RAMUPPILLAI
V
FESTUS PERERA, MINISTER OF PUBLIC ADMINISTRATION, PROVINCIAL COUNCILS AND HOME AFFAIRS AND OTHERS

SUPREME COURT,
RANASINGHE, C.J.,
TAMBIAH, J.,
G.P.S.DE SILVA, J.,
JAMEEL, J.
FERNANDO, J.,
DHEERARATNE, J., AND
RAMANATHAN, J.,
S.C. APPLICATION NO. 49/90
November 7, 8 and 9, 1990

Fundamental Rights - Equality - Ethnic ratio in recruitment and promotion-Constitution, Articles 12, 55 (4) and (5) and 126.

The petitioner, a Superintendent of Customs was an applicant along with 52 other Superintendents for 22 vacancies in the grade of Assistant Directors of Customs. He was 10th in the list of seniority but on the application of the ethnic quota system whereby

the selecters would have to be 15 Sinhalese and 7 Tamils he would be left out. The ethnic quota system was introduced by two Public Administration circulars (No. 15/90 dated 09.03.1990 and No. 15/90 (i) and (ii) dated 25.03.1990). The effect of these two circulars was to drastically alter the scheme of recruitment to and promotion hitherto applicable to the Public Service by introducing the ethnic quota principle. The displacement of the principle of merit and seniority in the promotion to the posts of Assistant Director would adversely affect the petitioner's prospects of promotion to the post of Assitant Director in that whilst 19 Sinhalese would be promoted as against 3 Tamils he being the 10th in the overall list and the 5th Tamil in the list of Tamils would not be promoted. This, it was argued, violates the principle of equality enunciated in article 12 (1) and (2) of the Constitution as the petitioner was placed at a disadvantage merely on account of race.

Held: -
***Per* Ranasinghe C.J.**

1. The state is free to decide upon the sources from which either admissions to educational institutions or recruitments to the Public Service are to be made. For such purpose the state could take into consideration the over-all needs and matters of national interest and policy. Once such selections are made those taken in from such sources are integrated into one common class. Thereafter such appointees are "clubbed" together into a common stream of service and cannot thereafter be treated differently for purposes of promotion by referring to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again. There should be no further classification among them, except upon certain acceptable criteria such as educational qualifications.

   Any differentiations made on ethnic grounds *per se* would be considered abhorrent. Even so under certain circumstances even such distinctions, drawn upon racial grounds, could be considered permissible.

2. Although the internal notice of March 1990 envisages the issuance of a fresh letter of appointment as Assistant Director to the successful applicants, yet, the applications are confined to officiers in a lower grade, viz: Superintendent of Customs. The said appointments, therefore, do in fact operate as promotions to a higher grade for the 22 officiers who, like the petitioner, are now serving in a lower grade as Superintendents of Customs.

3. It seems to me that these Customs Officer were, upon their initial appointment, integrated into one common class and that thereafter there should not ordinarily be any further classification, as amongst them, for promotion from their present grade to the higher grades. The only consideration that should thereafter prevail, in regard to promoting them to a higher grade, is merit, or merit and seniority, which alone would enhance and ensure the efficiency of the service rendered by the department to the public in general.

4. Any promotions made, based upon ethnic quotas would be violative of the right of equality assured by the provisions of article 12 of the Constitution.

5. The Cabinet has by virtue of the provisions of article 55 (4) the power to make rules for appointment and promotion subject however to the power vested in the Supreme Court by the provisions of article 55 (5) of the Constitution.

6. The complaint of imminent infringement is directed against acts of the respondents, more particularly the 2nd and 3rd respondents who seek to do such acts on the authority of cabinet decisions. Such acts fall within the category of 'executive and administrative' acts as contemplated in sub-articles 1 and 2 of article 126 of the Constitution.

Quaere - Are ethnic quotas applied at initial recruitment valid?
***Per* Thamblah J.**

7. The right that is protected and guaranteed by article 12(1) is the personal right of any person, qua person, and not as belonging to a particular community. So also the right that is protected and guaranteed by article 12(2) is the personal right every individual citizen, qua citizen, and not as belonging to a particular community. The rights of a community or caste or of persons professing a particular religion do not come into the picture at all.

8. The gravamen of article 12 is equality of treatment. The Superintendents of Customs form a single class. All persons within this class must have an equality of opportunity of advancement of their career in the Public Service irrespective of race, caste, religion etc.

***Per* De Silva J.**

9. The petitioner is not claiming a right to an appointment but the right to equality of opportunity in the matter of promotion in the public service.

10. When public officers who constitute a single class reach the state of promotion to the next grade their promotion cannot be regulated by a new criterion based solely on race and what is more a criterion quite unrelated to the maintenance of efficiency in the service.

***Per* Fernando J.**

"It is the individual who is the repository of the fundamental right guaranteed by article 12 and the violation of his right cannot be excused or overlooked by reference to the treatment meted out to the group to which he is linked by race of ethnicity".

11. For a variety of reasons, the purported ethnic clssification is uncertain, unreasonable and inconsistent and on this ground too cannot be sustained.

12. The following principles should guide is in the interpretation of article 12:

(a) Article 12 (1) read with articles 3, 4 and 12 (2) embodies a principle of equality broadly comparable to that recognized in the Constitutions of the United States and India but more extensive in nature and scope.

(b) (i) Paragraphs (2) (3) and (4) of article 12 are essentially explanatory and declaratory of the principle of equality and do not add to or detract from that principle. Article 12 (4) in particular, does not **authorise** "affirmative action" for women, children and disabled persons, but out of an abundance of caution declares that nothing in article 12 shall prevent affirmative action; apart from proved "inequality", article 12 (4) would not permit, for example a quota of 60% being

(ii) Those paragraphs also emphasize that references to "the law" in article 12 (1) do not restrict the scope of equality to the province of legislation; paragaph (4) emphasizes that subordinate legislation and executive action must also abide by the equality principle; paragraphs (2) and (3) indicate that the non-discrimination principle is binding not only on the "State" but on all institutions and individuals. Citizens shall not be discriminated against by anyone, although the special remedy under article 126 is only available in respect of executive or adminsitrative action.

(c) The principle of equality requires that equals be treated equally, and that unequals may (and sometimes must) be treated unequally. Affirmative action is preferential treatment: i.e. unequal treatment of unequals. Affirmative action is therefore not a refinement or extension of as an exception to, the principle of equality, but its necessary corollary; it is applicable whenever "unequals" are being considered.

(d) (i) For the purpose of applying those twin principles, it is necessary to determine whether persons are equals or unequals. Differences in respect of "immutable" factors (such as race, ethnicity, arresting, caste, sex, place of birth) do not per se render persons unequal; nor differences in respect of "acquired" or changeable factors, such as language, religion and political opinion. Differential treatment of citizens on account of factors set out in article 12 (2) is, prime facie, constitutionally odious, but there seems to be no such presumption in the case of other factors.

(ii) However, all differential treatment needs to be justified, there must be a legitimate object to be achieved, in relation to which it must be shown that there are intelligible and rational criteria which render a particular individual or group of individuals a distinct "class".

(e) If in relation to a legitimate object, their race makes persons of one race a distinct "class", they may be differently treated. The same is true of sex, religion, and political opinion.

(f) (i) Even where race would not normally afford a permissible basis of classification, on proof of special circumstances differential treatment would be justified.

(ii) Racial preferences or quotas for their own sake, are not permissible because in a free, republican, democracy one citizen is as good as another, and is entitled to equal treatment, regardless of the group to which he belongs. Likewise, racial quotas cannot be imposed simply for the pupose of "correcting" an existing racial imbalance except perhaps where there is serious, chronic, pervasive under representation (or over - representation) sufficient to raise a presumption of past discrimination.

(iii) Affirmative action, where the necessary proof exists, is permissible both at the stage of recruitment and promotion; but the proposed remedy would be more strictly scrutinized in the latter case, on account of other competing needs and interests; such as the efficiency of the service the higher levels of responsibility involved upon promotion, and the legitimate expectations of employees that merit and devoted service would be rewarded.

Cases Referred to:

01. *Palihawadana V A.G. of all R.R.D.* Vol 1 p 1, 5, 6, 11
02. *Perera* V *University Grants Commission* FRD Vol 1 p 10, 3, 111
03. *Seneviratne* V *University Grants Commision*
    S.C. Application No. 88 of 1980
    S.C. minutes of 10 October 1980
04. *Gulf of Colombo Co* V *Ellis* (1987) 65 US 150
05. *Southern Railway Company* V *Greane* (1909) 216 US 400
06. *Budham Chaudhry* V *the State of Bihar* AIR 1955 SC 191
07. *Railway Express Agencies* V *New York.*
    (1949) 336 US 100, 115
08. *Probhudas Morarjee* V *Union of India* AIR 1966 Sc 1044
09. *State of Kerala* V *Thomas and others* AIR 1976 SC 490, 507
10. *Regents of the University of California* V *Alan Bakke*
    (1978) 438 US 265
11. *Kumari* V *State of Mysore* AIR 1971 SC 1439.
12. *Abeywickrema* V *Pathirana* (1986) 1 Sri LR 120.
13. *The Public Services United Nurses Union* V *M. Jayawickreme, Minister of Public Administration* (1988) 1 Sri LR. 29.
14. *Madras* V *Champakam Durairajah and others*
    AIR 1951 SC 226, 227, 228
15. *Durairajah* V *State of Madras* (F.B.) AIR 1951 Madras 120, 126, 133, 136 to 139.
16. *Triloki Nath* V *Jammu & Kashmir* AIR 1969 SC 1, 3, 4.
17. *Weligodapola* V *Secretary, Ministry of Home Affairs* (1989) 2Sri L.R. 63 at 85
18. *Hinayabashi* 1943 320 U.S. 106
19. *Dred Scott* (1857) 19 How. 393, 407, 451
20. *Slaughter - House Cases* (1873) 16 Wall. 36, 70
21. *Civil Rights cases* (1883) 109 U.S. 3
22. *Goonewardena* V *Perera* 1983 2 FRD 426, 437
23. *Plessy* V *Ferguson* (1896) U.S. 537, 544
24. *Brown* V *Board of Education* (1954) 347 U.S. 483
25. *United Steel workers of America* V *Weber* (1979) 443 U.S. 193, 208 - 209.
26. *Fullilove* V *Klutznick* (1980) 448 U.S. 448
27. *Local 28, Sheet Metal Workers International Association* V. *Equal Employment Opportunity Commision* (1986) 106 S.Ct. 3016.
28. *United States* V *Paradise* (1987) 107 S.Ct. 1053
29. *Johnson* V *Santa Clare Transportation Agency* (1987) 107 S.Ct. 1442
30. *Makhan Lal* V *Jammu & Kashmir* AIR 1971 SC 2206
31. *Mudiyanse* V *Appuhamy* (1913) 16 NLR 117, 119
32. *Miller & Co.* V *Ratnasekera* (1943) 26 CLW 7, 8
33. *Manikkam* V *Peter* (1899) 4 NLR 243, 245
34. *Pasangna* V *Registrar - General* (1965) 67 NLR 33, 39
35. *R.* V. *Liyanage* (1963) 64 NLR 313
36. *Khan* V. *Marikar* 16 NLR 425
37. *Saibo* V *Ahamat* 1851 Ram 163
38. *Narayanan* V *Saree Umma* 21 NLR 439
39. *Ghouses* V. *Ghouse* (1988) 1 Sri LR 25
40. *Fernando* v *Proctor* (1909) 12 N.L.R 309, 312

