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Editor's Note

Child Abuse

Our lead article in this month's issue is on child abuse and some possible methods of responding to it. State Counsel Sajeeva Samaranayake in an depth analysis of the problem, argues that Sri Lanka needs to adopt a broader approach to the issue that will go beyond litigation and prosecution. One of his arguments is that the country needs to develop appropriate systems of child care and parental support. He analyses the adversarial nature of court proceedings and discusses some of the limitations of pure legal methods. He provides an interesting analysis of the legal system's search for the 'official truth'. If the child's interests are the paramount consideration, then greater emphasis should be placed on protecting the child and providing a broader range of emotional support, says Samaranayake. He analyses the Scottish Children's Panel and offers this as a possible model.

The Mannar Rape

On the 19th of March this year, two women were allegedly raped and molested by members of the Navy in Mannar. We re produce in this month's issue a press release by the Centre for Human Rights and Development on this allegation and the indifference and tardiness of the police in relation to the complaint. The response of the police is often related to the personalities involved. Where complaints are made against members of the armed forces, the wheels of justice move slowly. The investigation into the complaints of rape at Mannar is no exception.

Human rights groups have for many years been alleging that the rape and molestation of women takes place frequently in the conflict areas and those bordering the conflict. Barring the Krishanthy Kumaraswamy Case, no members of the armed forces have been charged and convicted.

Human Rights Commissions and Socio Economic Rights

We also publish an article by Danie Brand and Sandra Liebenberg that analyses the Second 'Economic and Social Rights Report' released by the South African Human Rights Commission in September 2000.

In an unique monitoring process, the South African Human Rights Commission is constitutionally required to request information from relevant state organs on the steps that they have taken to implement the socio economic rights guaranteed in that country's constitution.

In Sri Lanka, the National Committee on Women has a similar power under the Women's Charter, but has never exercised it. The South African report may also provide some inspiration to the Sri Lankan Human Rights Commission as the new Commissioners commence their second year in office. The Sri Lankan Human Rights Commission has recently initiated a study into the human rights of Internally Displaced Persons (IDPs) in collaboration with three NGO partners: the Consortium of Humanitarian Agencies, the Centre for Policy Alternatives and the Law & Society Trust. The plight of IDPs illustrates very well the links amongst the different categories of human rights: civil, cultural, economic, political and social.

Women and the Right to Housing

We carry this month the unofficial text of a recent resolution by the Commission on Human Rights on 'Women and the Right to Housing'. The resolution is preceded by a brief introduction by the Centre on Housing Rights and Evictions.

The resolution welcomes the findings of a 2000 report by the Special Rapporteur on Violence against Women, in particular, that women's poverty, coupled with a lack of alternative housing options, makes it difficult for women to leave violent family situations, and reaffirms that forced relocation and forced eviction from home and land have a disproportionately severe impact on women.

Integrating Fundamental Rights into Other areas of the law

In a previous issue of the LST Review we published a decision of the Supreme Court, where the Court had used the Directive Principles of State Policy and international human rights norms as interpretive aids. In this issue, we publish another decision of the Supreme Court where the fundamental rights provisions of the constitution were used to interpret the criminal law and to give meaning to the right to a fair trial. The case was a criminal appeal, yet one of the judges held that the procedures followed in that case was a violation of the constitutional right to a fair trial of the accused, guaranteed under Article 13(3).

CAN OUR COURTS EVER BE AN APPROPRIATE MECHANISM FOR SAFEGUARDING AND PROMOTING THE WELFARE OF AN ABUSED CHILD?

Sajeeva Samaranayake*

INTRODUCTION

1.1 'Child abuse' has become one of the foremost topics of discussion today. Our society has awakened, albeit gradually, to the grim reality that we are simply not taking adequate care of our children. At a time like this we need to remind ourselves of the rich cultural legacy we have inherited from our forefathers. An important aspect of this legacy was the protective role that society played in taking care of its weakest and most vulnerable segment; the children. Thanks to our ignorance inaction and indifference, the last vestiges of this great culture are receding before our very eyes today.

1.2 It must also be recognized that this problem cannot be regarded as a mere by-product of the political economic social and cultural instability our country is experiencing at present. It has far greater ramifications. Ignoring the burning issues facing the children today would be the surest means of guaranteeing the perpetuation of the current state of affairs and perhaps bringing about the eventual disintegration of Sri Lankan Society.

1.3 In our scramble for material advancement we overlook the fact that there is no other resource – human or otherwise, which demands to be cherished, nurtured or protected more for the survival of our civilized way of life, than our children.

1.4 A society loses the very core of its morality once it loses the innocence of its children. When it looks on as their physical, moral and intellectual development gets blighted through the inexorable decline of human values, hope itself dies.

1.5 A few enlightened individuals who have realized the gravity of this problem have dedicated their lives to this worthy cause. Yet they are grappling with this

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* State Counsel. The views expressed in this article are the personal views of the author.

problem in their individual spheres leaving their fellow professionals and the general public far behind. Our civic consciousness is mired in conventional prejudice and ignorance, finding solace in simplistic platitudes which affirm the status quo and scarcely touch the root of the problem. A classic example of this is our national preoccupation with law reform to the virtual exclusion of how laws are implemented and enforced. Another example is the hidebound attitude towards corporal punishment and its mechanical justification "spare the rod and spoil the child"

1.6 It is a sign of the times that societal attitudes towards child abuse should reflect established attitudes regarding other national problems. A small minority which is actually doing something about it is left to their own devices. It requires a major calamity for the general public to sit up and take notice and little time is needed thereafter to conveniently forget about it. Members of the public who are genuinely concerned are given neither the direction nor the opportunity to give meaningful support to those who are actively involved in containing the problem. However, fingers are pointed, views expressed, theories and solutions advanced but at the end of the day society is not just divided, but confused and uncertain.

1.7 Therefore, there is no consensus and clarity of purpose and no social cohesion in dealing with what is after all a threat to the very existence of society. Yet there is no reason for disunity where children are concerned. Society has already acknowledged that child abuse is a serious problem and that something must be done about it. The purpose of this paper is to identify the priorities in combating child abuse, to highlight the relevance of child welfare and to propose a radical departure from traditional approaches to this problem.

THE LINK BETWEEN CHILD ABUSE AND THE CARE SYSTEM OF AN ABUSED CHILD

2.1 Child abuse is no ordinary crime. Generally the physical, sexual or emotional abuse of a child reflects upon the failure of his or her family and immediate community to protect them. The following classification is therefore based upon the universal principle of inter-dependence.

Category A

This is where a child is abused by an immediate member of his or her care circle. In so far as the family is concerned such failure may be attributed to a lapse or breakdown in inter-personal relations within the family which may be caused in turn by socio-economic factors beyond its control.

Category B

These cases reflect adversely, not upon the family but upon the wider society as where a school girl returning home from school is abducted and raped by a stranger. In such cases the care system of the child (comprising the immediate family and other care-givers) whilst not having 'caused' the crime may nevertheless have to contend with its traumatic effects and consequences.

Category C

In cases falling under this category a breakdown of the care system is exploited by a third party in order to abuse the child.

Category D

A child belonging to this category is the most vulnerable for in this case there is a complete absence of a care system and no legitimate parent or guardian. This may even be an aggravated phase of a child who initially belonged to the third category.[1]

2.2 This categorization illustrates the critical importance of the care system surrounding an abused child in preventing abuse from taking place at all and in supporting recovery and rehabilitation where it has taken place.

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[1] It will of course be appreciated that these categories are not water-tight compartments but a practical guide for classifying the child victim with reference to the most relevant criterion in so far as his or her security and well being is concerned.

SUGGESTED PRIORITIES IN CHILD PROTECTION

3.1 The adoption of a holistic approach and a child perspective therefore reveals three principal objectives which ought to be included in any agenda for action which has child protection as its foremost goal. They are set out below in their suggested order of priority.

1. Prevention of abuse either through family support or the provision of an alternative care system.

2. Protection of an abused child from further harm and his recovery and reintegration into society.

3. Prosecution of the offender and his rehabilitation and re-integration into society.

SOCIETAL RESPONSE IN SRI LANKA AND ITS INADEQUACY

4.1 Child abuse has been prevalent in our society in its various manifestations, (some considered tolerable like the employment of child domestics) for a considerable length of time but it was never perceived as a serious problem. During the late 1980s however certain types of abuse (like sex tourism which thrives on the abundance of poverty-stricken children) grew so alarmingly that the conscience of society was shocked both by their nature and extent. For a country which had more than its share of problems on its plate the societal response was understandably late. But this delay by itself may not have exacerbated the problem if the state response had addressed not merely the symptoms of the problem but its causes as well.

4.2 The breakdown of care systems in our society can probably be traced (albeit broadly) to the social changes brought about by the opening up of the national economy in 1977. It was this economic climate which prompted a mass exodus of mothers and fathers for employment in the Middle East, generating immense wealth by way of foreign exchange, but at a crippling social cost.

4.3 In October 1995 an unanimous Parliament passed the celebrated Penal Code (Amendment) Act No. 22 of 1995. The problem of child abuse was thereby entrusted to the criminal justice system, lock, stock and barrel. Five years later it is obvious to all that what was done in 1995 was woefully inadequate to even contain the problem. The fault lay not with the Amendment Act which, despite certain drawbacks was an influential piece of legislation, but with official attitudes which regarded the passing of the Act as an end in itself.

4.4 Apart from setting up Women and Children's Desks in police stations all over the island, no serious effort has been made, up to now, to understand the limitations and dynamics of the three institutions charged with the task of **enforcing the law**, and to render them more efficient and service oriented; these being, the Police Department, the Attorney General's Department and the Judiciary

4.5 If deterrence was the central object of the 1995 Amendment the steady increase of cases all over the country must surely give second thoughts to the policy makers now. In the words of a Woman Sub Inspector of Police[2] the number of cases of child abuse has reached epidemic proportions with the situation worsening day by day.

