

## **BRIEFING NOTE**

# **CONDEMNED BUT NOT DETERRED: TORTURE IN SRI LANKA**

September 2020

## Introduction

Police brutality violates the rights and freedoms of civilians. June 2020 witnessed a global outcry against the abuse of power and acts of violence by law enforcement officers.<sup>1</sup> These global events prompted fresh calls for the eradication of torture and custodial deaths in Sri Lanka.<sup>2</sup>

The Sri Lankan judiciary recently acknowledged the systemic practice of torture in the country. In June 2020, the Supreme Court observed that there is a ‘consistent pattern of police violence, custodial torture and death, as evidenced by the considerable number of Fundamental Rights petitions filed before this Court’.<sup>3</sup> This observation was made in the latest judgment in a series of cases (between June 2019 to June 2020), where the court acknowledged the practice of widespread torture by law enforcement authorities. The judgments in these cases also corresponded with previous observations made by independent institutions on widespread torture in Sri Lanka.<sup>4</sup>

This brief explains the recent jurisprudence of the Supreme Court and provides insight into the continuing challenges concerning torture in Sri Lanka. It argues that, apart from judicial condemnation of torture, three major issues need to be adequately addressed to deter law enforcement from engaging in torture: (1) the costs and delays in seeking justice; (2) the lack of penal/disciplinary action against the perpetrators; and (3) the ad-hoc computation of compensation. The brief is presented in three sections. First, it sets out the legal framework pertaining to torture. Next, it explains the four recent landmark cases decided by the Supreme Court. Finally, it explores the three issues that impede meaningful progress on the elimination of torture in Sri Lanka.

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<sup>1</sup> British Broadcasting Corporation, *Black Lives Matter: From social media post to global movement*, at <https://www.bbc.com/news/world-us-canada-53273381> [last accessed on 17 July 2020].

<sup>2</sup> The Human Rights Commission of Sri Lanka, *Report of the Human Rights Commission to the Committee against Torture – Review of the 5<sup>th</sup> Periodic Report of Sri Lanka* (October 2016), at [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT\\_CAT\\_NHS\\_LKA\\_25601\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_NHS_LKA_25601_E.pdf) [last accessed on 10 July 2020], p. 13; United Nations Committee against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka (27 January 2017)*, UN Doc. CAT/C/LKA/CO/5, at <https://www.refworld.org/docid/596f5cc24.html> [last accessed on 10 July 2020], p. 3.

<sup>3</sup> *Kandawalage Don Samantha Perera v. Officer in Charge, Hettipola Police Station*, S.C. FR Application No. 296/2014 (Supreme Court of Sri Lanka), judgment delivered on 1 June 2020 [*Kandawalage Don Samantha Perera*], p.11.

<sup>4</sup> The Human Rights Commission of Sri Lanka, op. cit., p. 13; United Nations Committee against Torture, op. cit., p. 3.

## 1. The Legal Framework

Torture can be generally defined as: (1) any act intentionally inflicted on a person that causes severe physical or mental pain or suffering; (2) for such purposes as obtaining information or a confession, as punishment, to intimidate or coerce, or on the basis of discrimination of any kind; and (3) by or at the instigation of/with the consent of a public official or a person acting in an official capacity.<sup>5</sup>

Article 11 of the Sri Lankan Constitution guarantees freedom from torture without any exception. It provides that '[n]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>6</sup>

Additionally, Sri Lanka is a party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>7</sup> This Convention recognises the freedom from torture as a non-derogable right under all circumstances,<sup>8</sup> and imposes an international obligation on states to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture' within their territories.<sup>9</sup>

In compliance with its international obligations under the Convention, Sri Lanka enacted the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 ('Torture Act'). Under this Act, any person who is found guilty of torture by a High Court shall be punished with imprisonment between seven to ten years and pay a fine of Rs. 10,000 to Rs. 50,000.<sup>10</sup>

## 2. Recent Jurisprudence

Over the years, the Supreme Court of Sri Lanka has made several pronouncements that enhance the scope of the freedom from torture under article 11 of the Constitution. Four positive developments are worth noting. First, the Court has expanded the notion of 'torture' to include psychological and mental suffering.<sup>11</sup> Second, it has imposed liability on superior officers for neglecting their duty to prevent acts of torture by subordinate

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<sup>55</sup> Article 1, *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (entered into force on 26 June 1987) ['Convention against Torture'].