APPLICATION under Article 126 of the Constitution for infringement of the fundamental right of equality.

R.K.W. Goonesekera with *M. Underwood, Mrs. S. Kalyanasundaram and C. Swarnadhipathy* for petitioner.

Sunil de Silva P.C. Attorney General with *Shibly Aziz P.C Additional Solicitor General* and *K.C. Kamalasabayson D.S.G* for 1 to 5 respondents.

Cur. adv.vult.

07. January, 1991

RANASINGHE, C.J.,

The Petitioner, who is an officer of the Sri Lanka Customs Department holding at present the post of Superintendent, Customs, has instituted these proeedings, under the provisions of Article 126(1) of the Constitution, complaining of an imminent infringement of the Fundamental Right of equality guaranteed to him by the provisions of Article 12 of the Constitution in that the Respondents are, in dealing with his application for appointment on promotion to the post of Assistant Director of Customs, seeking to take into consideration the requirement of the ethnic ratio set out in the two Public Administration Circulars bearing Nos. 15/90, dated 9.3.90, and 15/90 (i), dated 25.3.90, marked P4 and P5 respectively.

The said Circulars, P4 and P5, have been issued in pursuance of a decision made by the Cabinet.

P4 provides that future recruitment and the appointment on promotion to the Public Service, Provincial Public Service, and the Public Corporation Sector, should be carried as outlined therein. It then proceeds to set out the criteria for recruitment to clerical grades and above as:

"2(1) (a) ....

(b) Appointments should be entirely on merit, subject to criteria (e), (f) and (g) below:

(c) .....

(d) Merit should be determined either by a written examination, or written test or trade test. In case there is only one applicant there should be an interview:

(e) Recruitment to the Public Service, Public Corporation Sector ....should be distributed to districts on the basis of population, subject to . . . .This is operative with effect from 1.1.90.

(f) .....

(g) Recruitment and promotion at the national level should be on the national ethnic proportion, at the provincial level on the provincial ethnic proportion and at the district level on the district ethnic proportion,, subject to (a) to (f) above with effect from 1.1.90.

The composition of the ethnic ratio of the Sinhalese community will be 75% of the total number of vacancies, Tamils, persons of Indian origin and Muslims shall be selected on the ratio of 12.7%, 5.5% and 8% respectively. However, if there is a difficulty in determining the exact number, a variation of minus or plus 2% should be permissible.

(3) All instances of promotions, including promotions from grade to grade in (i) Public Service . . . . shall be made on the principle of ethnic ratio applicable to such services with effect from 1.1.1990.....

(4) .....

(5) The ethnic ratio in exceptional circumstances may not be applicable, if the total number of promotional positions available are few in number (e.g. below four in number) and therefore not facilitating such a ratio application. In such cases merit will be the sole criterion of selection....."

The Circular P5, which is dated 25.3.90 whilst drawing attention to the earlier circular P4, provides:

"(1) .....
(2) .....

(3) The 75% allotment of the total number of vacancies for the Sinhala community and in para 2 (i) (g) of the above circular will include all minorities other than Tamils, persons of Indian origin and Muslims. Malays will be included in the 8% allotment to Muslims.

(4) .....

(5) Recruitment and promotions to the posts in the abovementioned Services are the responsibilities of the respective Appointing Authorities. You are requested to personally ensure the effective and fair implementation of the above Circular. No deviations therefrom will be permitted. Any problems, issues or acts of non-compliance should be immediately brought to my notice without delay, in futre."

The Petitioner pleads that on 5th March 1990, there was issued an internal notice calling for applications from officers in the grade of Superintendents to fill vacancies in the posts of Assistant Directors of Customs: that P2 is a copy of the said notice; that all eligible officers sent in their applications: that the Petitioner and 52 other Superintendents appeared at an interview held on 7.7.90: that there are in all twenty-two vacancies to be filled from and out of those applicants who were interviewed on the 7.7.90: that all such promotions have hitherto been made on merit and seniority, that in terms of seniority and merit, of the first twenty two persons eligible for selection for promotion, 15 are Sinhalese and 7 Tamils: that the Petitioner being the tenth in the list of seniority, he would definitely be selected to fill one of the said twenty two vacancies in the post of Assistant Director: that the effect of the aforesaid Circulars P4 and P5 is to drastically alter the scheme of recruitment to and promotion hitherto applicable to the Public Service by introducing the ethnic quota principle: that the displacement of the principle of merit and seniority in the promotion to the post of Assistant Director would adversely affect the Petitioner's prospects of promotion to the said post; that if the selection and appointment is made on ethnic quota, as set out in the aforesaid circulars P4 and P5, then whilst 19 Sinhalese would be promoted as against 3 Tamils, he the Petitioner, who though the 10th in the list, is the 5th Tamil in such list would not be promoted: that the 2nd and 3rd Respondents, whose responsibility it is to fill such vacancies, intend to comply with the principles set out in the said Circulars P4 and P5: that the said Circulars are discriminatory, and violated the principle of equality, as enunciated in the Article 12(1) and (2) of the Constitution, in that the Petitioner is placed at a disadvantage merely on account of his race.

The position taken up by the learned Attorney-General briefly is that the said Circulars, far from being violative of Article 12, in fact entrenches and emphasises the concept of equality: that the quotas assigned to each ethnic group is commensurate with the proportion it bears to the entire population of the country: that in any given instance all things being equal the number of appointments from each group would be equivalent to its respective ethnic proportion which is the ratio assigned in the Circular to each ethnic group: that, if any part of the Circular is found to be violative, then directions be given as to how it could be brought into conformity with the law, rather than strike down the entirety of the Circular.

The reach, scope and content of the provisions of Article 12 - which guarantees equality before the law and also the equal protection of the law - were considered at length in three cases shortly after the Constitution of 1978 was promulgated: the judgment of Sharvananda, J., (as the Chief Justice then was) and Wanasundera, J., in the case *Palihawadana* vs. *A.G., et al* (1) the judgment of Sharvananda, J., delivered on 8.8. 1980 in the case of *Perera* vs. *University Grants Commission,* (2) the judgment of Wanasundera, J., delivered on October 1980 in the case of *Seneviratne* vs. *University Grants Commission,* (3)

What the concept of "equality", so assured in Article 12, connotes was elucidated by them, with reference to the several authorities referred to in their respective judgments; and what is relevant for the purposes of the issue under consideration in this Application may be set down as follows: that such equality meant that, among equals, the law should be equal and it should be equally administered: that like should be treated alike: that all persons are equal before the law and are entitled to equal protection of the law: that no citizen shall be discriminated against on grounds of race, religion, language, casts, sex, political, opinion, place of birth or any of such grounds: that equality of opportunity is an instance of the application of this general rule: that whilst Article 12 does not confer a right to obtain State employment, it guarantees a right to equality of opportunity for being considered for such employment: that what is postulated is equality of treatment to all persons in utter disregard of every conceivable circumstance of difference as may be found amongst people in general: that it prohibits class legislation, but that reasonable classification is not forbidden: that "it must appear that not only that a classification has been made, but also that it is one based upon some

reasonable ground - some difference which bears a just and proper relation to the attempted classification: " *Gulf of Colombo Co.* vs. *Ellis* (4): that it merely "requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and on liabilities imposed" -(*Willis, Constitutional Law 1936 Ed.p.574,580*) : that whilst "reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which such classification is imposed" - *Southern Railway Company* vs. *Greane* (5): that "in order to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act: that "what is necessary is that there must be a nexus between the basis of the classification and the object of the Act. " *Budhan Chaudhry* vs. *the State of Bihar* (6): that discrimination of persons in one class or similarly circumstanced should be avoided: that the basis of classification must generally be so drawn that those who stand in substantially the same position in respect of the law are treated alike: that Article 12 nullifies sophisticated as well as simple-minded modes of discrimination: that equal protection carries with it, of necessity, the doctrine of classification, for inequalities and disabilities whether natural, social or economic may have to be taken into account if justice and fairness is to be achieved as a final result: that the principle of equality does not mean that every law must have universal or uniform application to all persons irrespective of differences inherent by nature's attainment or circumstances: that the State must be allowed to classify persons or things for legitimate purposes: that the classification to be acceptable must be based on some real or substantial distinction bearing a just and reasonable relation to the object sought to be attained: that in any permissible classification mathematical nicety or perfect equality is not expected.