4.6 A cursory glance at the statistics emerging from the Attorney General's Department reveals that a total of 464 cases were submitted for processing of indictment during the period 5th August 1999 to 31st December 1999,[3] alone. The number of cases submitted during the first five months of this year has exceeded 500 and a conservative estimate would place the total for this year at 1000.

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[2] An emerging breed within the police service which is now pushed into the front line of the battle against child abuse and compelled by the force of circumstances to play the role of counsellor and care giver to the abused child in addition to their primary role as investigator.

[3] The division of criminal files within the Department is generally based on the criminal circuits which prevailed during an era when Supreme Court Judges went on assizes to hear cases of murder and rape. Files submitted from the Criminal Investigation Department, the Colombo Fraud Investigation Bureau and the Police Narcotic Bureau are exceptions to this rule and treated as special categories. To this special list was added cases of child abuse submitted to the Department from all over the Island and such cases were designated as "CH" files from 5th August 1999. Cases of child abuse submitted prior to 5th August 1999 came under the respective circuits.

Comparative statistics taken from the period 1st August 1999 to 31st December represent the general trend:

Murder	465
Attempted Murder	150
Adult Rape	70

In reading these statistics it is important to bear in mind that the percentage of reported cases of murder far exceed the percentage of reported cases of child abuse. Virtually every case of murder gets reported whilst in child abuse we are said to be dealing with the tip of the iceberg.

4.7 As the numbers mount upwards our children continue to pay the price which is necessarily extracted by a criminal justice system sans child-friendly procedures hell bent on punishing the offender without addressing the most basic issue of caring for and supporting the victim through a protracted judicial process. Therefore, even the successful prosecutions achieve little by way of providing relief and redress to the child victim.

4.8 The legislative response in 1995 was confined to the third principal object mentioned above which was identified as "prosecution and meting out stringent punishment to the offender". In the result the nature and complexity of the crime itself as well as the other two objects are being ignored today.

INTERNATIONAL RECOGNITION OF THE NEED FOR A FLEXIBLE AND PRAGMATIC APPROACH

5.1 The complexity of these crimes requires a flexible and pragmatic approach as opposed to an automatic investigation in every case. The Agenda for Action adopted at the 1st World Congress against Commercial Sexual Exploitation of Children in Stockholm, Sweden in 1996 aims to highlight existing international commitments, to identify priorities for action and to assist in the implementation of relevant international instruments. In particular it calls for action from states to:

develop or strengthen and implement laws, policies and programmes to protect children and to prohibit the commercial sexual exploitation of children, bearing in mind that the different types of perpetrators and ages and circumstances of victims require differing legal and programmatic responses. (emphasis is mine)

5.2 According to Prof. Savitri Goonesekere:

> *The law has to strike a balance between intervention and non-intervention in the area of child abuse within the family in order to protect the child's interests in retaining his/her relationships within the family. In that sense there is some rationale for keeping the family outside the area of public scrutiny: the child must not be placed at greater risk by state intervention. No such balance need be maintained when the child is the victim of violence in the community. Yet the legal systems of the region in their penal and other laws treat abuse of this type, in general, in the same manner as parental abuse and exploitation".*[4]

5.3 Be that as it may the luring of Children's Organizations into this same prosecution trap has undoubtedly been the most unfortunate by product of the legislative approach of criminalizing all forms and degrees of child abuse.

5.4 These voluntary organizations committed to the fight against child abuse find themselves spending less time working to support and advise parents and offering services and resources to help needy children, and more time investigating allegations of child abuse, collecting evidence and helping to bring cases before the courts[5].

5.5 This pre occupation with the criminal justice process is aptly summed up by the English duo of Michael King and Dr. Judith Trowell in their path breaking book "Children's Welfare and the Law – The Limits of Legal Intervention" Sage Publications (1992) at p.18. Their message is clear.

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[4] Children, Law and Justice. A South Asian Perspective, Sage Publications, 1998, at p.270

[5] This is a general statement which ought to be understood generally and not as a specific reference to any particular Non Governmental Organization.

"We voice our concern over the way in which, whenever the spectre of child sexual abuse is raised, all other aspects of that child's needs and welfare seem to vanish from sight as social workers, police, lawyers and judges all seek answers to the two big questions: 'Did it happen?' and 'Who did it".

5.6 Although we are now fascinated by the concept of child-friendly procedures we need to guard ourselves against embracing it as a panacea for all ills in the same way that the 1995 Amendment was welcomed[6].

5.7 Apart from the fact that it leaves the issue of preventive care untouched, this concept should not obscure the uncomfortable truth that victims of crime in general have been treated as nothing more than evidentiary baggage[7] by the criminal justice system.

5.8 The historical cause for this strange indifference to the victim of crime is explicable by reference to the conceptual underpinnings of the criminal law which legitimized the theory (or fiction?) that a crime is committed not merely against an individual but against society; thereby transferring the prosecutorial function and powers to the state. This arrangement was efficient and convenient but it marginalized the victim for all time. His and her wounds became state property and they had no say in how the prosecution was conducted. His or her only function was to re-live their painful memories, defend their credibility and character against an unfeeling cross examiner and then fade into oblivion after securing a "victory" for the state. The criminal law sought to punish the offender – not to provide reparation to the victim. That was the function of the civil law. Therefore the proponents of child friendly procedures must appreciate that a side wind may not suffice to overcome this fundamental flaw in the system.

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[6] This is not to underestimate this idea in any way as it is a true blessing to all children within the criminal justice system.

[7] The phrase is borrowed with gratitude from the following statement made by Chief Robert P. Owens in his testimony to the United States President's Task Force on Victims of Crime. "For too long we have viewed the victim as evidentiary baggage to be carried to court along with blood samples and latent fingerprints. It is about time that we as police began to view crime victims as our clients, as the aggrieved party in need of representation, reparation and recognition".

THE ROLE OF THE LEGAL SYSTEM AND ITS INHERENT LIMITATIONS

6.1 We will now examine the inherent features of the legal system, which prevent or obstruct, a caring yet dispassionate and professional consideration of the real issue, which are crucial for the mental, physical and emotional well being of a troubled child. We will focus in particular on the importance of the care system of an abused child, which alone can guarantee their continuing welfare once the law has intervened (whether in criminal proceedings or civil such as actions for divorce, custody, maintenance etc.) It is sought here to question the assumption that the law (whether criminal or civil) can take on and deal effectively with human relationships in the guise of adjudicating on rights and duties.

THE RELEVANT FEATURES OF THE LEGAL SYSTEM

(A) The Adversarial Approach

7.1 One aspect of this approach is the polarizing effect it has on the parties who are driven to two separate camps. The dispute becomes a legal issue. The primary duty of submitting the facts rests on the respective parties and the task of the judge is to apply the law to those facts and provide a legal solution. The sum total of the facts submitted by both parties (presented in a way to secure the best advantage to them) may not approximate to the whole truth. But rarely does the judge venture on his or her own to make independent inquiries.

7.2 Another aspect is the position of power given to the advocate within the system. According to Richard Du Cann.[8]

> *Few laymen realize how extensive, indeed how dominant, are the powers given to the advocates on the two contending sides in our adversarial system. It is these powers which have given a special place to advocacy in our common law trial system in both civil and criminal courts. On the criminal side in all the Continental systems, the accusatorial approach is adopted where the Judge dominates the proceedings. The Judge decides*

[8] The Art of the Advocate, Penguin, 1993, at p.2.

which witnesses shall be called, often beginning the trial with questions to the accused person...

In our system the Judge presides somewhat like a referee on the football field, blowing his whistle from time to time for an infringement but not actually kicking the ball himself save in very limited or exceptional circumstances. In such a climate advocacy flourishes.

7.3 The adversarial approach reduces the dispute between parties to specific isolated issues where certain facts are deemed relevant and others not. The judgment is delivered in the affirmative or negative in answer to these issues. Here the victory of one party is the defeat of the other. No compromises are possible. The legal remedy is superimposed on the parties by law. Nonetheless the difference or disagreement between them does not disappear. It remains in fact.

7.4 Contrast this with our own ancient method of settling disputes through mediation. According to Justice Dr. A.R.B. Amerasinghe:[9]

Some of the early British Administrators, like Skinner probably understood the value of the way in which a dispute was traditionally settled, namely allowing the parties themselves to settle a matter and removing the underlying cause of the dispute; it was a decision that was likely to stick, because it was made by the parties themselves, and at the same time the cause of future acrimony was removed because the underlying causes of the dispute were considered... unfortunately as we have seen, the adversary atmosphere in the courts introduced by the British was not designed to bring about amicable settlements: the identification and removal of the real cause of grievance by delving below the superficial cause of complaint is not the aim of adjudication. (emphasis is mine)

[9] The Legal Heritage of Sri Lanka, Sarvodaya Vishva Lekha, 1999, at p.350–351.

7.5 In the alternative the European inquisitorial approach with its broad powers of factual investigation affords an appropriate method of handling complex issues concerning the custody and welfare of a child.

(B) The Role of the Courts in maintaining Social Cohesion.

7.6 An important function of the law is to simplify complex and seemingly intractable situations into a simple story, which conveys a moral message. Thus, the complex nature of human relationships is broken down to fit into the twin methods of reward and punishment. For example, 'the wicked father abused his child and was sent to jail'. The wicked are punished and the innocent protected. Although, on the surface this gives the public a sense of confidence that the law has once again meted out justice, it is achieved only by ignoring the complexities that the law itself is unable to deal with.

