. Mind is chief; mind-made are they. If one speaks or acts with a wicked mind, because of that, suffering follows one, even as the wheel follows the hoof of the draught-ox.' (*Dhammapada* n.d., Narada translation, 1, v.1.) '2. Mind is the forerunner of (all good) states. Mind is chief; mind-made are they. If one speaks or acts with pure mind, because of that, happiness follows one, even as one's shadow that never leaves.' (*Dhammapada* n.d., Narada translation, 5, v.2.)

[73]'When your dog does anything you want to break him of, you wait till he does it and then beat him for it. This is the way you make laws for your dog, and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do – they won't so much as allow of his being told; they lie by till he has done something, which they say he should not have done, and then they hang him for it.' (Bentham 1823, 235.)

[74]'Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: 1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. 2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed. Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks. Article 13: 1. Everyone has the right to

freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country. Article 14: 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Article 15: 1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. Article 16: 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Article 17: 1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property. Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 20: 1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association. Article 21: 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Article 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 23: 1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests. Article 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Article 25: 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. Article 26: 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and

professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. 3. Parents have a prior right to choose the kind of education that shall be given to their children. Article 27: 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Article 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. Article 29: 1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. Article 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

End.