What equality before the law and the equal protection of the law, assured by the said Article 12, connote were once again dealt with by Sharvananda, C.J., in the case of *S.C. Perera* vs. *University Grants Commission - F.R.D. p. 103* (2) - in this way: that discrimination to be violative of Article 12 must be discrimination between equals: that no infringement of Article 12 is involved where unequals are treated differently: that the

intelligible differentia required to support a permissible classification must distinguish persons or things that are grouped together from others left out of the group, and must have a reasonable relation to the object sought to be achieved: that there must be some rational nexus between the basis of such classification and the object intended to be achieved by such classification: that the "equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free." - *Railway Express Agency* vs. *New York* (7) : that where the effect of any executive or administrative action is discriminatory, the fact that the dominant purpose of the authority was not to discriminate is immaterial: that the court, is not concerned with the motive for such action that it is only concerned with its effect or impact on the citizen: that " to make out a case of denial of the equal protection, a plea of differential treatment, is by itself not sufficient: that the Petitioner pleading that Article 14 has been violated, must make out that not only had he been treated differently from others, but that he had been so treated from persons similarly circumstanced without any reasonable basis and such differential treatment is unjustifiably made. " - *Probhudas Morarjee* vs. *Union of India,* (8)

Learned Counsel for the Petitioner cited the decision of the Indian Supreme Court in the case of *State of Kerala* vs. *Thomas and others* (9) in which Article 14 of the Indian Constitution which corresponds to Article 12 of our Constitution was considered and in which the court, dealing with the concept of equality embodied in the Indian Constitution, observed: that the concept of equality embodied in the Indian Constitution ensures to all citizens equality of opportunity in matters relating to employment: that that is an incident of the guarantee of equality contained in Article 14: the there could be reasonable classification of the employees in matters relating to employment or appointment: that the Supreme Court of India has taken the view that equal protection of the law is a pledge of the protection of equal laws, and has evolved the doctrine of reasonable classification: that such classification is one which includes all who are similarly situated and none who are not: that discrimination is the essence of classification: that equality is violated if it rests on unreasonable basis: that those who are similarly circumstanced are entitled to an equal treatment: that equality is amongst equals: that classification is therefore to be founded on substantial differences which distinguish persons, groups together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved: that the categories of classification

for promotion can never be closed on the contention that they are all members of the same cadre in service: that, if classification is made on educational qualifications or if classification is made on the ground that persons are not similarly circumstanced in regard to entry into employment such classification can be justified: that there is no denial of equal opportunity unless the person who complains of discrimination is equally set with the persons who are alleged to have been favoured: that there is no prohibition of the prescription of reasonable rules for selection to any office: that in regard to employment, like other terms and conditions associated with and incidential to it, the promotion to a selected post is also included in the matters relating to employment: that even in regard to such a promotion all that is guaranteed is equality of opportunity: the power to make reservation of appointments includes the power to provide reservation of selected posts: that in doing so the State has to take into consideration claims consistent with the maintenance of the efficiency of the administration: that the rule of parity is equal treatment of equals in equal circumstances: that the rule of classification is not a natural and logical corollary of the rule of equality, but that the rule of differentiation is inherent in the concept of equality: that equality means parity of treatment, under parity of conditions: that any classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory: that the test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none natural falling into that category: that the equality of opportunity takes within its fold all stages of service from initial appointment to its termination including promotion, but that it does not prohibit the prescription of reasonable rules for selection and promotion applicable to all members of a classified group: that the principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity: that with regard to promotion the normal principle is either merit--cum-seniority or seniority-cum-merit: that seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority: that a rule which provides that given the necessary requisite merit a member of a backward class shall get priority to ensure adequate representation will not violate Article 14: that the concept of equality is that if persons are dissimilarly placed they cannot be made equal by having the same treatment: that equality of employment opportunity admits discrimination with reason, and prohibits discrimination without reason: that reservation of post for a section of the population has the effect of conferring special benefits on that section,

because it would enable members belonging to that section to get employment or office under the State which otherwise in the absence of reservation they could not have got: that such preferential treatment is plainly a negation of theequality of opportunity for all citizens in matters relating to employment or appointment to an office under the State: that permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and such differentia must have a rational relation to the object sought to be achieved by the statute: that equality of opportunity in matters of promotion must mean equality between members of the same class of employees and not equality between members of separate independent classes: that a classification based upon the consideration that an employee belongs to a particular section of the population with a view to according preferential treatment for promotion is a clear violation of equality of opportunity: that in no case has the Court ever accepted and upheld a classification and differential treatment for the purpose of promotion among employees who possessing the same educational qualifications were initially appointed to the same category of posts: that to overdo classification is to undermine equality: that to expand the frontiers of classification beyond those which have so far been recognised is bound to result in creation of classes for favoured and preferential treatment for public employment and thus erode the concept of equality of opportunity for all citizens in matters relating to employment under the State: that in construing Articles of the Constitution the historical background, the felt necessities of the time, the balancing of conflicting interests must all be considered: that the genius of Articles 14 and 16 of the Indian Constitution consists not in literal equality but in progressive elimination of pronounced inequality: that even if racial classifications do have some negative educative effect, the classifications may be so effective that they should be instituted despite this draw back, and that if a court is convinced that the purpose of a measure using racial classification, is truly benign, that is that the measure represents an effort to use the classification as part of a program designed to achieve an equal position in society for all races then it may be justified in permitting the State to choose the means for doing so, so long as the means chosen are reasonably related to achieve that end: that the courts adopt a policy of restrained review where the situation is complex and is intertwined with social, historical and other substantially human factors: that through imperceptible extensions, a theory of classification should not be evolved which may subvert, perhaps submerge the precious guarantee of equality, which would result in the ideals of

the supremacy of merit, the efficiency of the public service and the absence of discrimination being sacrificed.

The judgments referred to earlier clearly show that the provisions of Article 12(1) and (2) bring within their reach equality of opportunity for employment as well and that such guarantee of equality applies not only in the matter of selection for employment, but also at the stage of selection for promotion.

For the purpose of determining the criterion for admission to the University in the year 1980, two separate examinations were held in the months of April and August 1979 upon two separate sets of syllabuses. The University Grants Commission - which is the 1st Respondent in each of the two abovementioned cases and is also the body established by the University Act No. 16 of 1978 with power to determine, in the manner set out therein, the total number of students which shall be admitted to each University, and the apportionment of the number to the different courses of study in each University, and to select students for admission to each University - decided: to adopt a system of allocating the available places to the two examinations in proportion to the numbers attaining the minimum requirement for admission at each examination: to fill 30% of the available places in respect of each examination in the order of merit determined on an Island-wide basis: 55% of the places so available to be allocated on a district basis to be filled in the order of merit in each district: balance 15% to be allocated to 13 districts deemed to be educationally under-privileged to be filled in the order of merit within each such district. It was this decision of the said Commission which came up for the consideration of this Court in *Perera's case* (supra) when the Petitioner in the said case challenged the application of a ratio in the selection for admission. His complaint, however, was only in regard to the 1st group of 30%, as between the successful candidates in the April and August examinations respectively.

After an exhaustive consideration of the Indian authorities referred to in the judgment, Sharvananda, C.J., took the view: that all those who qualified for admission at the two examinations were integrated into one class: that once they were so absorbed into one class they cannot, by reference to their original source, be discriminated in the selection for admission: that all those who qualified for admission in both examinations must be afforded equality of opportunity: that this principle of equality of opportunity is violated by a process of selection not grounded on

the merits of the candidates: that the discrimination complained of was not based on any reasonable classification: that the application of any ratio based on any consideration other than merit to the three categories referred to earlier would infringe the rule of equality: that the selection of candidates into the aforesaid three categories has to be on the basis of merit and merit alone. The imposition of the said ratio was thus struck down by the Supreme Court.

The constitutionality of the second of the three categories referred to in *Perera's case (supra)*, viz: the reservation of 55% of the available places to be allocated on a district basis among the 24 Revenue Districts - which was not challenged in *Perera's case* (supra) and was therefore not considered by Sharvananda, C.J., - was what came up for consideration in *Seneviratne's case* (supra) by Wanasundera J. After an exhaustive consideration of the relevant Indian decisions, - in which quota reservations for admission to colleges, classification on territorial or geographical basis, the relevancy of the demand of the times, the national interest, the right of the Government to lay down criteria of eligibility and sources of admission, in determining the permissibility of the classification, whether or not the merit principle could be modified, when courts would interfere in regard to claims based upon national policy and national interest had been considered by the Indian Supreme Court - and also few American decisions, including the case of *Regents of the University of California* vs. *Alan Bakke* (10) - where the "equal protection" clause in the Fourteenth Amendment of 1868, and Title VI of the Civil Rights Act of 1964, which expressly forbade racial or ethnic discrimination in programmes that receive federal aid, were discussed and the majority (even though only 4 out of the 9 judges ultimately thought it was permissible in that particular case) were of the view that racial preferences were sometimes permissible - and also the development of affirmative action or reverse discrimination programmes in the United States, Wanasundera J., took the view that the State enjoys wide discretion in laying down criteria for admissions, that it is a matter of discretion for the relevant Authority to indicate the sources from which admissions should be made after an overall assessment of the needs: that a rational classification could include considerations of national interest and policy.

Wanasundera, J., was satistied with the material adduced by the Respondent Commission; and concluded by upholding the decision of the said Respondent Commission, and by quoting with approval the observation of the Indian Supreme Court, in the case of *Kumari* vs. *State of Mysore* (11)

"For relief against hardship in the working of a valid rule the petitioner has to approach elsewhere because it relates to policy underlying the rule."

A consideration of the facts and circumstances of the two decisions of this Court, referred to above, and the principles laid down in the Indian cases, referred to therein, and also in the case of *State of Kerala* vs. *Thomas (supra)* it is clear: that the State is free to decide upon the sources from which either admissions to educational institutions or recruitments to the Public Service are to be made: that for such purpose the State could take into consideration the over-all needs and matters of national interest and policy: that once such selections are made those taken in from such sources are integrated into one common class: that thereafter such appointees are "clubbed" together into a common stream of service and cannot thereafter be treated differently for purposes of promotion by referring to the consideration that they were recruited from different sources: that their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again: that there should be no further classification amongst them, except upon certain acceptable criteria such as educational qualifications.