7.7 The argument has been convincingly advanced that the performance of this function is singularly inappropriate within the arena of human relationships. King and Trowell sound this note of caution; (at p.113)

> *"The legal process works relatively well as a protector of substantive rights when it is asked to rule upon issues arising out of a contractual arrangement, such as landlord and tenant or seller and buyer. It may also work well when faced with such quasi-contractual situations as teacher-pupil or trustee-beneficiary. However, it works far less well for those relationships which are based upon a complex interweaving of emotional and economic factors such as one finds in family issues. While it may be able to regulate the economic relationship by deciding, for example, that the couple should share equally the proceeds of sale of the matrimonial home, it often has to leave emotional conflicts to be resolved outside the courtroom. In child protection cases, however, it is often not possible for law to renounce responsibility in the fraught area of emotions. To reduce the complexities to issues of rights and their infringement may the only way that the legal process can give the impression of dealing effectively with such conflicts. The suspicion remains, however, that the rights rhetoric is covering up vast areas of human experience which law is ill equipped to tackle".*

7.8 Naturally, improvement of court facilities in terms of making them more child-friendly, training judges and lawyers and employing experts will go a long way towards improving the quality of justice for children and parents. Once these improvements are made the impression may be created that the court is now well equipped to handle complex problems, although in reality the court may still not be the most appropriate forum to determine matters relating to child welfare. There will be no change in the basic methods adopted by the legal system in dealing with complex issues by simplifying them and thereby ignoring to a great extent the emotional element. The danger arises, in situations where parents and social workers are unable to resolve matters and therefore feel that the court will be the most competent body to decide the issue.

(C) The Formalism of the Law

7.9 The Vijaya Samaraweera Report on "the Abused Child in the Legal Process" takes the view that the legal process cannot be child friendly in the true or strict sense of the term. This is because legal systems have inherent characteristics or qualities which when combined together make them far removed from the understanding of the average individual who comes before them. These qualities are to be found in the institutional culture, behaviour patterns of the actors involved, in the formalism and in the mystification of the law. The language of the law exemplifies this.

7.10 Dr. Samaraweera also states that there is an undoubted tension or conflict between the formalism of law and the substantive objectives looked upon on behalf of children. He illustrates this with reference to the basic concept of the rule of law.

7.11 The rule of law requires that the law will operate in such fashion that the outcomes will be uniform and certain through the objective application of easily verifiable rules. This of course is contrary to the expectation of a child friendly system where it is the individual and unique make up of the child who is before the court that is to be considered and evaluated, not the unvarying application of rules.

7.12 King and Trowell make the identical point with characteristic directness; (at p.119)

While we accept without any hesitation that, as individuals, sympathetic and well-intentioned lawyers and judges may from time to time be able to improve the lives of children whose problems come before the courts, this is not, we would argue, because they are lawyers and judges, but because they are sympathetic and concerned individuals. By forcing good intentions to conform to very precise and correct forms ... the legal process may at times actually inhibit these good intentions or hem them in with conditions and provisos which detract from their benevolence. Nor should it be thought that tinkering with the process will in itself bring about changes in the fundamental nature of law and the social functions that the legal system serves. The legal process **is** *not, for example, going to provide those material and emotional resources that give children security and allow them to blossom. Generally, all that law can do effectively is to manage the conflicts that arise between adults over the extent and nature of their relationships with children. Even here one may well question how effective the law is as a social institution for conflict management where the subject of the conflicts consists, not of material goods or property, but of relationships and emotional engagements.*

7.13 There is another aspect which flows from the 'mystification of the law' referred to by Dr. Samaraweera.

7.14 The immense power that judges and lawyers wield over their fellow citizens, coupled with a lack of accountability leads to a pre-occupation with legal principles and procedures to the virtual exclusion of the factual context on which they impact. The relevance of courts as a social institution depends upon the extent to which it is grounded in social reality. The formalism of the law promotes an isolationist approach whereby the courts stand removed from the people and follow practices and conventions which are agreed upon by the judges and lawyers. That some of these practices (like the practice of postponing cases as a matter of course and permitting cases to drift along without an end in sight) may not accord with the public interest is rarely recognized.

7.15 The wisdom of the saying, "you cannot learn law by learning the law alone" is forgotten. The interaction of law with other disciplines in society and the need for a multi-disciplinary approach in tackling social problems do not receive the

emphasis they require from the legal profession. Moreover no examination is conducted with regard to the social impact of the operation of laws within society. Social impact assessments need to be carried out regularly and on a continuing basis in order to ensure that laws and legal procedures remain relevant and useful.

(C) The Dominance of the "Legal Truth"

7.16 Besides conflict resolution, the legal institution renders an important social service in establishing the 'truth'. The legal system will thus provide answers to questions such as 'did abuse actually take place?' and 'if so, who was responsible?' The answers to these questions will establish the 'official' truth i.e. the truth as determined by the legal system.

7.17 However, factors which seem relevant in deciding the truth as understood by those who have been in close contact with the child and family may not correspond to the 'official' truth. A decision to discharge or acquit the accused may be based on factors such as the inadmissibility of evidence or even the performance of witnesses in court. On the other hand social workers, psychologists and others who have been involved in the investigation process have been exposed to a version, which has not been sieved through a net of legal rules and which has not been limited to snap shot exposures in court. Therefore, a rejection of this version by the court may seem to them, only to encourage repetition of the abuse by the perpetrator.

7.18 Another vital aspect is that non-confirmation of the child's version by the court should not hinder the work of those agencies in trying to help the child or the family. Much emphasis must be placed on the fact that even if the alleged perpetrator is acquitted or discharged, therapeutic treatment for the child must not cease. There is a probability that the child was abused although the person implicated was not the actual perpetrator. For instance, in the case of an alleged statutory rape (i.e. rape of a girl under the age of 16 years), although the accused is acquitted, an offence has been committed. Therefore, the agencies responsible for the welfare of the child must continue to work with the child to ascertain whether she was lying on behalf of someone else and if so, for what reason.

7.19 Furthermore, the law deals with a dispute by making a determination on the facts in order to establish the truth. The importance of establishing 'facts' is not limited to merely proving or disproving a case. Once a court decides on the facts as represented by the parties, its determination becomes an authoritative statement of what is 'true' or 'false'. This creates a problem for social workers who invest much time and energy in investigative work in order to establish the facts at the expense of family support work. This can also create a conflict of interest when welfare workers while attempting to provide support to the family find themselves collecting facts for presentation in court.

7.20 A separation of the investigative role from the therapeutic role would therefore be highly desirable. Thus in France investigations into child abuse are entrusted to prosecutors, court social workers and specialized sections of the police, thereby relieving social workers of this duty who are then free to work with the family.

(D) Delays and Uncertainties in the Legal Process

7.21 It is ironic that the more the law tries to make itself responsive to children's needs and the more the courts transform themselves into tribunals of inquiry into the best interests of children the longer the delays and the deeper the uncertainties are likely to be. King and Trowell explain (at p.6)

> *When the courts are simply concerned with deciding issues of 'proved' or 'not proved', as in criminal trials, the law can rely upon the 'good sense' of judges, magistrates and juries. But when it is a matter of determining questions about a child's future welfare, this necessarily involves lengthy investigations of the family, the personalities and motivations of the parents, their capacity to care for and protect their child and the child's needs and problems and how the needs can be met and the problems tackled. All this takes time – a considerable amount of time.*
>
> *The more the legal system takes on itself the burden of protecting children and promoting their interests, therefore, the less able it is to act swiftly to resolve conflicts and provide certainty. If courts were actually able to offer an environment for long-term problem-solving and resources to help children and families in difficulties, there would be less of a problem.*

Unfortunately, in Anglo-Saxon countries which operate upon an adversarial system of justice this is not possible... Furthermore, despite all the trappings of welfarism ... when it comes to the crucial decision-making, the courts often revert to type and concentrate on issues of 'proved' and 'not proved'.

(E) The Role of Lawyers

7.22 King and Trowell argue that lawyers appearing for parents in cases involving the welfare of children cannot espouse the cause of the latter within their professional framework (at p. 101-103). According to them:

"Lawyers have a strong and at times enviable part to play. They fight to win the case for their client, but at the same time seem able to cultivate the art of detachment as part of their professional equipment, describing calmly, without emotion, the most horrific details of child physical or sexual abuse. Their transient involvement with children and families moving swiftly from one case to another, protects them against the emotional impact of what has happened to the children and relieves them of responsibility.

7.23 Nevertheless this is not a role which they would relinquish gladly. King and Trowell again (at p.104):

For lawyers to accept, for example, that the legal process itself may be harmful for children, and that some extra-legal method might be preferable for dealing with disputes between state and parent or between parents over the protection and welfare of children, would be to deprive themselves of a role, status, business. The tendency rather is to call for reforms of the system such as video evidence, psychological experts or training programmes for lawyers and judges which, far from removing the delicate and complex cases involving children's welfare to a more appropriate setting than courts of law, retain and increase the lawyer's role, albeit in a form which gives the impression that lawyers are moving with the times and are well able to cope with the new demands made of them.

THE KING AND TROWELL PRESCRIPTION

King and Trowell thus recommend a separate decision making body outside the court structure and the new model to contain the following features or attributes.

1. The limited use of the courts as the appropriate mechanism for determining issues concerning children's welfare.

2. The capacity to engage the family in the child's future welfare.

3. The ability to control resources or provide authoritative directives to those controlling resources.

4. Continuity in the involvement with the child and family.

THE SCOTTISH CHILDREN'S PANEL

8.1 The English Authors cite the Scottish Children's Panel as an example of an adversarial system which has devised a method to separate the legal from child welfare aspects of cases. The Panel can only take on those cases where both the child and parents accept the facts or a previous court decision has established that the child is at risk. Where the facts are disputed the case is first referred to a hearing in the Sheriff's Court where all the trappings of legal procedures are present, including legal representation for both parents and child.