<sup>6</sup> Restrictions may be imposed on fundamental rights and freedoms only under and in terms of article 15 of the Constitution. Article 15 does not permit any restrictions to be placed on the rights recognised by article 11.

<sup>7</sup> Sri Lanka signed the Convention against Torture on 10 December 1984. The treaty entered into force in Sri Lanka on 02 February 1994.

<sup>8</sup> *ibid.*, article 2(2), which states that torture cannot be justified any circumstances, including 'war, internal instability or any other public emergency'.

<sup>9</sup> *ibid.*, article 2(1).

<sup>10</sup> Section 2(4), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 ('Torture Act').

<sup>11</sup> *W.M.K. de Silva v. Chairman, Ceylon Fertiliser Corporation* [1989] 2 Sri.L.R. 393; *Adhikary v. Amarasinghe and Others* [2003] 1 Sri.L.R. 270.

officers.<sup>12</sup> Third, it has recognised the right of the victim to be compensated.<sup>13</sup> Finally, it has liberally interpreted procedural rules to enable access to justice.<sup>14</sup>

This brief focuses on four recent judgments that were delivered between June 2019 and June 2020 and deal predominantly with torture: (1) *Landage Ishara Anjali v. Waruni Bogahawatte, Matara Police Station*,<sup>15</sup> (2) *Herath Mudiyansele Indika Kanchana Hemantha v. Karunaratne Mudiyansele Abeyasinghe, Maho Police Station*,<sup>16</sup> (3) *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon, Officer-in-Charge, Embilipitiya Police Station*<sup>17</sup> and (4) *Kandawalage Don Samantha Perera v. Officer-in-Charge, Hettipola Police Station*.

The victims in each of these cases belonged to the majority community in Sri Lanka, i.e. the Sinhalese community. Moreover, in three of these cases, acts of torture took place in the south of Sri Lanka, where the population is predominantly Sinhalese. These facts reveal that torture and police brutality cut across ethnic lines.

	Date and Victim's Profile	Reason for Arrest/Detention	Acts of Torture/Cruel Treatment	Compensation Awarded
1.	17 July 2012 – 15-year-old female	To further investigate an allegation that the victim had been sexually harassed by a local politician.	<ul style="list-style-type: none"> <li>• Subject to humiliation through public interrogation.</li> <li>• Coerced to make confessions by threat of reprisal.</li> <li>• Forcibly kept in custody overnight.</li> <li>• Deprived of food.</li> <li>• Forcibly admitted and compelled to remain in hospital for eight days.</li> </ul>	<ul style="list-style-type: none"> <li>• Rs. 100,000 by the respondent.</li> <li>• Rs. 50,000 by the state.</li> </ul> <p><b>(Rs. 150,000 in total)</b></p>

<sup>12</sup> *K.D.S. Silva v. Chanaka Iddamalgoda*, S.C. FR Application No. 471/2000 (Supreme Court of Sri Lanka), judgment delivered on 8 August 2003.

<sup>13</sup> *Sanjeewa, Attorney-at-Law (on behalf of Gerald Mervin Perera) v. Suraweera, Officer-in-Charge, Wattala Police Station* [2003] 1 Sri.L.R. 317; *Machchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and Others* [2005] 1 Sri.L.R. 341.

<sup>14</sup> *Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala* [2003] 2 Sri.L.R. 6.

<sup>15</sup> *Landage Ishara Anjali v. Waruni Bogahawatte, Matara Police Station and Three Others*, S.C. FR Application No. 677/2012 (Supreme Court of Sri Lanka), judgment delivered on 12 June 2019 [*'Landage Ishara Anjali'*].

<sup>16</sup> *Herath Mudiyansele Indika Kanchana Hemantha v. Karunaratne Mudiyansele Abeyasinghe, Maho Police Station and Five Others*, S.C. FR Application No. 411/2012 (Supreme Court of Sri Lanka), judgment delivered on 13 November 2019 [*'Herath Mudiyansele Indika Kanchana Hemantha'*].

<sup>17</sup> *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon, Officer-in-Charge, Embilipitiya Police Station and Nine Others*, S.C. FR Application No. 577/2010 (Supreme Court of Sri Lanka), judgment delivered on 17 December 2019 [*'Rathnayake Tharanga Lakmali'*].