The principles culled from the authorities considered above do make it clear: that any differentiation made on ethnic grounds *per se* would be considered abhorrent: that, even so, under certain circumstances even such distinctions, drawn upon racial grounds, could be considered permissible.

The Circular P4 deals with both initial appointments and subsequent promotions within the Service. Although the internal notice of March 1990 envisages the issuance of a fresh letter of appointment as Assistant Director to the successful applicants, yet, the applications are confined to officers in a lower grade, viz: Superintendent of Customs. The said appointments, therefore, do in fact operate as promotions to a higher grade for the twenty-two officers who, like the Petitioner, are now serving in a lower grade as Superintendents of Customs.

The Petitioner's principal complaint, with respect to the imposition of an ethnic-quota requirement in the said Circulars, is directed against the *threatened enforcement of this requirement in regard to the impending* selections for promotions to the said grade of Assistant-Director.

On a consideration of what has been stated above it seems to me that these Customs Officers were, upon their initial appointment, integrated into one common class, and that thereafter there should not ordinarily be any further classification, as amongst them, for promotion from their present grade to the higher grades. The only consideration that should thereafter prevail, in regard to promoting them to a higher grade, is merit, or merit and seniority, which alone would enhance and ensure the efficiency of the service rendered by the department to the public in general. In effecting the promotions, referred to in these proceedings, the Respondents do not seek to place any consideration upon any individual educational qualifications of the officers eligible to be so promoted. There is no evidence of any past discrimination within the service: nor of any imbalance existing within the service which calls for rectification. The object of effecting such promotions should quite clearly be to provide a more efficient service through such officers to the general public.

I am, therefore, of opinion that any promotions made, based upon ethnic quotas as set out in paragraph (3) of P4, would be violative of the right of "equality" assured to the Petitioner by the provisions of Article 12 of the Constitution.

I would not, however, in these proceedings go the length of striking down paragraph (3) of P4, for the reason that, as set out earlier, the authorities do seem to recognise the existence of certain circumstances in which classification based upon ethnic grounds could be considered permissible.

Similarly, the question whether the contents of the said Circulars, P4 and P5, in regard to initial appointments to the Public Service, also offend against the said principle of equality spelt out in Article 12 of the Constitution will be left open to be considered at some future date, when the matter of initial recruitment itself, to the Public Service, arises directly for consideration by this Court, and when also a fuller consideration of all aspects of the matter of ethnic quotas and reservations, which, according to the local, Indian and American authorities, referred to above are relevant and pertinent, viz: matters of historical background, the felt necessities of the time, national policy, imbalances, reverse discrimination, could be entertained and undertaken. On such an occasion not only the concept of "group" rights in international human rights law, but also the other universally recognised set of norms and principles relating to

human rights, which are now being widely and increasingly considered proper and necessary for national courts to recognise and apply in reconciling the competing claims of individuals and groups of persons with the general interests of the community, could be considered. These seem to be matters upon which this Court would wish to be, and should be advised further and more fully.

There is just one other matter which requires to be considered. Learned Counsel for the Petitioner submitted: that the Government has no power to make rules with regard to appointment and promotion based on ethnic proportions: that it must be made by legislation and not by way of executive action: that it was outside the scope of the rule making power and beyond the scope of Article 55(4) fo the Constitution: that, in any event, it can be done only by way of amendments to the Establishment Code.

In regard to this submission all that need be said is that, if that is the real position then the complaint is against an act of a body which either has no power at all or has exceeded the power vested in it. If that were so, relief against the impugned act cannot then be by way of the provisions of Article 126 of the Constitution.

It, however, seems to me that the Cabinet has, by virtue of the provisions of Article 55(4) and on the authority of the decisions of this Court in the cases of *Abeywickrema* vs. *Pathirana* (12) *and The Public Service United Nurses Union vs. M. Jayawickrema, Minister of Public Administration* (13) the power to make rules such as are embodied in P4 and P5, subject, however, to the power vested in this Court by the provisions of Article 55(5) of the Constitution.

The complaint of imminent infringement made by the Petitioner is directed against acts of the Respondents, more particularly the 2nd and 3rd Respondents who no doubt seek to do such acts under and by virtue of the authority of P4 and P5 which embody decisions of the Cabinet. Even so, the immediate acts, which are said to affect the Petitioner, are clearly those of the 2nd and/or the 3rd Respondents themselves. Such acts of the said Respondents undoubtedly fall within the category of "executive or adminsitrative" acts as is contemplated by the provisions of Sub-Articles (1) and (2) of Article 126 of the Constitution.

For the reasons set out above, I make order - as also made by Fernando, J., whose judgment I have had the advantage of perusing in draft and with whose "guide-lines" I am in general agreement - directing the Respondents to consider the Petitioner's application, called for by the departmental internal notice issued on 5.3.90 (P2), for promotion from the grade of Superintendent, Customs to the grade of Assistant Director, Customs, without taking into consideration any ethnic-quota.

Having regard to all the circumstances, I direct the parties to bear their own costs of these proceedings.

TAMBIAH, J.,

The petitioner has filed this application under Article 126 of the Constitution challenging the criteria laid down in the Public Administration Circular, No. 15/90, dated 09th march, 1990, for promotion in the Public Service. The Circular was issued by the then Secretary, Ministry of Public Administration, Provincial Councils & Home Affairs. The said Circular states, inter alia, -

(1) If the total number of promotional positions available in the Public Service are below 4 in number, merit will be the sole criterion of selection. (para 05).

(2) If the total number of promotional positions in the Public Service are above 4 in number, promotion at the national level should be entirely on merit, subject to the principle of national ethnic quotas being followed. (para 02 (i) (b)).

The composition of the ethnic ratio for the Sinhalese Community will be 75% of the total number of vacancies. Tamils, persons of Indian Origin and Muslims shall be selected on the ratio of 12.7%, 5.5% and 8% respectively. However, if there is a difficulty in determining the exact numbers, a variation of minus or plus 2% could be permissible. (para 02 (i) (g)).

(3) The Secretaries to Ministries and Heads of Departments are required to implement this Scheme of promotion with effect from 01.01.1990 as a matter of National Policy. (para 09).

The Public Administration Circular, No. 15/90 (i) dated 25th March, 1990, states that "the 75% allotment of the total number of vacancies for the Sinhala Community as per paragraph 02 (i) (g) of Circular No. 15/90, will include all minorities other than Tamils, persons of Indian Origin and Muslims. Malays will be included in the 8% alloted to Muslims." The Appointing Authorities are "required to personally ensure the effective and fair implementation of the above Circular. No deviations therefrom will be permitted." The public Administration Circular, No. 15/90 (ii), dated 15th June, 1990, states that "the Government has decided that promotions in the Public Service etc. should be proceeded with in terms of the approved scheme for promotion subject to the principles of ethnic ratio being followed."

The Hon. Attorney-General referring to the ratio of Muslims as given out in the Circulars said that it should be corrected to read as "Moor", highlighting the ethnic composition rather than the religious composition. Nevertheless, I shall refer to them as Muslims as the Circular, No. 15/90, calls them so; so do our Legislative Enactments (*See,* Muslim Marriage & Divorce Act, Cap. 134; Muslim Intestate Succession Ordinance, Cap. 72; Muslim Mosque & Charitable Trusts Ordinance, Cap. 459).

The petitioner is an officer of the Sri Lanka Customs Service. He was first appointed to the General Clerical Class of the General Clerical Service on the results of a competitive examination held on 10.8.1956. After his probationary period he was confirmed on 18.09.1958. On 01.10.1958 he was appointed to the General Clerical Class of the Customs Clericl Service and on 01.11.1962 he was promoted to the Executive Clerical Class, Grade II, of the Customs Clerical Service. The petitioner passed the first Efficiency Bar Examination before the salary scale of Rs. 3,180/- per annum.

In 1968, the Unified Customs Service was established. Consequent on creation of the Unified Customs Service, the petitioner was appointed to Grade II of that Service on 01.10.1968. He passed the 2nd Efficiency Bar Examination before the salary point of Rs. 3,900/- per annum on 23.08.1972. The petitioner was promoted to Class I of the Unified Customs Service on 28.06.1979.

The Minute on Unified Customs Service dated 15.09.1968 issued under the hand of the then Permanent Secretary of the Ministry of Finance and approved by the Public Service Commission states in paragraph

5 that promotion to grade 1 and the Special Grade of the Unified Customs Service will be on merit and seniority.

Chapter 11, a. 5, of the Establishment Code (Volume 1) which deals with promotion of public officers states, inter alia, that in filling of a vacancy, the Head of the Department should prepare a Scheme of Recruitment and forward same to the Appointing Authority who would then appoint a Selection Board. On receipt of the recommendation of the Selection Board, the Appointing Authority will make the appointment. S. 5:3,1, states that the Appointing Authority, on receipt of the recommendations of the Selection Board, will have the order of merit ascertained according to the marks obtained by the candidates at the written examination and at the interview and thereafter make the appointment.

On 15.07.1985, the petitioner was promoted as Sub-Collector, which designation was later changed to Superintendent of Customs, a post which he currently holds in the Sri Lanka Customs Department.

In all, the petitioner counts 34 years in the Public Service.

On 05.03.1990 there was an internal notice calling for applications from officers in the grade of Superintendents to fill vacancies in the post of Assistant Director of Customs which is a post just above the post of Superintendent. In the specimen form of application, the particulars called for were, inter alia, the date of appointment to the Department, educational qualifications, knowledge of the official language and particulars of work done during the last 5 years. The petitioner and other Superintendents applied in response to the said notice and attended the interview held on 07.07.1990. The petitioner has filed a list of Superintendents according to seniority. It is common ground that 53 persons holding the post of Superintendents attended the said interview and that the petitioner was the 10th in order or seniority. The appointments to the post of Assistant Directors have not yet been made. This Court, when granting leave to the petitioner to proceed with his application made order restraining the Respondents from filling the vacancies in the post of Assistant Directors until the final determination of this application.