8.2 Panel members are members of the local community with a particular interest in children. Their training sessions concentrate on such matters as child development, family systems theory and communicating with children. There is no legally qualified person to guide them in their decisions.

8.3 The Reporter who plays an important part in investigating and selecting the cases for the panel presents the facts of each case and often offers guidance as to what solutions are available. He is more usually trained as a social worker than a lawyer.

8.4 At the hearing, Panel members, the Reporter, Social Workers, Parents and Children usually sit around a table and discuss the situation informally. No lawyers are permitted. Significantly the Panel has successfully resisted demands for legal representation by arguing that it is not a court of law, but a hearing to decide what is best for the future welfare of the child.

8.5 King and Trowell observe that in both England and the United States the legal culture and the jealously protected power and interests of the judiciary and the legal profession are likely to present a major obstacle to the changes they wish to see implemented.

8.6 Quite apart from the legal culture the biggest obstacle towards setting up a child care model in Sri Lanka is the lack of human resources at grass roots level in the form of professional social workers and mental health professionals who ought to be in the forefront of all preventive and protective measures taken in this field.

CONCLUSION

9.1 Notwithstanding the two major obstacles cited above much could be accomplished once all sectors of society engaged in combating child abuse reach a consensus and establish the priorities in child law and child protection. Once this is achieved, the seemingly endless road would at least be clear and free of distractions.

The Mannar Rape

Press Release by the Centre for Human Rights and Development

The incident involving rape, torture and molestation of two young Tamil women in Mannar by Naval and Police personnel has shocked the conscience of civilized society in Sri Lanka and around the world. The casualness and impunity with which this brutal crime was committed has cast doubts not only on the existing safeguards for ordinary citizens against police and military excesses, but also on the Sri Lankan Government's commitment to abide by the rule of law.

The two young Tamil women, Sivamany and Vijikala aged 22 and 24 respectively were arrested from Ashika Lodge close to Mannar town by Navy personnel at about 10.30 p.m. on 19th March 2001. Despite the absence of any evidence to implicate them with any offence, the two women were taken to the Special Investigation Unit (SIU) and were raped by both naval and police personnel. Thereafter they were molested and tortured while at the SIU overnight. They were made to parade naked and hung upside down and assaulted and a statement purported to be a confession was obtained.

Although the news of this incident had appeared in newspapers from the 22nd March onwards, the SIU and the Mannar Police were in no hurry to produce them in court. They were finally produced at the Magistrate's bungalow on the 27th March evening. Thereafter on 30th March they were produced for a medical examination before the DMO who confirmed the rape and torture of the two women.

On 3rd April after taking depositions from the victims in open court where they stated in detail their ordeal and disclosed at length three names of the perpetrators, the Magistrate ordered the Director CID to arrest the offenders. However, even when lawyers representing the two women appeared in court on 9th April, no arrests had been made. Instead, the police made an application to further remand the victims. Refusing the application of the police, the Magistrate granted bail to both women. The Magistrate further ordered that Raja, Vimal and Inspector Suraweera, specifically named in the deposition, and Sub Lieutenant S.P.N.Kumara of the Navy, together with other suspects at the SIU and the Naval party be arrested and produced forthwith on 23rd April for an identification parade.

The most glaring aspect in this episode is the total indifference and reluctance of the police hierarchy to take action against the offenders. The two women who had been arrested by Navy on the night of 19th March were illegally kept in the SIU and the Mannar Police Station until 27th March and were remanded to fiscal custody. Although news of these sordid happenings had leaked out to the outside world and were published in Sri Lanka and International media, no action was taken either by the Mannar Police or the Police HeadQuarters. It is appalling that the police who make arrests on a mere tip off in respect of ordinary and minor crimes had not even attempted an investigation into this heinous crime committed under their very roof. In Sri Lanka rape is an indictable offence triable in the High Court. Even after the Court ordered the arrest of the suspects, the Police have not made any such arrest, acting in defiance of the court order.

The Police inaction was so blatant that the Minister of Justice, Batty Weerakoon, had to take the IGP to task for failure to arrest suspects and expressed surprise that the only action taken so far was the transfer of the offenders out of their station. The stand taken by the minister is indeed commendable.

The most serious fallout from this incident is the erosion of confidence placed in the Police Department. This confirms the belief that the police are acting partially in dealing with Tamil people and that the Police are protective of the offenders when the victims happen to be Tamils. Instances are numerous in far off outposts such as Mannar, Vavuniya, Batticaloa and Trincomalee that murder, rape and illegal arrests go unchecked and unprobed when the police and armed forces commit them.

Another serious concern is the non-observance of the safety mechanisms that have been put in place in the Emergency Regulations. The salutary provision that any search operation by the armed forces should be conducted with the assistance of the police had not been observed. It seems that no police assistance had been sought or obtained in the search operations of Asika Lodge and that the Naval personnel had gone on a frolic of their own.

Another safeguard is the normal requirement that women police officers or military women cadres be present during this type of operation. This requirement has also been flouted. These two young girls were totally at the mercy of an all-male naval force when they were arrested at 10:30 p.m. Even at the SIU when the girls were kept overnight, no women police officers were on duty. The requirement of the presence of Women Police

Constables (WPCs) is to eliminate such violations. The violation of such an imperative requirement cannot be justified under any circumstance.

The requirements that receipts of arrest should be issued and the Human Rights Commission be informed of the arrest within 48 hours have also not been followed. This gives the impression that the armed forces and police are not interested in observing the rules and that they are a law unto themselves in the North and East.

Another matter for concern is the lack of adequate coverage of this incident in the national English and Sinhala newspapers and the electronic media. Quite apart from a failure to highlight the injustice perpetrated on these women, the lack of media coverage gives the wrong message to the perpetrators that they could escape public scrutiny even after committing an offence of this magnitude.

We of the CHRD urge the Inspector General of Police and Director, CID and the Police Department to shake off their discriminating attitude towards this case that has gained wide publicity locally and internationally.

It is imperative that all those who were on duty on the day of 19th March at the SIU, and all the naval personnel who were in the party that searched the lodge should be arrested and produced at the identification parade ordered by court to be held on 23rd April. Any delay in doing so would result in the offenders escaping from trial and possible punishment, which will be a blot on the reputation of the police department and adversely affect the reputation of the country.

Once the identification parade has been concluded, it will be in the best interests of justice to indict the accused and have them tried at a trial-at-bar consisting of three High Court Judges sitting in Colombo.

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The South African Human Rights Commission
The Second Economic and Social Rights Report*

Danie Brand and
Sandra Liebenberg

On Friday 15 September 2000 the South African Human Rights Commission launched its second Annual Economic and Social Rights Report. This presents an opportunity to take stock again of the manner in which the Commission is implementing its mandate in terms of section 184(3) of the Constitution.

The process and report arising from the second monitoring cycle warrants some comment. The report and the monitoring procedure are discussed under three main headings: the process of preparing the report; the protocols in terms of which information was gathered for the report; and the final product, the report itself. Finally we consider what the final outcome of the monitoring process should be now that the report has been completed.

A. The process

Public Participation

The Commission was at pains throughout the preparation of its second Economic and Social Rights Report to assert its control over the monitoring process. In doing so, it has restricted civil society involvement in the process to a minimum by, for example, only seeking comments and suggestions from some NGOs on the draft protocols (questionnaires) to be submitted to relevant organs of state.

However, the Commission maintained its position adopted during the first monitoring cycle that it would not make the reports submitted to it by organs of state available to organisations of civil society prior to the production of its own report (see Tseliso Thipanyane, 1998 *ESR Review* vol 1 no. 3, 11 – 12). This position was also confirmed in a number of recent conversations between staff of the Centre for Human Rights and the

Commission. The Commission seems to justify this stance in the following terms: government departments submit their reports to the Commission in confidence. The Commission would be held responsible if the reports were made public and caused embarrassment or harm to the relevant departments.

At the risk of sounding like a stuck record, this position of the Commission is problematic and difficult to understand (see Dannie Brand, 1999 *ESR Review* vol 2 no 1, 18 at 20). What possible harm could come from making information available to NGOs that is in any event part of the public record? What is it that the Commission will be blamed for – engendering a critical appraisal of government performance within civil society? With one exception, all of the government departments approached were perfectly willing to provide the reports they had sent to the Commission. Why then should the Commission be so reluctant to do so? The contents of the reports are matters of public record in any event.

It is also detrimental for the effective running of the monitoring process. The Commission, by all accounts, does not have sufficient resources for carrying out its mandate. Civil society organisations can provide invaluable resources of information and analysis to the Commission. NGOs, if allowed to study the information provided to the Commission by government departments, can provide the Commission with alternative information against which to verify the government reports. They can also furnish the Commission with their own experience and evaluation of government programmes and policies. During the course of this second cycle of the monitoring process a group of people organised by the Centre for Human Rights at the University of Pretoria engaged in the preparation of an economic and social rights report parallel to that of the Commission. This report will be launched on 15 October 2000. The information and context provided on the realisation of socio-economic rights in South Africa would have been useful to the Commission in the preparation of its own report, had it been willing to take up the offer. Many NGOs and CBOs operate at the coalface of delivery of social services to communities. There are also many university-based institutions that have done valuable studies on issues relating to socio-economic rights such as children's nutritional status, the impact of HIV/AIDS and housing delivery. These experiences and research projects could provide the Commission with valuable insights on where the gaps

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and problems lie in the realisation of socio-economic rights. This would have enhanced the status of the Commission's final report as an independent, well researched and extensively consulted assessment of the measures taken by organs of state to realise socio-economic rights. At least the First Socio-Economic Rights Report annexed the report on *Poverty and Human Rights* arising from the National 'Speak Out on Poverty' Hearings held during 1998, as well as an independent study commissioned by the Human Rights Commission on public perceptions regarding the state of realisation of socio-economic rights in South Africa.