2.	26 June 2012 – adult male	No reasons were given to the victim at the time of arrest (the respondents claimed it was on alleged suspicion of theft on board a passenger train).	<ul style="list-style-type: none"> <li>• Grievous physical assault, including assault with blunt weapons.</li> <li>• Deprived of medical treatment.</li> <li>• The victim’s family was not informed of his whereabouts for two days.</li> </ul>	<ul style="list-style-type: none"> <li>• Rs. 50,000 each by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.</li> <li>• Rs. 25,000 each by the 3<sup>rd</sup> and 4<sup>th</sup> respondents.</li> <li>• Rs. 100,000 by the state.</li> </ul> <p><b>(Rs. 250,000 in total)</b></p>
3.	16 September 2010 – adult male	On alleged suspicion of drug-related offences.	<ul style="list-style-type: none"> <li>• The victim was killed in police custody on 18 September 2010.</li> <li>• The victim was seriously physically assaulted prior to death.</li> <li>• The victim’s family was also threatened before his death.</li> </ul>	<ul style="list-style-type: none"> <li>• Rs. 250,000 each by the 1<sup>st</sup> to 4<sup>th</sup> respondents.</li> <li>• Rs. 25,000 each by the 5<sup>th</sup> to 7<sup>th</sup> respondents.</li> <li>• Rs. 1 million by the state.</li> </ul> <p><b>(Rs. 2,075,000 in total)</b></p>
4.	13 December 2013 – retired member of the Army	No reasons were given at the time of the arrest (the respondents claimed it was on suspicion of theft).	<ul style="list-style-type: none"> <li>• Grievous physical assault, including assault with blunt weapons.</li> <li>• Subjected to degrading and humiliating treatment.</li> </ul>	<ul style="list-style-type: none"> <li>• Rs. 50,000 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.</li> <li>• Rs. 100,000 by the state.</li> </ul> <p><b>(Rs. 200,000 in total)</b></p>

In each of the four cases, the Supreme Court condemned torture and police brutality, and called for reforms to address widespread torture. Three important observations emerge from the judgments delivered.

First, the Court acknowledged that all suspects were entitled to be treated with dignity, and that torture was an affront to human dignity. In the *Rathnayake Tharanga Lakmali case*, where the victim was killed while in police custody, Justice Thurairajah affirmed the principle that even suspects of serious crimes must be treated with dignity. The Court observed that the Sri Lankan legal system ‘provides for investigation, inquiry, trial and punishment by proper authorities’, and that ‘even a convicted criminal has a right not to be arbitrarily deprived of his life except in accordance with [the] law.’<sup>18</sup>

Second, the Court observed the recurrent nature of torture and state inaction. In the *Landage Ishara Anjali case*, Justice Buwanaka Aluwihare noted ‘the increasing number of

<sup>18</sup> *Rathnayake Tharanga Lakmali*, p. 12. The court also cited a passage from *Wolff v. McDonnell* [418] U.S. 539 (1974), which states at pp. 555-556 that ‘[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons.’

incidents of abuse of power by law enforcement authorities'.<sup>19</sup> He observed that '[t]here is no doubt that what is brought before courts is a fragment of the totality of incidents taking place across the country.'<sup>20</sup> Each of the four judgments also reiterated the state's duty to protect the rights of all citizens, and condemned the state's failure to fulfil this duty.<sup>21</sup>

Third, the Court reaffirmed the principle that superior officers are accountable for the actions of their subordinates by holding the superior officers also liable for the violation of victims' rights.<sup>22</sup> The imposition of superior officer liability signals that the Court is attempting to ensure that senior officers fulfil their responsibilities more diligently.

The Supreme Court's condemnation of torture is exemplified by its proposed guidelines that are to be followed by law enforcement authorities. These include: (1) maintaining proper records of arrests; (2) ensuring equal protection to persons in custody; and (3) training law enforcement personnel.<sup>23</sup> Judicial policy recommendations are uncommon in Sri Lankan jurisprudence. As such, the proposition of proactive guidelines is a welcome development. At least a few of these guidelines mirror the standards found in the International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018.<sup>24</sup>

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<sup>19</sup> *Landage Ishara Anjali*, p. 21.

<sup>20</sup> *ibid.*

<sup>21</sup> See *Kandawalage Don Samantha Perera*, p. 11-12, where the court opined that 'the violation of the right to liberty guaranteed by Article 11...of the Constitution should be of serious concern and in my view, the State should take more proactive steps to address the gap between the law and practice.' See also *Rathnayake Tharanga Lakmali*, p. 15.