In terms of paragraph 2 (i) (g) of Circular No. 15/90, in the Customs Department which is a national service, promotions are to be made on the national ethnic proportion, i.e., Sinhalese 75%, Tamils 12.7%, Indian

Tamils 5.5% and Muslims 8%. There are at present 24 vacancies to be filled in the post of Assistant Directors, according to the Hon. Attorney-General. Applying this ratio, the 24 vacancies would be distributed as follows: Sinhalese 18%, Sri Lanka Tamils 3.05%, Indian Tamils 1.32%, and Muslims 1.92%. Since there are no Indian Tamil or Muslim applicants, the 24 vacancies have to be filled by Sinhalese and Tamils. The result would be that the 24 vacancies must be filled by 20 Sinhalese and 4 Tamils.

According to the petitioner, hitherto all promotions to the post of Assistant Director from the post of Superintendent have been made on merit and seniority principle; the seniority list is followed and an officer is overlooked for promotion only if there have been adverse reports against him; once the selections are made, there are adjustments made in the order of seniority in the promoted post according to merit earned in the lower post, and this scheme of promotion has been consistently followed and given satisfaction to customs officers.

It is the case of the petitioner that since he is 10th in the list of seniority, if the merit and seniority principle in followed he certainly would have been selected to fill the 24 vacancies as Assistant Director. In terms of seniority and merit, the 1st 24 persons whose names appear in the list of seniority would ordinarily be selected for appointment to the post of Assistant Director. Of these persons, 17 are Sinhalese and 7 are Tamils. But, if the selection and appointment is made on the ethnic quota in terms of the Public Administration Circular, the 20 Superintendents who are Sinhalese will be promoted as against 4 Tamils. The petitioner who is 10th in the list and who is the 5th Tamil in the same list would not be promoted. It has been his expectation, he says, from the time he entered the service that he would obtain the promotions that he was entitled to and that he would eventually retire having reached the highest position in the Customs Department available to him in terms of merit and seniority.

So near and yet so far!

The petitioner wants this Court to declare the Public Administration Circulars, Nos. 15/90, 15/90 (i) and 15/90 (ii) ultra vires the Constitution and null and void as being violative of the petitioner's right to equality as enshrined in Articles 12 (1) and 12 (2) of the Constitution and to make order that any purported appointments as Assistant Directors in

the Unified Customs Service in terms of Public Administration Circulars, Nos. 15/90, 15/90 (i) and 15/90 (ii), would be violative of the petitioner's right to equality enshrined in the Articles 12 (1) and 12 (2) of the Constitution.

The 2nd Respondent denies that in filling the 24 vacancies, the seniority list is displaced exceptionally where the record of a particular officer disentitles him for promotion. Seniority is often overlooked depending on the performance of the candidates in the service and at the interview. Being 10th in the list does not entitle the petitioner to be selected to fill a vacancy.

It it the position of the Respondents that in the recent past the national security of the country was thereatened by force and violence. One of the causes of such force and violence was the perception among minority communities and other disadvantageous groups of this country that they have been denied of opportunites and promotions within the Public Service and the other public sector organisations. Therefore, as a measure of national policy it was determined that such perception would be favourably assuaged by the promulgation of a scheme of recruitment and promotion which manifestly ensured that no ethnic group would be denied entry or opportunity of appointment in the Government Service and other public sector organisations on account of their ethnicity; that the apportionment of the recruitments and appointments on the relevant ethnic ratio was the most reasonable criteria that would remedy this unfavourable situation and eradicate the prevailing condition and instil confidence in the minds of the different ethnic groups. The Circulars set out a rational basis for recruitment and promotion in the Public Service and ensures the proper representations of the interests of all sections of the community. The Circulars are reasonable in the circumstances and do not offend the equality provisions under the Constitution.

Before us, the Hon. Attorney-General submitted that at different times there has been many complaints that the scheme of recruitment in the Public Service was unfair either to the majority or the minority. He pointed out that there was a finding in the Report of the Presidential Commission on Youth that one of the major causes of youth unrest was the feeling of discrimination in schemes of recruitment in all sectors of employment, public, private, the corporation and plantation sector. The Circular was drafted to meet a social need. The scheme of recruitment would ensure that all ethic groups have a fair chance of being recruited. The Circulars

are not discriminating but entrench a guarantee against discrimination. He further submitted that by these Circulars, ethnicity has not subsumed the criteria of merit. There has to be a basic qualification which makes a person eligible to apply for a vacancy in the public service. And among these eligible, the selection will be made according to the ethnic proportion as stipulated in the Circulars. It was further submitted that the petitioner does not enjoy a right to appointment to any particular grade or post within the Public Service and therefore cannot claim a breach of any fundamental right.

Though the Report of the Presidential Commission examined in depth the problem of youth employment, the Report makes no reference to any demand being made for the adoption of national ethnic ratios in recruitment for employment nor does the Report make such a recommendation. On the other hand, in regard to admissions to the University, the Commissioners declined to accept a request made by certain representatives of the youth of the Muslim Community for a reservation of 8% of University admissions for Muslims and went on to state "that ethnic quotas are not an answer to Muslim representations in the Universities. The introduction of such quotas has in the past led to a great deal of unrest and a sense of discrimination. Any advances made by such schemes are negated by the political repercussions in a multi ethnic society."

The Respondents do not deny that hitherto all promotions to the post of Assistant Director have been made on seniority and merit principle, and that the Public Administration Circular (15/90) drastically altered the scheme of promotion in the Public Service by introducing a new criteria for promotion, viz, the principle of ethnic quotas. Nor do the Respondents dispute the petitioner's eligibility and seniority for promotion.

The Hon. Attorney-General submitted that there have been many complaints at different times that the scheme of recruitment in the Public Service was unfair either to the majority or the minority; so the Government has decided to formulate a scheme of recruitment to meet a social need and ensure that all ethnic groups have a fair chance of being recruited. These may be proper and legitimate considerations to be taken into account in formulating government policy. But they have to be accommodated within the framework of the Constitution. The State is at liberty to do everything to achieve that object so long as no provision of the Constitution is contravened and no fundamental right declared

by the Constitution is infringed or impaired. As was pointed out by *Seervai (Constitutional Law of India, 3rd Edn. p. 286);* "Article 14 (identical with Art. 12 (1) of our Constitution) confers a personal right by enacting a prohibition, and the only question which has to be determined when the law is said to violate the right is to inquire whether the prohibition is violated. If the prohibition has been violated, the law will be void, however laudable the motive of its makers; and if the prohibition has not been violated, the utmost malignity on the part of the law-makers will not make it void"

Article 12 (1) of our Constitution which states that "all persons are equal before the law and are entitled to equal protection of the law" is the equivalent of Article 14 of the Indian Constitution. Article 12(2) of our Constitution which states that "No citizen shall be discriminated against on grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds", corresponds to Article 15(1) of the Indian Constitution. Article 15 of the Indian Constitution, as originally enacted, contained only 3 sub-clauses. Clause (4) which reads "nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes or for the Scheduled Castes and the Scheduled Tribes" was inserted by the Constitution (1st Amendment) Act, 1951. Article 16(1) of the Indian Constitution states that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State", and Article 16 (2) states that "no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated, against in respect of any employment or office under the State". Article 16 (4) states that "nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services of the State".

Article 16 (4) of the Indian Constitution was brought in by an Amendment in 1951 as a result of the decision in *Madras* v. *Champakam Dorairajah and another* (14). This case first came up before the High Court of Madras *(Dorairajah* v. *State of Madras)* (15). The 2 petitioners, both belonging to the Brahmin Community, sought admission to the Medical and Engineering Colleges maintained by

the State of Madras. They complained that the Communal Government Order was violative of their fundamental rights contained in Articles 15 (1) and 29 (2) of the Constitution. Article 29 (2) states that "no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." In terms of the Communal Government Order, the seats in both the Medical and Engineering Colleges were to be filled up according to certain proportions. For every 14 seats to be filled, candidates were to be selected strictly on the following basis:

Non-Brahmins (Hindu)	- 6
Backward Hindus	- 2
Brahmins	- 2
Harijans	- 2
Anglo-Indians & Indian Christians	- 1
Muslims	- 1

For the State it was sought to justify the discrimination on grounds of public policy and as necessary to bring out social justice by promoting the interests of the educationally backward sections of the citizen. Reliance was placed on Article 46 which contains directive principle of state policy which runs, "The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation". Rajamannar, C.J. observed (p.126) -

> "After reiterating the principle of non-discrimination in Article 16 (2), Article 16 (4) makes an exception and provides for discrimination in favour of backward classes of citizens. Now there is no such provision for reservation as regards admissions into educational institutions... and we do not feel justified in adding a new provision by way of an exception to the expressed declaration made in Article 15 (1) and Article 29 (2). In our opinion Article 46 cannot override the provisions of these two Articles or justify any law or act of the State contravening their provisions."

The Court held that the Communal Government Order violated Article15 (1)of the Constitution. Rajamannar, C.J. observed (p. 125) -"Article 15 (1) in unambiguous terms declares that the State

shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. "Discriminate against" means make an adverse distinction with regard to, distinguish unfavourably from others (Oxford Dictionary). What the Article says is that no person of a particular religion or caste shall be treated unfavourably when compared with other religions or castes merely on the ground that they belong to a particular religion or caste."

Viswanath Sastri, J. observed (pp. 133, 136, 137, 138 & 139)

"The use of the words "or any of them" in Articles 15 (1) & 29 (2) shows emphatically that not one of the enumerated grounds namely, race, religion, caste etc. is a valid ground for admitting or refusing admission of students to educational institutions maintained by the State or with State aid.