Finally, the lack of effective participation by NGOs in the process is bad for the Commission's image. It is the premier institution tasked with the promotion and monitoring of human rights in South Africa. As such, it should be seen to function in a transparent, open and participatory way. Withholding information from NGOs, and not actively seeking input from civil society on the realisation of social and economic rights does not project a positive image.

Relations with government departments

Some government departments were tardy in responding to the Commission's requests for information during the first cycle. The Commission was at pains to ensure that government departments took its section 184(3) mandate seriously during the second monitoring cycle.

It emphasised the need for government departments to respond timeously to its requests for information. To underscore this, the Commission eventually, after various extensions of dead-lines, subpoenaed 36 government departments who had not submitted their reports by the final deadline. Departmental representatives were subpoenaed to appear before the Commission to explain the reasons for their failure to submit the information requested. This had the desired effect: all but two of the subpoenaed departments managed to submit their reports before the return date.

Strong action by the Commission to ensure compliance with the monitoring process has to be welcomed. It emphasises the fact that government departments are constitutionally obliged to provide information to the Commission on the realisation of socio-economic rights. However, the power of subpoena should be used with some caution in the section 184(3) process.

One of the most important advantages of a human rights monitoring process, is the opportunity it creates for a constructive dialogue between the monitoring body and those who are monitored. The Commission has the opportunity through its monitoring system to influence the policies, laws and programmes of government through education and recommendations.

The adversarial atmosphere created by the issuing of subpoenaes is not conducive to the process of constructive engagement. This problem comes into focus when one takes into account that no substantial effort was made by the Commission to ensure that officials in government departments responsible for preparing the reports received some sort of education and training on socio-economic rights, and the specifics of the reporting process.

The Commission identifies as one of the most important reasons for the inadequacy of the reports received from government departments the lack of awareness, understanding and knowledge of the section 184(3) process (South African Human Rights Commission, 2000, *2nd Economic and Social rights Report* at 13). In the light of this problem, it is critical that the Commission engages in a process of training of government officials who have to prepare reports for the Commission. Such officials need to be trained in the technical aspects of the monitoring process: how to prepare reports, what information to include, what format to follow. They should also receive substantive training on socio-economic rights and the duties they impose on the State. This training can be provided by the Commission or through NGO partners, but it will have to be relatively intensive to have the desired effect.

A. The Protocols

The Commission elicits information from relevant organs of state through questionnaires (referred to as 'protocols'). The nature and role of these protocols was one of the most contentious issues during preparation for the first monitoring cycle. The protocols that formed the basis of the first monitoring cycle represented a compromise between two differing views held respectively by the Commission and its NGO partners in the process at the time. Nevertheless the Commission and its partners developed an understanding of the nature and role of the protocols during the first cycle. This was intended to form the basis for the further development of protocols in the future.

The protocols for the second monitoring cycle were developed by the Commission with the assistance of a Canadian consultant specialising in the quantitative analysis of social and economic policy. The new protocols have problems that go to the core of the monitoring process, and will influence their practical efficacy as a human rights monitoring tool. The new protocols are problematic for two reasons: they ask government departments for too much, and they ask for the wrong things.

During the first monitoring cycle, the approached adopted was that the information requested in the protocols should be relatively modest. This would enable government departments to respond adequately, and the Commission would be able to process and analyse the information it received (see Tseliso Thipanyane, 1998 *ESR Review* vol 1 no 3, 11 – 12). This set of protocols focused on:

- the impact of past discriminatory policies and practices on the implementation of socio-economic rights;

- the understanding by government departments of the obligations imposed on them by the socio-economic rights in the Constitution;

- the policies, laws and programmes planned or in place to implement socio-economic rights; and

- the existence of information and monitoring systems within government departments through which to track the implementation of socio-economic rights.

In essence the protocols focused on very clearly defined and limited batches of information. This information was designed to give the Commission a relatively clear picture of the measures being taken by relevant organs of state towards the realisation of socio-economic rights.

This approach had a number of advantages. The amount of information requested was not so extensive that the government departments and the Commission would not be able to deal with it in a useful manner. In fact, the argument could be made that the protocols should have been even more limited than they were. The focus on the measures adopted by government departments was also appropriate for the first monitoring cycle. In future

cycles, the Commission could ask about the impact of the measures, as well as the problems and difficulties experienced in implementing policies and laws intended to advance the realisation of socio-economic rights. The more modest approach also avoided overlap with other process of information gathering, such as those conducted by Statistics South Africa.

The Commission, in designing its protocols for the second cycle of monitoring, consciously departed from the more modest approach in favour of a "maximalist" approach (South African Human Rights Commission, 2000 *2nd Economic and Social Rights Report* 1). The new protocols require extensive and detailed statistical information from government departments, for example, the numbers of people denied access to medical services because of fees, government departments are asked, where possible, to provide the statistical data separately for seven listed categories of vulnerable and disadvantaged groups.

This is too much. The Commission's Report indicates that in general government departments could not provide this kind of information. Where this information is reflected in the Commission's report, it was gathered by the Commission from other sources (see for instance the sources quoted for nutritional information: South African Human Rights Commission, 2000 *2nd Economic and Social Rights Report* 110). The Comission is also not adequately equipped to analyse large volumes of statistical information effectively. This function is better performed by other institutions such as Statistics South Africa. To ask government departments this kind of detailed statistical information amounts to a waste of effort and energy. Much of the detailed information the Commission requests is already available from other institutions in a conveniently digested form. The Commission can find this information in sources such as *Measuring poverty in South Africa,* (Statistics South Africa, 2000), *Men and Women in South Africa* (Statistics South Africa, 1998), and the publications of the Health Systems Trust.

Some of the information requested is also of the wrong kind. The role of a particular government department in realising the right to food, for example, cannot be assessed by examining abstract statistical information relating to the nutritional status of the population. These statistics may reveal that there are people without access to sufficient food, but they do not indicate which organ of state should be held responsible and why this situation exists. Is it due to a lack of a coherent nutritional strategy on the part of government, or that relevant policies and laws are not being properly enforced? Only

through a close examination of the measures adopted by relevant organs of State and their impact, is it possible to assess whether government is fulfilling its constitutional duty to respect, protect, promote and fulfil socio-economic rights. As discussed above, it is also vital that the intended beneficiaries of socio-economic rights – disadvantaged communities and their organizations are consulted on the impact of government measures.

Relevant questions for consultation are:

- Are relevant laws, policies and programmes effective in improving access to socio-economic rights?

- What are the main problems experienced in seeking to participate in various government programmes to improve access to land, housing, health care etc?

- Where are the main shortcomings of these measures, and where do the main gaps lie?

This type of engagement will provide the Commission with the insight it needs to ask probing and meaningful questions of the relevant organs of state.

C. The report

The second report highlights a number of key problem areas in the implementation of socio-economic rights in South Africa. A welcome feature of the report is the fact that it is clearly a product of an evaluation exercise. This presents an important departure from the Commission's understanding of its s 184(3) mandate during the first monitoring cycle. It seems that the Commission now accepts that its role in the socio-economic rights monitoring process is indeed to evaluate the performance of government in realising socio-economic rights, and to report to Parliament on its assessment. One of the main functions of the South African Human Rights Commission in terms of section 184(3) of the Constitution is to "monitor and assess the observance of human rights in the Republic." Section 184(3) is an important tool for information-gathering in the sphere of socio-economic rights. It is intended to facilitate this over-all monitoring and evaluation role of the Commission.

The evaluation of government reports by the Commission is discussed in each particular section of the report under the heading "Commentary". The "Commentary" is then followed up by a list of "Recommendations" addressed to the particular government departments involved. The "Commentary" and "Recommendations" sections of the report tend to focus on an evaluation of the manner in which a particular department reported to the Commission, rather than the contents of the report itself. This is understandable given the fact that the reports submitted by a large number of the government departments were clearly inadequate, and did not provide the information the Commission required. It is important, however, that the Commission focus more on an evaluation of the actual contents of the reports in future monitoring cycles.

The focus in the evaluation tends to be on an analysis of the statistical indicators relating to social services. More emphasis needs to be given to assessing whether the measures taken by relevant organs of state are "deliberate, concrete and targeted as clearly as possible" towards ensuring the effective realisation of socio-economic rights within the shortest possible time (UN Committee on Economic, social and Cultural Rights, General Comment No. 3, UN doc. E/1992/23, paras. 2 and 9). In order to hold Government accountable for a failure to realise socio-economic rights, it is imperative that there is a thorough analysis of the legislation, policies and programmes adopted by all spheres of government, and the manner in which they are implemented. As has been emphasised, a rigorous, independent analysis is only possible if the Commission solicits divergent views from civil society on the effects of government policies and practices. A failure to do so, makes the reporting process a highly technical exercise which excludes the on-the-ground experiences of the disadvantaged groups and communities in South Africa.

D. The outcomes of the reporting process

A further shortcoming of the Second Report, is the fact that it makes no reference to the recommendations made in the first report. The protocols did not contain any follow-up questions to government departments on the extent to which these recommendations were accepted and implemented. It is also not clear whether the Commission itself took any action to follow-up on the recommendations it made in the First Report.