<sup>22</sup> See *Herath Mudiyanseelage Indika Kanchana Hemalatha*, pp. 7-8, where the court held that '... any officer-in-charge of a police station, as part of his duty as superior officer is expected to monitor and be aware of the activities of his delegates or subordinates. Merely being present for duties does not amount to fulfilment of the responsibility attached to the designation.' See also, *Rathnayake Tharanga Lakmali*, p. 15.

<sup>23</sup> *Kandawalage Don Samantha Perera*, p. 11.

<sup>24</sup> Sections 15 and 16, International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018.

### 3. Issues that Impede Progress

Three issues continue to impede progress towards the eradication of torture in Sri Lanka, despite positive jurisprudential developments.

#### (a) Costs and delays in seeking justice

Under the current legal framework, victims are required to institute and maintain proceedings in three separate fora in order to seek justice: (1) fundamental rights applications before the Supreme Court to obtain a declaration that the victim's rights under Article 11 of the Constitution were violated; (2) criminal proceedings in the High Court under the Torture Act to ensure penal sanctions are imposed on the perpetrators;<sup>25</sup> and (3) administrative proceedings at the National Police Commission to take disciplinary action against the perpetrators or their superiors.<sup>26</sup>

Such legal action requires significant pecuniary and non-pecuniary costs that will have to be personally borne by the victim. Additionally, these costs will have to be borne over a protracted period when considering the inordinate time taken for a torture case to conclude. The victim will also be compelled to circumvent several institutional biases as the victim's actions are essentially against officers of the state. These costs and obstacles can discourage victims from taking legal action.

Additionally, the Supreme Court granted relief to the petitioner at least seven (7) years after the incident of torture in each of the four cases. Such delays may erode public confidence in judicial and law enforcement institutions, and may also discourage victims of torture from seeking legal remedies against their perpetrators. This predicament may result in further unchecked abuses of power by law enforcement officials.

#### (b) Lack of penal/disciplinary action against the perpetrators

The Supreme Court is constitutionally empowered to grant 'just and equitable relief' to persons whose fundamental rights have been violated. Accordingly, the Court has 'wide discretion' to issue a range of orders and reliefs 'considering the circumstances of the case in question.'<sup>27</sup> However, the Court failed to recommend any penal/disciplinary action against the perpetrators in the four cases.<sup>28</sup>

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<sup>25</sup> See section 4, Torture Act, by which the High Courts of Sri Lanka have the jurisdiction to hear and try offences under the Torture Act.

<sup>26</sup> See Article 155G of the Constitution, by which the disciplinary control and dismissal of police officers is vested in the National Police Commission.

<sup>27</sup> *Kanapathipillai v. Sri Lanka Broadcasting Corporation* [2009] 1 Sri.L.R. 406, p. 415.

<sup>28</sup> One possible explanation for this is that fundamental rights applications require a lesser evidentiary burden, while criminal action requires a much higher evidentiary burden. However, as per *Vivienne Gunawardena v. Perera* [1983] 1 Sri.L.R. 305 a higher degree of probability is required to be met in torture cases, and the Court generally evaluates a series of official records.



The Court's failure to recommend further legal action gives rise to two problems: (1) the victim is burdened with pursuing multiple legal proceedings to seek justice, and (2) perpetrators of torture are inadequately deterred.

If the Court makes recommendations for further penal/disciplinary action against perpetrators of torture, it will both aid the victim in navigating institutional biases, and place on notice the relevant officials to take stricter measures to counter systematic torture.<sup>29</sup> Such recommendations may also be used when examining the credibility of perpetrators at later proceedings. However, the lack of such recommendations discourages both victims and the state from taking necessary measures to address and deter routine torture.

### **(c) The lack of a formula for computing compensation**

Under international standards, victims of torture have a right to 'just and adequate compensation'.<sup>30</sup> However, the Supreme Court follows the principle that awards of compensation for fundamental rights violations should not burden the ordinary citizen.<sup>31</sup> Therefore, compensation for fundamental rights violations are usually nominal.