The rights that are protected and guaranteed by this Article (Art. 15 (1) are the personal rights of each individual citizen, his caste, race or religion being wholly ruled out of consideration. It is not rights of a caste or community or rights of citizens as representing or forming integral parts of a caste or community that this Article deals with and guarantees. The right guaranteed is the personal right of every individual citizen, qua citizen and not as belonging to a particular caste or professing a particular religion.

They (Articles 14 & 15 (1)) guarantee certain valuable personal rights to every citizen . . . The State is prohibited by Article 15 (1) from discriminating against any citizen on the ground of his caste or religion. It prohibits the State from discriminating against citizens seeking to avail themselves of opportunities provided by the state for their intellectual development and material advancement by joining educational institutions maintained at the expense of the State, on the ground of caste or religion, if they statisfy reasonable tests prescribed alike for all citizens similarly situated. The Communal Government Order which classified citizens according to their caste and religion for the purpose of admission to Government Medical & Engineering Colleges, which allots seats in definite and fixed proportions to different castes and religions and communities and which operates effectively to shut out a large number of students with higher qualifications and

> to let in a large number of students with lower qualifications, solely, on account of their belonging to particular castes or communities, discriminates against citizens on the ground of caste, community or religion and therefore violates Article 15 (1) of the Constitution."

When this case came before the Supreme Court, S.R. Das, J. pointed out (p.228) that Article 16 which guarantees the fundamental right of equality and provides that no citizen shall, on grounds only of religion, race, caste etc. be ineligible for or discriminated against in respect of employment or office under the State also includes clause 4 which empowers the State to make reservations of posts for backward classes. Das, J. observed (p. 228), -

> "Seeing, however, that clause (4) was inserted in Article 16, the omission of such an express provision from Art. 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. The protection of backward classes of citizens in State services and the reason why power has been given to the State to provide for reservation of such appointments for backward classes may under these circumstances be understood. That consideration, however, was not obviously considered necessary in the case of admission into an educational institution and that may well be the reason for the omission from Art. 29 of a clause similar to cl. (4) of Art. 16."

Das, J. pointed out (P. 227) that Ch. (2) of Article 29 guarantees the fundamental right of an individual citizen to get admission into any educational institution maintained by the State or receive aid out of State funds and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, etc. The argument on behalf of the State that Article 46 entitles the State to maintain the Communal Government Order fixing proportionate seats for different communities and if by reason of that the petitioners cannot gain admission into educational institutions, there is no infringement of their fundamental rights was rejected.

The Court held that the Communal Government order proceeds on the basis of religion, race, and caste and such classification is a violation of the fundamental right guaranteed to a citizen under Article 29 (2), and was therefore void.

In *Tritoki Nath* v. *J. & K* (16) the State of Jammu and Kashmir in giving promotions to teachers in the services of the Education Department adopted the following policy, -

(1) 50% of the vacancies were filled from among the Muslims of the entire State.

(2) 40% of the remaining 50% vacancies were filled by Jammu Hindus.

(3) the remaining 10% of the posts were given to the Kashmir Hindus.

The petitioners claimed that their promotions were denied to them and they had been discriminated solely on the ground of religion and place of residence; that junior officers were promoted over senior officers on the sole ground that the former belonged to the Muslim Community or that they were Hindus belonging to the Jammu province of the State of Jammu and Kashmir. The State sought to justify the basis of promotion on the ground that it had acted in consonance with the principles of clause (4) of Article 16; that the Muslims as a community in the whole of the State of Jammu and Kashmir formed a backward class of citizens and not adequately represented in the services under the State; that similarly the Hindus from the province of Jammu formed a backward community and were also not adequately in the services of the State.

The evidence showed that the Selection Board consisting of four Secretaries to the government was directed to select candidates "keeping in view the policy of adequate representation of such elements as were not adequately represented in the Services and to pay due regard to Provincial proportions." The Court held that this direction violated Articles 16 (1) and 16 (2) and was void.

Shah, J. observed (pp.3 & 4):

"Art. 16 in the first instance by cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression 'backward class' is not synonymous with 'backward caste' or 'backward community'. But for the purpose of Art. 16 (4), in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth, or residence cannot be

adopted, because it would directly offend the Constitution. The state policy was policy not of reservation of some appointments or posts; it was a scheme of distribution of all the posts community wise. Distribution of appointments, posts or promotions made in the implementation of that State policy is contrary to the constitutional guarantee under Art. 16 (1) and (2) and is not saved by cl. (4)."

Our Constitution does not have provisions similar to Articles 15 (4) and 16 (4) of the Indian Constitution.

There is more than one decision of this Court which states that Article 12 (1) of our Constitution though it forbids class legislation, does not forbid classification *(See, Palihawadana & Others* v. *Attorney-General:* (1) *Perera* v. *University Grants Commission* (2). The guarantee of equality under Article 12 (1) is therefore not denied by a permissible classification. But, Article 12 (2) prohibits discrimination on any of the enumerated grounds, namely, race, religion, language, caste, sex, political opinion, place of birth or any such ground. *Chaudhuri (Fundamental Rights, 2nd Edn., Vol. 1, pp 96,97)* discussing Articles 14 and 15 of the Indian Constitution says, "Article 15 expresses particular application of the general principle laid down in Art. 14. When a law comes within the prohibition of Art. 15, it cannot be validated by recourse to Art. 14 by principles of reasonable classification." So that, if a law or executive decision comes within the prohibition of Article 12 (2), it cannot be justified under the theory of classification. In fact, the Hon. Attorney-General did not seek to justify the impugned Circular (15/90) under the doctrine of reasonable classification by establishing that the classification is not arbitrary but bears a reasonable relation to the purpose or object of the Circular. his contention was that the Circulars set out a rational basis for recruitment and promotion in the public service and ensures the proper representations in the interests of all sections of the community; that it ensures that all ethnic groups have a fair chance of being recruited, and that the Circulars are in furtherance and not in derogation of Article 12 (1).

The right that is protected and guaranteed by Article 12 (1) is the personal right of any person, qua person, and not as belonging to a particular community. So also the right that is protected and guaranteed by article 12 (2) is the personal right of every individual citizen, qua citizen, and not as belonging to a particular community. The rights of a community or caste or of persons professing a particular religion do not come into the picture at all. It is of relevance to note that in the 1972 Constitution,

in Article 16 (2) (a) there was a reference to "group rights" which was omitted in the 1978 Constitution.

> "It (Art. 12 (1)) only means that all persons similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed and there shall be no discrimination between one person and another, if, as regards the subject matter of the legislation or administratioin, their position is substantially the same."
>
> (*per* Sharvananda, J. in *Palihawadane* v. *Attorney-General* (1).)

The Indian Constitution has a specific provision (Art. 16 (1)) guaranteeing equality of opportunity in matters relating to employment or appointment to any office under State and by Art. 16 (2) prohibits discrimination in employment or appointment to an office on grounds of religion, race, etc. Our Constitution does not have a similar provision. But there are decisions of this Court that though Article 12 does not specifically mention the right of equality of opportunity in matters of public employment, it is an instance and a necessary incident of the application of the concept of equality enshrined in Article 12; that Article 12 does not confer a right to obtain State employment: it only guarantees a right of equality of opportunity for being considered for such employment *(Palihawadana's Case* (supra), *pp. 5,6, & 11; Weligodapola* v. *Secretary, Ministry of Home Affairs,* (17)

> "Equality of opportunity in matters of public employment cannot be confined to the initial matters prior to the act of employment, but include other matters relating to employment, such as promotion to selected posts."
>
> *(Seervai, Constitutional Law of India, Vol. 1, 3rd Edn., p. 423)*

Seervai (supra), *p. 422,* discussing the right to an equality of opportunity to obtain public employment under Art. 16 of the Indian Constitution says that Art. 16 "does not exclude selective tests, nor does it preclude the laying down of qualifications for office, not only of mental excellence, but also of physical fitness, sense of discipline, moral integrity, loyalty to State etc. Where the appointment requires technical knowledge, evidence of such knowledge may be required. Further the Government is entitled to have regard to the character and antecedents of candidates for appointment to public office."

The State, therefore, is not prohibited from prescribing reasonable rules for promotion in the Public Service. The significance of the words "or any one of such grounds" in Article 12 (2) is that not one of the enumerated grounds namely, race, religion, language, caste, etc., shall be a ground of preference or disability for promotion in the Public Service.

Now, what does the Public Administration Circular, No. 15/90, purport to do? It says that promotions in the Public Service shall be made on the principle of ethnic ratio, while maintaining the merit principle. Promotions are to be made on the national ethnic proportion, that is, Sinhalese 75%, Tamils 12.7%, Indian Tamils 5.5%, Muslims 8%. It, therefore, classifies citizens seeking promotion to higher posts on the basis of community and allocates definite and fixed proportions to the different communities. It is a scheme of distribution of promotions community wise and imposes a pre-determined quota or reservation in favour of each ethnic group.

Take the case of the petitioner in this case and let us see the effect and operation of the Circular on him. He has been 51 years in the Public Service. He has been given his due promotions and increments. That he is the 10th in the list of seniority is not disputed; his eligibility and suitability for promotion is also not disputed. There are 24 vacancies as Assistant Director of Customs, 20 of which are reserved for the Sinhalese and 4 for the Sri Lanka Tamils. He is the 5th Tamil in the list of seniority. The petitioner may be more eligible and more suitable than one or more in thr group of 20 Sinhalese and even be senior to them and yet will be denied promotion because he is not a Sinhalese. What is the reason for this denial of promotion except that he is a Sri Lanka Tamil and not a Sinhalese.