The end-goal of the section 184(3) process should not be seen as the production of a report. A report has the potential to be a valuable public record of the monitoring

process. However, the Commission's primary objectives under section 184(3) should be to :

- engage in a constructive dialogue with relevant organs of state on measures needed to improve access to socio-economic rights;
- make well-considered and targeted recommendations flowing from the information it has gathered from government departments and civil society;
- follow-up on the implementation of its recommendations in a sustained way;
- identify cases where economic and social rights are being violated, and where immediate action is needed eg. an investigation, negotiation or mediation of a dispute, or even embarking on litigation to enforce people's socio-economic rights.
- educate relevant organs of state about their obligations in relation to social and economic rights;
- raise public awareness about socio-economic rights, and their importance to the reconstruction and development of our society;
- identify priority areas of focus for the next monitoring cycle eg.social security rights for people living with HIV or AIDS, children's right to nutrition.

At the end of the day, the value of the section 184(3) mechanism lies in its ability to contribute to making socio-economic rights a reality in the daily lives of disadvantaged groups. The tabling of a formal report in Parliament will not achieve this goal on its own. Finally, in order to promote public debate and accountability for the realisation of socio-economic rights, it is essential that the report receives some form of consideration in the parliamentary process. The first report was tabled in Parliament, but was not publicly considered or debated. At the very least, the second report should be considered by the relevant portfolio committees, and the possibility explored of a debate on the Commission's report in the National Assembly. In addition, a 'user-friendly' version of the report should be actively disseminated to the general public. Ways should also be found of popularising the report, for example, through the use of media such as the radio.

Conclusion

The section 184(3) mandate presents the Commission with a number of challenges. There are few comparative precedents available to guide the Commission in carrying out this mandate. Valuable guidance can however be obtained from the development of the international reporting procedure under the International Covenant on Economic, Social and Cultural Rights, 1966. By studying some of the strengths and weakness of the international reporting systems, the Commission can develop this mandate into a dynamic tool for advancing the realisation of socio-economic rights in South Africa.

Women Reclaim the Right to Housing at the Commission on Human Rights

Centre on Housing Rights and Evictions

COMMISSION ON HUMAN RIGHTS ADOPTS RESOLUTION ON WOMEN'S RIGHTS TO LAND, PROPERTY, HOUSING AND INHERITANCE FOR A SECOND CONSECUTIVE YEAR.

On Monday, 23rd April 2001, the United Nations Commission on Human Rights reaffirmed its political commitment to women's rights to land, property, housing and inheritance. After a show-down on the right to adequate housing between Mexico (in defence of the right) and the USA (denying the existence of housing as a human right), the Mexican delegation won the day and the resolution was adopted by consensus by this important human rights body.

For the second consecutive year, the delegation of Mexico - supported by close to 50 government delegations from both the North and the South - put forward for adoption a resolution entitled, 'Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing' (E/CN.4/2000/L.53) (see below for the full text and list of government co-sponsors).

The US responded by launching an attack on references to the right to adequate housing contained in the resolution, arguing that housing is not a human right. The US position was viewed by many States as an undiplomatic affront particularly in light of the fact that the US had recognized the right to adequate housing last year when they co-sponsorsed the resolution which included the same reference. After a passionate speech by Alicia Perez-Duarte of the Mexican delegation in defence of the right to adequate housing (supported unequivocally by the EU) and with additional pressure from the Chair of the Commission, the US was shamed into reversing their position. As a result, the resolution was adopted by consensus with the reference to the right to adequate housing intact. The content of the resolution is slightly stronger than last year. The lack of progress can be attributed to the fact that many of the delegates who would normally have been in a position to fortify the resolution, were kept extremely busy just trying to retain the integrity of last year's text.

Despite this minimal progress, two new additions are particularly noteworthy. In a preambular paragraph, the resolution welcomes the findings of a 2000 report by the

Special Rapporteur on violence against women, in particular, that women's poverty, coupled with a lack of alternative housing options, makes it difficult for women to leave violent family situations, and reaffirm[s] that forced relocation and forced eviction from home and land have a disproportionately severe impact on women. The resolution encourages her to continue to take these findings into consideration in her future work. The resolution also encourages all human rights treaty bodies, in particular the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women, to regularly and systematically take a gender perspective into account in the implementation of their mandates, and to integrate the contents of the present resolution into their work, as appropriate.

The resolution also remains an important affirmation of women's right to inheritance by the Commission on Human Rights. Though the reference to the right to inheritance was retained, its inclusion was tenuous throughout the negotiations. Despite the fact that the reference to the right to inheritance had been negotiated in several international fora over the course of 5 years, and despite the fact that the head of the grouping of Islamic countries co-sponsored the Resolution last year, Libya expressed extreme concern with the reference. It was only as a result of Pakistan's and Mexico's bi-lateral discussions with Libya, that they agreed to back-off allowing the reference to be retained. As the resolution will be put forward by the delegation of Mexico at next years session of the Commission, it is likely that women's inheritance rights will again be the cause of concern for some States.

This resolution would not have been adopted by consensus (and with reference to the right to adequate housing) without the support of many NGOs in countries around the world. We would like to take this opportunity to extend our thanks and gratitude to all of you who supported the adoption of this resolution by commenting on ways to improve the text, by responding to Urgent Actions and by sending emails encouraging us to continue the struggle in the face of ugly politics.

Now that the resolution is firmly entrenched in the work of the Commission on Human Rights, we have more work ahead of us: We must work together to ensure the wide dissemination of the resolution, we must transform it into a popular advocacy tool and translate it into local languages, and we must develop creative means to use the resolution so that it assists in domestic struggles to promote, protect and fulfill women's rights to land, property, housing and inheritance.

For more information contact: Leilani Farha, Coordinator, Women's Housing Rights Programme, Centre on Housing Rights and Evictions, Tel:1.416.944.0087 Ext. 26, Fax:1.416.968.2823.

Unofficial text of the 2001 resolution

Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing

The Commission on Human Rights,

Recalling the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, the Beijing Declaration and Platform for Action of the Fourth World Conference on Women, the Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development, and the Habitat Agenda of the World Conference on Human Settlements (Habitat II), the report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly and the report of the Ad Hoc Committee of the Whole of the twenty-fourth special session of the General Assembly,

Reaffirming the human right to be free from discrimination and the equal right of women and men to the enjoyment of all civil, cultural, economic, political and social rights as stipulated, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Recalling resolution 200/13 of the Commission on Human Rights of 17 April 2000 and resolution 42/1 of the Commission on the Status of Women of 13 March 1998,

Recalling also resolutions 1997/19 of 27 August 1997, 1998/15 of 20 August 1998 and 1999/15 of 25 August 1999, of the Sub-Commission on the Promotion and Protection of Human Rights, formerly the Sub-Commission on the Prevention of Discrimination and Protection of Minorities,

Welcoming the findings of the Special Rapporteur on violence against women contained in an addendum entitled Economic and social policy and its impact on violence against

women (E/CN.4/2000/68/Add.5) to her previous annual report to the Commission, that womens poverty coupled with a lack of alternative housing options, makes it difficult for women to leave violent family situations, and reaffirming that forced relocation and forced eviction from home and land have a disproportionately severe impact on women, and encouraging her to continue to take these findings into consideration in her future work,

Recognizing that laws, policies, customs and traditions that restrict women's equal access to credit and loans and also prevent women from renting, owning and inheriting land, property and housing and exclude women from participating fully in development processes, are discriminatory, and may contribute to the feminization of poverty,

Recognizing also the full and equal participation of women in all spheres of life is essential for the full and complete development of a country,

Stressing that the impact of gender-based discrimination and violence against women on women's equal ownership of, access to, and control over land and the equal rights to own property and to adequate housing is acute, particularly during complex emergency situations, reconstruction and rehabilitation,

Convinced that international, regional and local trade, finance and investment policies should be designed in such a way that they do not increase gender inequality in terms of ownership of, access to, and control over land and the rights to own property and to adequate housing and other productive resources and undermine women's capacity to acquire and retain these resources,

Mindful of the fact that elimination of discrimination against women requires consideration of women's specific socio-economic context,

1. Affirms that discrimination in law against women with respect to having access to, acquiring and securing land, property and housing, as well as financing for land, property and housing, constitutes a violation of women's human right to protection against discrimination;

2. Reaffirms women's right to an adequate standard of living, including adequate housing as enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights;

3. Also reaffirms the obligations of States to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

4. Urges Governments to comply fully with their international and regional obligations and commitments concerning land tenure, the equal rights of women to own property and the right to an adequate standard of living including adequate housing;

5. Reaffirms Commission on the Status of Women resolution 42/1 of 13 March 1998 which, inter alia, urged States to design and revise laws to ensure that women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital, appropriate technologies, access to markets and information;

6. Encourages Governments to support the transformation of customs and traditions that discriminate against women and deny women security of tenure and equal ownership of, access to and control over land and equal rights to own property and to adequate housing and to ensure the right of women to equal treatment in land and agrarian reform as well as in land resettlement schemes and in ownership of property and in adequate housing and to take other measures to increase access to land and housing for women living in poverty, particularly female heads of households;

7. Also encourages Governments, specialized agencies and other organizations of the United Nations system, international agencies and non-governmental organizations to provide judges, lawyers, political and other public officials, community leaders and other concerned persons, as appropriate, with information and human rights education concerning women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing;

8. Recommends that Governments encourage financial lending institutions to ensure that their policies and practices do not discriminate against women;

9. Also recommends that international financial institutions, regional, national and local housing financing institutions and other credit facilities promote the participation of women and take into account their views to remove discriminatory policies and practices, giving special consideration to single women and households headed by women, and that these institutions evaluate and measure progress to this end;

10. Invites the Secretary-General, as Chairman of the Administrative Committee on Coordination, to encourage all organizations and bodies of the United Nations system, individually and collectively, in particular the United Nations Development Programme, the United Nations Centre for Human Settlements (Habitat) and the United Nations Development Fund for Women, to undertake further initiatives that promote women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing, and allocate further resources for studying and documenting the impact of complex emergency situations, particularly with respect to women's equal rights to own land, property and adequate housing;

11. Invites the Office of the United Nations High Commissioner for Human Rights and the Office of the United Nations High Commissioner for Refugees and other relevant international organizations, within their respective mandates, to address discrimination against women with respect to land, property and adequate housing in their technical cooperation programmes and field activities;

12. Encourages all human rights treaty bodies, in particular the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women, special procedures and other human rights mechanisms of the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights regularly and systematically to take a gender perspective into account in the implementation of their mandates, and to integrate the contents of the present resolution into their work, as appropriate;

13. Encourages the Office of the High Commissioner for Human Rights and the United Nations Centre for Human Settlements (Habitat) to take into account the contents of the present resolution in the development of the mandate of the United Nations housing rights programme;

14. Requests the Secretary General to report to the Commission on Human Rights at its fifty-eighth session on the implementation of the present resolution;

15. Decides to consider the issue of women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing at its fifty-eight session under the agenda item entitled "Economic, social and cultural rights".