In the four judgments analysed in this brief, the compensation awarded by the Supreme Court was Rs. 150,000, Rs. 250,000, Rs. 2,075,000, and Rs. 200,000 respectively. If the compensation awarded in the *Rathnayake Tharanga Lakmali* case is excluded, it may appear that the Supreme Court adopts a uniform scheme of compensation. However, during the same period, the Court awarded the following amounts as compensation in four cases that dealt with violations of the right to equality: Rs. 1,000,000 (to two petitioners each), Rs. 200,000 (to three petitioners each), Rs. 600,000 (to one petitioner) and Rs. 500,000 (to one petitioner).<sup>32</sup>

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<sup>29</sup> Both the Inspector General of Police and the Attorney-General are named as respondents in cases of torture, and can be ordered to institute penal/disciplinary action against the perpetrators. For instance, in *Sugathapala Mendis v. Chandrika Kumaratunga* [2008] 2 Sri.L.R. 339 and *Environmental Foundation Limited v. Mahaweli Authority of Sri Lanka* [2010] 1 Sri.L.R. 1, the Court recommended further legal action be taken against the perpetrators concerned.

<sup>30</sup> Article 14, Convention against Torture; UN Committee against Torture, *General Comment No. 3 – Implementation of Article 14 by States*, UN Doc. No. CAT/C/G/3 (13 December 2012), p. 10.

<sup>31</sup> *Adhikary v. Amarasinghe and Others* [2003] 1 Sri.L.R. 270, p. 276. See also, *Saman v. Leeladasa* [1989] 1 Sri.L.R. 1, p. 44, where Justice Amarasekera held that '... I am unable to agree that deterrence is a relevant element in the assessment of compensation in Fundamental Rights action... It behoves us also to be mindful of the tax-payer and that of the ordinary man in the street to whom the burden of the tax-payer will, lamentably, be passed on eventually. Therefore, we need to act with restraint in awarding compensation.'

<sup>32</sup> *M.S.K. Wickramanayake v. Mahinda Balasooriya, Inspector General of Police*, S.C. (F.R.) Application No. 81/2010, S.C. Minutes of 27 August 2019; *S.M. Halpe v. Dr. Anil Jasinghe, Director-General of Health Services*, S.C. (F.R.) Application No. 54/2019, S.C. Minutes of 30 July 2019; *Sunway International (Pvt.) Limited v. Airport & Aviation Services (Sri Lanka) Limited*, S.C. (F.R.) Application No. 147/2017, S.C. Minutes of 02 December 2019; *Tharushi Amarasena v. Sri Lanka Medical Council*, S.C. (F.R.) Application No. 113/2017, S.C. Minutes of 01 November 2019.



None of these eight (08) judgments (the four on torture and the four on equality) reveal how the awards of compensation were computed. The Court does not venture into any analysis of medical expenses, injuries to the dignity and reputation of the victim, the degree of physical and mental distress caused to the victim or the loss of potential earnings. Therefore, there is no technical justification for how the Court arrives at the value of compensation.

The lack of a clear means of computing compensation undermines legal certainty, as the quantum of compensation would be left to the discretion of judges. This lack of justification could perpetuate the granting of nominal compensation, as seen in three out of the four torture cases analysed in this brief.

Most victims of torture will consider the financial burden of sustaining protracted litigation against state authorities, particularly in view of the delays in the Sri Lankan justice system. Therefore, the prospect of receiving only nominal compensation could discourage victims with financial difficulties from bringing abuses of power by law enforcement authorities to light. Moreover, nominal compensation is unlikely to have a deterrent effect on other law enforcement officers inclined to resort to torture—especially given that the Court has not recommended concomitant penal/disciplinary action.

## **Conclusion**

The recent jurisprudence of the Supreme Court condemns the practice of torture in Sri Lanka. Four landmark cases demonstrate the Court's willingness to reaffirm the principles of human dignity and the Rule of Law, recognise the systemic nature of torture in the country, and issue certain guidelines on the prevention of torture.

However, (a) the significant cost of and delays in justice, (b) the Court's hesitance to make orders requiring penal/disciplinary action against the perpetrators, and (c) the ad-hoc computation of compensation, remain serious barriers to progress. The existence of these three major issues continues to impede progress towards the eradication of torture and causes perpetrators to remain inadequately deterred.

Therefore, while the unequivocal condemnation of custodial torture by the Court over the past year is commendable, further measures need to be advanced by the Court to meaningfully reform law enforcement authorities and to curb the systemic practice of torture in Sri Lanka.