Assume there were Muslim and Indian Tamil applicants as well. The 24 vacancies would then be distributed as follows: Sinhalese 18, Tamils 3, Muslims 2 and Indian Tamils 1. The 4th Tamil applicant for promotion as Assistant Director may be more eligible and suitable than the two Muslims and the one Indian Tamil applicants, but nevertheless he cannot get the vacancies reserved for them, for no fault of his except that he is a Sri Lanka Tamil and not a member of the aforesaid communities. Likewise, the 3rd Muslim applicant may be more eligible and suitable than one or more of the 3 Sri Lanka Tamil applicants. And yet, he cannot get the vacancies reserved for them because he is not a Sri Lanka Tamil; nor can he get the vacancy reserved for the Indian Tamil who may be

less eligible and suitable because he is not an Indian Tamil. The 2nd Indian Tamil applicant also may find himself in a similar predicament vis-a-vis the ethnic quota reserved for the Sri Lanka Tamils or the Muslims. So also the 19th Sinhalese applicant may be more eligible and suitable for promotion and yet he cannot get any of the vacancies reserved for the minorities merely because he is not a Sri Lanka Tamil, Muslim or an Indian Tamil.

The Superintendents of Customs form a single class. The gravemen of Article 12 is equality of treatment. All persons within this class must have an equality of opportunity of advancement of their career in the Public Service irrespective of race, caste, religion etc. The imposition of a pre-determined quota or reservation in favour of an ethnic group in the matter of promotion in the Public Service violates the principle of equality of opportunity in public employment and offends Article 12 (1). The provision in the impugned Circular which classifies citizens according to their race for the purpose of promotion in the Public Service, which allots promotional positions in definite and fixed proportions to different races and which will operate to deny promotions to more eligible and suitable applicants for promotions and let in others with less eligibility and suitability on the ground that they belong to a particular community, discriminates against citizens on the ground of race and therefore violates Article 12 (2) of the Constitution.

I make order that any purported appointments as Assistant Directors in the Unified Customs Service in terms of Public Administration Circulars, Nos. 15/90, 15/90 (i) and 15/90 (ii) are violative of the petitioner's right to equality as enshrined in Articles 12 (i) and 12 (2) of the Constitution. The petitioner has the right to be considered for promotion as Assistant Director of Customs without reference to national ethnic quotas mentioned in the aforesaid Circulars, and I direct the Respondents to consider the petitioner's application for promotion accordingly. There wil be no order for costs.

G.P.S. DE SILVA, J.

I have read in draft the clear and comprehensive judgment of my brother Fernando, J. The relevant facts have been set out by him and I agree with his reasoning and conclusions. However, I would like to add just a few words of my own, in view of the importance of the issue involved.

The question that directly arises for our consideration is whether the application of the "principle of ethnic ratio" (formulated in the Circulars P4, P5 and 2R1 issued by the Ministry of Public Administration, Provincial Councils and Home Affairs) in the matter of the *promotion* of the petitioner from the grade of Superintendent (Customs) to the post of Assistant Director of Customs is violative of the Constitutional guarantee enshrined in Article 12 of the Constitution. Article 12 (1) sets out the general principle of equality of treatment", that is to stay, all persons similarly circumstanced must be treated alike in the matter of privileges conferred and liabilities imposed. Article 12 (2) is but a facet of the principle embodied in Article 12 (1). It is a special application of 12 (1) in specific areas which for historical, cultural, socio-economic or other reasons, have a contemporary relevance and significance. Articles 12 (1) and 12 (2) must therefore be read together.

Although our Constitution does not have a specific provision relating to equality of opportunity in public employment as the Constitution of India has (Article 16) yet, as stated by Sharvananda, J. (as he then was) in *Perera* vs. *University Grants Commission,* (2) "equality of opportunity is only an instance of the application of the general rule of equality laid down in Article 12". The petitioner is plainly not claiming a right to an "appointment" but the right to equality of opportunity in the matter of promotion in the public service, where he has served for well over three decades.

It is common ground that the petitioner along with 52 other superintendents were interviewed for the post of Assistant Director of Customs. There is little doubt that the petitioner along with his brother officers holding the posts of Superintendent form one "class" or "category". No submission to the contrary was made before us. In other words, they are persons similarly situated and must be treated equally in the matter of promotion to the higher grade, viz. post of Assistant Director of Customs. As observed by Khanna, J. in his dissenting judgment in *State of Kerala* vs. *Thomas,* (9) "equality of opportunity in matters of promotion must mean equality between members of the same class of employees and not equality between members of separate, independent classes.

When these public officers who constitute but a single class, reach the stage of promotion to the next grade, could their promotion be regulated by a *new* criterion based solely on race, and what is more, a criterion quite unrelated to the maintenance of efficiency in the service to which

they belong? I think the answer clearly is that this cannot be done without infringing or at least restricting the fundamental right guaranteed by Article 12 of the Constitution. It amounts to a constitutionally unwarranted discrimination on the ground of race, and race alone. There can be no "classification" based solely on a ground prohibited by Article 12 (2) unless it could be shown that such classification is meaningfully related to the object to be achieved by the classification. This, the respondents have failed to do, there being no material before us to show that the "principle of ethnic ratio" is related to the duties to be performed by the Assistant Directors of Customs.

I accordingly hold that the application of the "principle of ethnic ratio", in so far as the facts and circumstances of the present case are concerned, would infringe or at least restrict the rule of "equality of treatment" protected as a fundamental right in our Constitution.

JAMEEL, J.,

The facts, pertaining to this application are detailed in the judgement of my brother Mark Fernando J. I am in agreement with his finding that the provisions of the paragraph 3 of the Public Administration Circular No. 15/90, (p4) dated 5/03/1990 are violative of the Petitioner's Rights to Equality under Art. 12 (1) and 12 (2) of the Constitution.

At the commencement of his submissions the Learned Attorney General stated that he would be advising the Government that, in the context in which it appears, the word "MUSLIM" in paragraph 2 (1)(g) of this circular is incongruous, and that he would be suggesting that that word be replaced by "Sri Lankan Moor" or some other word or phrase which would indicate race, as opposed to religion for the reason that, the rules contained in P4 were meant to provide for the observance of due proportions according to the racial distributions prevailing in the Island, the Provinces and in the Districts, as the case may be, in the matter of the recruitment and promotions in the Public Service, the Provincial Services and in the Public Corporate Service respectively.

The word "MUSLIM" does mean and has referrance to a person who has 'RECEIVED, 'EMBRACES' or follows Islam. Islam is the name of the religion and a Muslim is an adherent of Islam. Taken in its literal

Dictionary meaning, Muslim will denote the religion and not the race of the individual.

However in Sri Lanka, and that too in post World War I period, the word MUSLIM has been used by the Administration and even by the Legislature, to mean and include the Ceylon Moors and the Ceylon Malays, even when dealing with subjects pertaining to race.

In the 19th century and thereafter up to about the end of World War I the word used by the British Government to refer to the followers of Islam in Ceylon was 'MOHAMMEDAN". Thus we have the Mohemmaden Code of 1806, the preamble to which is most enlightening. It reads as follows:-

> "Extract from the Minutes of the Council held at Colombo on the Sixth day of August 1806".
>
> Present:- His Excellency the Governor.
> The Hon: Alexander Johnstone Esquire.
> Robert Arbuthnot Esquire.
>
> The Chief Justice submits to the Governor in Council the Code of the Mohammedan Laws, observed by the Moors in the Province of Colombo and acknowledged by the Head Moormen of the District to be adopted to the present usage of the caste. Resolved on the motion of the Chief Justice that the same be published, and that they be observed throughout the whole of the Province of Colombo.
>
> 'A true Extract' - John Deane (Sec: of the Council)
>
> Published on the Order of His Excellency The Governor Robert Arbuthnot. (Chief Sec: to the Governor)

SPECIAL LAWS CONCERNING MOORS OR MOHAMMEDANS.

This was followed in 1886 by the Ordinance No: 8 of 1886 (as amended by Ord: No. 2 of 1898) entitled:-

> "An Ordinance to provide for the Registration of Mohammedan Marriages contracted in the Colony."

In 1901, under the Education Ordinance, then prevailing, the Regulations framed in respect of Grant In Aid Schools, provided for Grants to 'Roman Catholic' schools and 'Mohammedan' schools.

At that stage those referred to as 'Mohammedan' were the Ceylon Moors and the Ceylon Malays, because they had a common religion - ISLAM which also gave them their Personal Laws.

It is in the matter of their Personal Laws that the Muslims (That is to say followers of Islam, be they Ceylon Moors, Ceylon Malays, Sinhalese Tamils or any other race or Nationality) in Sri Lanka are governed by the Muslim Law, and that too by the Law of the SECT to which they belong. In all other matters, and especially in matters provided for by Statute the Muslims, as in the case of everyone else is governed by the Statute. This would apply equally to all rules having the force of Law.

In the matter of the interpretation of any provision of these Personal Laws recourse must be had to the principles of that Law, while for the interpretation of our Ordinance and other Enactments the general principles of interpretation of statutes and our Interpretation Ordinance will have to be applied. Thus De Sampayo J in *Khan* vs. *Marikar* (36) stated that:-

"It is true that the Mohammedan Code of 1806 entitled 'The Special Laws concerning Maurs and or Mohammedans' was to be observed in the Province of Colombo. But it is clear that the words Maurs and Mohammedans were are used as synonymous terms. When by the Ordinance no. 5 of 1852 the Law was extended to the whole Island the only word used was 'Mohammedan' and the Ordinance No. 8 of 1888 which provided a system of Marriage Registration for Mohammedans is still plainer and section 17 speaks of 'Persons professing the Mohammedan Faith' The Mohammedan Law has certainly been applied to the Malays and to immigrants from India known as Coast Moormen. The fact is that Mohammedan Law is based on Religion and is applicable to all followers of Islam. Even before Ord. No. 5 of 1852 the Supreme Court had applied it to the Moors at Kandy observing that they were governed by their own Law and Customs of inheritance, and marriage which was founded on their Religion." *(Saibo* vs. *Ahamat)* (37). In *Narayanan* vs. *Sareeumma* (38) De Sampayo J. observed as follows:-

"It is urged that the Special Laws governing Mohammedans in Ceylon

are only concerned with such matters as Inheritance and Matrimonial Affairs, and that where there is a CASUS OMISSUS the Roman Dutch Law should be applied even to the Mohammedans. I cannot a acceed to that proposition . . ."
(see also - 1 S.C.C. 80 and 2 Bal. 188)

Even in interpreting a Sri Lanka Statutary Provision on Muslim Law recourse should be had to the principles enshrined in Islamic Law or Shariat.