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

Danwatte Liyanage Wijepala
Near Government Hospital,
Galpotha

Accused-Appellant

S.C. Appeal No: 104/99
S.C. (Spl) LA No: 238/99
C.A. No: 80/95
H.C. Panadura No: 534/99

v.

The Attorney General
Attorney General's Department
Colombo 12

Respondent

BEFORE	:	Fernando, J. Wadugodapitiya, J. and Ismail, J.
COUNSEL	:	Ranjit Abeysuriya PC with Ms. D. Mirihana for the accused-appellant. Dappula de Livera SSC for the Attorney General
ARGUED ON	:	3.10.2000
DECIDED ON	:	5.12.2000

ISMAIL, J:

The appellant Wijepala and his brother Carolis who were named as the 1st and 2nd accused respectively were charged on indictment with the murder of Don Sarath Srilal on

8th June 1988 at Batagoda. At the trial before the High Court Judge, Panadura. sitting without a jury, N.D. Senaratne, the father of the deceased, was the sole eyewitness who claimed to have seen the attack on his son that night shortly after 7.30 p.m. with the aid of a torchlight. The deceased had received a single penetrating 1" long stab injury on the back of the left side of the abdomen which had cut a major blood vessel resulting in death due to shock and intense hemorrhage. The trial judge accepted the evidence of N.D. Senaratne and at the conclusion of the trial on 20.6.95, the 1st accused-appellant was convicted of the lesser offence of culpable homicide not amounting to murder and was sentenced to a term of 10 years rigorous imprisonment. The 2nd accused was acquitted. The appeal of the 1st accused-appellant to the Court of Appeal was dismissed by its judgment, dated 16.9.99. This appeal is against the said judgment of the Court of Appeal affirming the conviction and sentence.

The Court of Appeal has in its judgment summarized the evidence of Senaratne as follows: "The main eyewitness who gave incriminating evidence against the accused-appellant was Nahalage Don Senaratne who was the father of the deceased. In his testimony, he asserted that on 8th June 1988 at about 7.30 p.m. that he set out with the deceased, his son intending to proceed along Pelpola Road to reach Galketiya to obtain some money from Uswatte Liyanage Thomas Singho to purchase one hundred weight of fertilizer. When they were proceeding along this road and when they were nearing the 1st accused's house, he has stated that he had seen the 1st accused, Carolis and five others on the road and these persons were standing beside a can of kasippu which had been placed on the road. At that stage these persons had addressed the deceased thus in Sinhala "adath tho oththu balannada awe kiya mage puthagen ahuwa" whereupon the deceased has stated "I have not come for any such purpose but I am proceeding on a journey." Thereafter the deceased proceeded passing these persons. Witness Senaratne who was following his son had heard footsteps behind them and when he flashed his torch towards his rear, he has stated that he saw Wijepala and Carolis proceeding towards his son with knives in their hands. According to the witness, the 1st accused Wijepala passed him and stabbed his son who was proceeding ahead of him and at that point, the deceased Srilal had shouted out "Budu ammo, I have been stabbed" and had proceeded after receiving the injury for a short distance. At that stage, Carolis the 2nd accused had shouted out "Do not let this fellow escape too" and had approached witness Senaratne to stab him. Whereupon the witness had changed his course and fled towards the rubber estate and had proceeded towards the extremity of the rubber estate to a point 200 yards away and had concealed himself. After hiding himself for about 20-25 minutes in the thicket of the

rubber estate, and on observing that there was no apprehension of danger to himself at that stage he had proceeded towards the road and thereafter approached the point at which his son lay fallen beside a pool of blood near a drain close to the Co-operative Society sales outlet."

The trial judge had arrived at a favourable finding in regard to the testimonial trustworthiness and credibility of the witness Senaratne. The Court of Appeal, while affirming the said judgment, has observed that it was unable to conclude that the trial judge had misdirected himself in the evaluation of the evidence of Senaratne.

Learned President's Counsel for the appellant submitted, however, that the testimony of Senaratne was completely untrustworthy and of such poor quality that a conviction against the appellant cannot possibly be sustained in law. His testimonial trustworthiness on vital aspects relating to the incident was assailed in an attempt to cast a doubt even in regard to his presence at the time the deceased had received the fatal stab injury.

Senaratne stated in his evidence that when his deceased son and himself were proceeding along the road to reach Galketiya that he saw the appellant, his brother Carolis and five others on the road beside a can of kasippu. One of them had addressed the deceased and asked him in Sinhala "Adath tho oththu balannada awe?" to which the deceased had replied in the negative and said that he was proceeding on a journey. Nevertheless, the High Court Judge had noted down erroneously in his judgment that this question was asked by the appellant. It was submitted that this misdirection by the trial judge on an item of evidence relating to the same transaction wrongly imputing the question as having been asked by the appellant could have largely contributed to his conviction. The Court of Appeal has not dealt with this vital misdirection on a crucial factual matter considering the possibility that any one of the other six persons who posed the question could have inflicted the fatal injury.

Further, Senaratne appears to have sought to buttress his claim to having been present at the scene with his son when he was fatally injured, by stating in evidence that his son had exclaimed "Budu Thaathe mata pihiyen anna." It was established at the trial that the witness had omitted to mention this fact in his statement to the police, that he had omitted to state so at the inquest proceedings and that he had not revealed this in his evidence even at the non-summary proceedings in the Magistrate's Court. The trial judge has taken the view that this omission did not affect the credibility of the witness as these

words have been uttered after the incident. It was submitted that, on the other hand, the High Court Judge had erred in failing to consider that as these words were allegedly uttered immediately after the deceased was stabbed, this fact itself raised a grave doubt as to the actual presence of the witness at the time of the incident. The Court of Appeal having erroneously set out that the words uttered were "Budu amme, I have been stabbed," has also failed to attach any significance to this omission as raising a possible doubt as to the actual presence of Senaratne at the scene, thus affecting his trustworthiness as a witness.

Senaratne stated in his evidence that he took his injured son in a car to the hospital. The Grama Sevaka Jayapala testified that he provided his car for the purpose and that he himself accompanied Senaratne and his injured son in the car to the hospital. Although the Grama Sevaka testified that Senaratne was known to him, there is no evidence that Senaratne revealed the identity of the assailant to him that night or even thereafter. The failure of Senaratne to inform the Grama Sevaka of the identity of the assailant therefore raises a serious doubt in regard to the presence of Senaratne at the scene of the incident and his claim to have identified the appellant as the assailant. Applying the test of spontaneity, his belatedness reduces the weight of his evidence and affects his credibility.

Senaratne made a bare unsupported assertion that he made a statement to the Horana hospital post at 9.30 p.m. that night although according to Jayapala, they reached the hospital at about 9.45 or 10.00 p.m. There was no evidence that the statement claimed to have been made at the hospital post was the first information to the police regarding this incident or in regard to the identity of any of the suspects. Although two police officers IP Dharmasena and PC Jayaratne gave evidence at the trial, there was no evidence elicited from either of them that Senaratne had made a statement to the hospital post at any time that night. It was submitted therefore that the Court of Appeal erred in its finding that Senaratne had made a statement at the earliest opportunity that presented itself. The Court of Appeal appears to have formed the impression that Senaratne had been thereby prompt in revealing also the identity of the suspects.

Senaratne was cross-examined in a further attempt to assail his testimony that he was eyewitness to the incident. He testified that he was on his way to the house of one Thomas Singho together with his son that night to obtain a loan from him for the purchase of some fertilizer. It was established that he had made no reference in his complaint to the police to the fact that he was on his way to the house of Thomas Singho

or that he had sought a loan from him. Thomas Singho himself gave evidence but he did not confirm either that he requested Senaratne to call over at his house or to call over that particular night to obtain the loan from him. While the Court of Appeal has erred in stating that there was such evidence from Thomas Singho, both the trial judge and the Court of Appeal did not attach any significance to this omission for the reason that Senaratne had mentioned to the police that he was proceeding to the village called Galketiya that night where it transpired that Thomas Singho resided.

Senaratne testified further that while he was proceeding with his deceased son that night, he heard footsteps behind him and that when he flashed his torch towards the rear he saw the appellant armed with a knife and his brother Carolis with a sickle like katty. However, in his statement to the police he had stated that both accused had pointed knives. The trial judge did not attach any significance to this contradiction as the position of the witness was that both accused were armed with weapons and the Court of Appeal too has found that the contradiction has been sufficiently explained and that it did not affect the credibility of the witness.

Senaratne who was the sole eyewitness has thus been cross-examined on vital aspects relating to the incident and doubts have been raised in regard to his presence at the scene. Section 134 of the Evidence Ordinance lays down a specific rule that no particular number of witnesses shall in any case be required for the proof of any fact, thus attaching more importance to the quality of evidence rather than the quantity. The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, then corroboration may be necessary. The established rule of practice in such circumstances is to look for corroboration in material particulars by reliable testimony, direct or circumstantial. In this instance the prosecution has not led any other evidence, which even barely supported Senaratne in regard to the infliction of the injury by the appellant.

The Court of Appeal was, in these circumstances, not justified in holding that the testimonial trustworthiness and credibility of the witness has been established before the trial judge. The Court of Appeal has circumscribed its jurisdiction and limited it to ascertaining if there was any vital misdirection or non-direction and if there was admissible evidence to support the finding of the trial judge. The Court of Appeal has declined to interfere with the finding of the trial judge and has stated that it is not entitled

to indulge in a re-appraisal and re-trial on questions of fact, which came up before the judge in his capacity as the "trier of facts." The Court of Appeal has been guided in following such an approach by the principles set out by Soertsz, ACJ in King v. Endoris, 46 NLR 498, that its function in hearing an appeal, "as laid down by the Court of Criminal Appeal Ordinance, is to examine the evidence in the case in order to satisfy ourselves with the assistance of counsel that there is evidence upon which the jury could have reached the verdict to which they came, and also, similarly, to examine the charge of the trial judge to satisfy ourselves that there has not been any substantial misdirection or non-direction." These guidelines are appropriate for an appellate court considering a charge to a jury. However, in a trial before a judge sitting alone, while his decision on questions of fact based on the demeanour and credibility of witnesses carry great weight, an appellate court has a duty to test the evidence by a careful and close scrutiny and if it entertains a strong doubt as to the guilt of the accused, the Court must give the benefit of that doubt to him. The Court of appeal has erred in failing to subject the evidence of Senaratne to a close scrutiny, but had it done so, it would certainly have entertained a doubt as to the guilt of the appellant on such weak and unsupported testimony. As Ranasinghe, J. as he then was, after a review of the earlier authorities, in Jagathsena and others v. G.D.D. Perera, Inspector Criminal Investigation Department and Mrs Bandaranaike, 1992(1) SRL 371 at 380, said, "...although the findings of a Magistrate on questions of fact are entitled to great weight, yet, it is a duty of the Appellate Court to test, both intrinsically and extrinsically the evidence led at the trial: that, if after a close and careful examination of such evidence, the Appellate Court entertains a strong doubt as to the guilt of the accused, the Appellate Court must give the accused the benefit of the doubt."

The evidence of Senaratne who was the sole eyewitness to the incident is open to suspicion. The trial judge has failed to appreciate that his evidence in regard to the identity of the appellant has not been supported by any other item of evidence. There is therefore a strong doubt as to the guilt of the appellant and, as such, the benefit of the doubt should have been given to the appellant. The Court of Appeal has erred in affirming the conviction without adequately testing the evidence of Senaratne. For these reasons, I allow the appeal and set aside the judgment of the Court of Appeal. The conviction and sentence imposed on the appellant by the High Court are set aside and the appellant is acquitted.

I agree with the reasons set out by Fernando, J. in his judgment allowing the appeal on an additional ground.

JUDGE OF THE SUPREME COURT

Wadugodapitiya, J.

I agree with the reasons set out by Fernando, J. and Ismail, J. and allow the appeal.

JUDGE OF THE SUPREME COURT

FERNANDO, J.

I entirely agree with the judgment and order of Ismail, J. and wish to draw attention to a matter of fundamental importance, which is another ground for allowing this appeal.

One of the questions which arose at the trial was whether Senaratne, the father of the deceased, actually saw the deceased being stabbed. A witness named Siripala, who claimed that he came to the scene soon after the stabbing, testified that Senaratne came a few minutes later and lifted up the deceased, saying "Son, who has done this to you?' The Grama Sevaka took Senaratne and his son to hospital in his car, but Senaratne did not disclose the identity of the assailant to him. In his evidence, Senaratne claimed that at 9.30 p.m. he made a statement at the police post at the hospital, and it is that statement which gives rise to a serious question. Admittedly, Senaratne made a statement to the Anguruwathota police at 11.30 p.m., and it was that statement which the prosecution sought to produce as being the first information. That was disallowed, for reasons which are not relevant to the question which now arises.

If indeed the 11.30 p.m. statement was the first information, then obviously Senaratne had **not** made an earlier statement at the police post; if so, his evidence on that point was not credible; and the finding of the Court of Appeal that he did make such a statement was erroneous.

On the other hand, if Senaratne was truthful in claiming that he had made a statement at 9.30. p.m., then that statement would have been the first information. Whether in that statement Senaratne had claimed that he had seen the stabbing, and had identified the Appellant as the assailant, would have been of very great importance.

An examination of the High Court record reveals, however, that such a statement was neither among the documents listed in the indictment nor included in the statements furnished in terms of sections 147 and 159 of the Code of Criminal Procedure Act, No 15 of 1979. Section 147 provides that the officer in charge of the relevant police station shall at the commencement of the non-summary inquiry furnish to the Magistrate two certified copies of the notes of investigation and of all statements recorded in the course of the investigation. When the magistrate commits the accused for trial, section 159(2) requires him to send one of those copies to the High Court and the other to the Attorney-General. The prosecution has throughout gone on the basis that there had been no 9.30 p.m. statement.

Either Senaratne made a statement at the police post, or he did not. If he did not, his credibility was seriously in question. If, on the other hand, he had made that statement, then a very serious irregularity had occurred at the trial: the first information had neither been disclosed nor furnished to the accused and to the Court. Quite apart from that being a failure to make such disclosure as the statutory provisions require, the non-discloser of that statement to the defence and to the Court resulted – for the reasons I set out below – in the impairment of the right of the Appellant to a fair trial which was his fundamental right under Article 13(3). That Article not only entitles an accused to a right to legal representation at a trial before a competent Court, but also to a fair trial, and that includes anything and everything necessary for a fair trial. That would include copies of statements made to the police by material witnesses.

In Phato v. A.G., [1994] 3 Law Reports of the Commonwealth 506, dealing with "the right to information... required for the exercise or protection of [one's] rights," read with "the right to a fair trial," the Supreme Court of South Africa (Eastern Cape Division) held that an accused had the right to information in the police docket, namely statements made by witnesses, in order to prepare properly for trial. The fact that in South Africa there is an independent right to information, makes little difference, because in my view the right to a fair trial recognised by Article 13(3) necessarily includes, inter alia, the ancillary right to information necessary for a fair trial (subject, of course, to exceptions such as privilege).

The judgment in Phato referred to R v. Stinchcombe [1992] Law Reports of the Commonwealth (Crim) 68, (a decision of the Supreme Court of Canada) which is even more in point. There, at a preliminary inquiry, a secretary employed by the accused gave

evidence apparently favourable to the accused. Thereafter, the police interviewed the secretary, before the trial, and took a tape-recorded statement, and again, during the trial, got a written statement from her. The prosecution informed the defence of the existence but not of the contents of those statements. During the course of the trial the prosecutor told defence counsel that he would not call the secretary as a witness because he considered that she was not creditworthy. Because defence counsel did not know what the witness had said to the police, he was unwilling to call her for the defence. His application that the court should order that the contents of the statements be disclosed was refused. The accused was convicted. The Alberta Court of Appeal dismissed his appeal. On appeal the Supreme Court of Canada ordered a new trial at which the statements were to be produced.

In State v. Botha, 1994 (4) SA 799, Le Roux, J. analysed Stinchcombe, and extracted six principles, which have been summarised thus in the judgment in Phato:

> "The first of the six principles which Le Roux J. extracts from Stinchcombe is that the information in the police docket belongs not to the police or the prosecution but to the public, not to secure a conviction but to see that justice is done. The second principle is that there is no duty on the accused to assist the prosecutor, who as far as he is concerned is his adversary. The third is that there is a general duty on the state to disclose to the defence all information, which it intends adducing, and also all information which it does not intend to use and which could assist the accused in his defence. This is not an absolute duty, but one which is subject to the discretion by the state to withhold privileged information and to delay disclosure if the investigation is not yet complete. Fourthly, the exercise of the state's discretion is reviewable by the trial court on application by the defence. Fifthly, initial disclosure must take place before the accused is called upon to plead. This is a continuing duty. If further facts come to light, the state is obliged to furnish them to the defence as soon as possible. The sixth and final principle is that the statements of all witnesses must be made available to the defence, whether or not they are to be called. If there is no complete statement but only notes, the notes must be made available and, if there was an oral consultation, a summary of the evidence must be prepared and provided to the defence." (at p 529)

These principles are, by and large, implicit in the right to a fair trial recognised by Article 13(3). Not only is no derogation permitted, but the Code of Criminal Procedure Act contains no inconsistent provision.

The failure to disclose to an accused the existence and contents of the first information – which might have cast serious doubt on the informant's credibility – may well result in a miscarriage of justice. Rule 52 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988, requires an Attorney-at-Law appearing for the prosecution to bring to the notice of the Court "any matter which if withheld may lead to a miscarriage of justice." That is a professional obligation founded on a constitutional right to a fair trial.

I hold that if Senaratne had made a statement at 9.30 p.m., that statement should have been brought to the notice of the Court and the defence, and the failure to do so was a violation of Article 13(3), by which all Courts are bound.

JUDGE OF THE SUPREME COURT

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