Sharvananda C.J. in *Ghouse* vs. *Ghouse* (39) has stated:-

> " . . .The Adoption Ordinance No. 24 of 1941 enables any person desirous of being authorised to adopt a child, to apply for an Adoption Order. Hence a Muslim too is competent to apply for an Adoption Order, and can adopt children in terms of that Ord. . . . In my view since Section 6 (3) of the Adoption Ord. does not supercede or abrogate the Muslim Law of Intestate Succession, which does not recognise an adopted child for the purposes of intestate succession, the Respondent's claim to succeed to the intestate Estate of his adopting parents, being based solely on that section 6 (3) of the Adoption Ord. cannot be sustained and therefore fails."

The principle that could be extracted from these decisions is that in all matters wherein the Muslim Law is not made applicable to the Muslims of Sri Lanka (and this includes the Rights under Art. 12 of the Constitution viz-a-vis this Directive of National Policy contained in P 4) and framed under the Establishment code) the general rules of interpretation will apply.

By about the end of the second decade of this Century, the replacement of the word 'Mohammedan' by the word 'Muslim' becomes apparent. For instance we have 'The Muslim Marriage and Divorce Registration Ordinance' of 1929. and 'The Muslim Intestate Succession and Wakfs Ordinance No. 10 of 1931.

In these two instance the word 'Muslim' is clearly used to indicate Religion. On the other hand in the Regulations framed under the Education Ordinance No. 31 of 1951 (Cap. 81 L.E.C. - 1956) (and contained in Vol. III - 1956 of the Subsidiary Legislative Enactments - 1956) it has been provided in Sections 4 (1) and 4 (2) that in all primary schools in the Island that the Medium of Instructions in the school shall be

Sinhalese or Tamil, as the case may be, if the number of children attending all classes in that school is 15 or more, Sinhalese or Tamil. It is the racial composition of the school children that determined the Medium of Instruction of that school. However by sub-section (4) of that same section provision is made to grant a choice to these children, or rather to their parents, of English, Sinhalese or Tamil as their Medium of Instructions, if in all the classes in that school there are at least 15 children who were either Muslims or who were neither Sinhalese nor Tamil.

Moving on to another sphere of activity in our country, we have the Sinhala, Tamil and Muslim Services of the Sri lanka Broadcasting Corporation. Also there used to be a scheme of recruitment of District Revenue Officers on the basis of area, namely The 'Kandyan or Up-country' area, the 'Low -country' area and the 'Tamil speaking areas'.

Official designations have changed from time to time. Thus the New Years day or the 'Aluth Avuruddha' in 1978 (14/04/78) was officially called the Sinhala and Hindu New Year while the corresponding day in the current year (14/04/91) is designated as "The Sinhala and Tamil New Years Day".

In all these instances in the recent past the Malays have been included in the category 'MUSLIMS'. Even when minority interests had to be represented in Parliament we have had both Moors and Malays being nominated to represent Muslim Intrests. For example:- The late Hon. Dr. T.B. Jayah; the late Dr. M.P. Draahman and the late Mr. M.D. Kitchilan along with the late Sir. Razik Fareed and Dr. Badi-ud-Din Mahmud, who were Moors.

Thus in Sri Lanka both for Administrative purposes and in Legislation the word "MUSLIM" has been used to mean and include Ceylon Moors and Ceylon Malays. That was the Ethnic Grouping known and adopted hitherto. Although this word Muslim does not denote anything more than a religious adherence yet in the context of the realities that existed, a reading of this word in P4 would have left the impression in the mind of the reader that both Malays and Moors were included.

It is in confirmation of this usage that in the Public Administration Circular No. 15/90 (1) - P5 - dated 25/03/90 in paragraph 3, the Executive has stated that for the purposes of the circular P4 there should be included in the 8% allotted to the 'Muslims", mentioned therein, the "Malays' so

that it will be a combined allotment to the Moors and the Malays as Muslims.

It is significant that one of the other groups mentioned both in P4 and P5 is "Persons of Indian Origin". In this the characteristic highlighted is Origin and not religion nor race. All persons of Indian Origin be they adherents of Buddhism, Christianity, Hinduism or Islam or be they Sikhs or Malayalees, they are to be included in this group, which is allotted 5.5%.

We have in our Statute Books an Ordinance entitled Estate Labour (Indian) Ord. no. 13 of 1889. In that Ordinance in its interpretation section (Sec. 3) the word 'LABOURER' is defined as:-

> 'Means any labourer or Kangany (Commonly known as Indian Coolies) whose name is bourne in an Estate Register and includes Muslims commonly known as 'TULICANS'."

The third category scheduled in both P4 and in P5 is the 'TAMILS' and is given 12.75% on the National figures. This category will not include Indian Tamils but only Ceylon Tamils be they Hindu, Christian, Muslim or Buddhist.

The fourth group is allotted 75% and in that group, as per P5, there should be entertained all minorities other than "Tamils, Persons of Indian Origin and Muslims". Thus the Sinhalese. whatever may be his religion and all other minorities whatever may be their religion, and who are not provided for in the other three categories aforesaid, and who are not 'Persons of Indian Origin' will come within this large group.

It is to be noted that the total of these percentages is 101.25%. Perhaps the 2% leverage for adjustments referred to in paragraph 2 (1(g) in P4 has some relevance to this excess.

P4 read with P5 does set out the factual position prevailing in Sri Lanka, though no doubt the word 'MUSLIM' used here does carry the Dictionary meaning of ' A person who follows Islam.'

I have had the advantage of perusing the Judgement of His Lordship the Chief Justice, and for the reasons stated by His Lordship, with which

I am in entire agreement; I agree with the order proposed by His Lordship the Chief Justice.

I too would direct that each party must bear his own costs.

FERNANDO. J.,

This application was referred to this Bench of seven Judges as it involved a question of general importance as to the constitutionality of ethnic quotas in employment.

Public Administration Circulars No. 15/90 dated 9.03.90, No. 15/90(i) dated 15.03.90 and No. 15/90 (ii) dated 15.06.90, were issued in pursuance of a Cabinet decision applicable to all appointments and promotions at all levels in the public sector, (in its widest sense, consisting of the public service, the provincial public service,public corporations, Government-owned companies and business undertakings, and universities); they set out a general principle that recruitment and promotions, at the national, provincial and district levels, shall be made strictly in accordance with the respective (i.e national, provincial and district) ethnic proportions. They also provide that all appointments and promotions shall be free of political patronage, and (subject to the ethnic quotas) *shall be based on merit.* The following provisions of the Circular are relevant to the matters arising for our decision:

> "The composition of the ethnic ratio for the Sinhalese community will be 75% of the total number of vacancies. Tamils, persons of Indian origin and Muslims shall be selected on the ratio of 12.7%, 5.5% and 8% respectively. However, if there is a difficulty in determining the exact numbers, a variation of minus or plus 2% could be permissible." (These percentages total to 101.2%)
>
> "The 75% allotment of the total number of vacancies for the Sinhala community (as set out above) will include all minorities other than Tamils, persons of Indian origin and Muslims. Malays will be included in the 8% allotted to Muslims." (It is common ground that it is incorrect to treat "Muslims" as constituting an ethnic group.)
>
> "The ethnic ratio in exceptional situations may not be applicable, if the total number of promotional positions available are few in number (e.g. below four in number) and therefore not facilitating such

a ratio application. In such cases merit will be the sole criterion of selection. Every such case should be indicated to the Committee set up under para 8 . ."

The Secretaries to Ministries, Chief Secretaries to Provincial Councils and other high officials to whom the Circulars are addressed have been specially directed -

". . .to personally ensure the effective and fair implementation of the above Circular. No deviation therefrom will be permitted. Any problems, issues or acts of non-compliance should be immediately brought to my notice without delay."

The Petitioner, after many years of service in the Customs Department, is now a Superintendent of Customs. In March 1990, in response to an internal notice calling for applications from officers in the grade of Superintendent to fill vacancies in the grade of Assistant Director of Customs, 53 eligible Superintendents applied; among these there are only Sinhala and Tamil officers. According to the Petitioner, there are 22 vacancies for which these applicants are entitled to be considered; if the Circulars are applied, 19 Sinhala officers and 3 Tamil officers will be appointed. (It is common ground that in applying the Circular, if there are no eligible applicants from any ethnic group, the entitlement of that group will be distributed, proportionately, among the other ethnic groups; and that although these vacancies will be filled from within the service, a fresh letter of appointment, as Assistant Director, will be issued to successful applicants, so that the selection involves a promotion as well as a new appointment.) In terms of the 1968 Minute of the Unified Customs Service, previously the relevant criteria for such promotions would have been seniority and merit alone. There is some controversy as to the precise numbers (of applicants and vacancies) involved, but this does not affect the legal principles applicable.

The Petitioner has sought relief from this Court fearing an imminent infrigement of his fundamental right to equality under Article 12; according to him, he is the tenth officer in order of seniority, but among these ten, he is the fifth Tamil officer. If the previous practice is followed, the probability that he will be promoted is high, in that he would not be overlooked unless thirteen junior officers were to be selected (as being more meritorious) in preference to him. If the Circular is applied, even if - from the point of view of merit - he is more deserving than all the Sinhala officers, and all except three of the Tamil officers, he would

nevertheless not be selected. It is therefore common ground that his chances of promotion are thus much less bright under the new scheme. Looked at from another point of view, under the old scheme he was eligible to be considered, equally with all the others, for 22 vacancies; under the new scheme he is eligible to be considered for only three vacancies, while his Sinhala colleagues officers are eligible to be considered for 19 vacancies. From yet another angle, if after 21 vacancies are filled the Petitioner has not been selected, when the 22nd vacancy is being considered his selection will depend, not on merit, seniority or other objective criteria, but on whether 3 Tamil officers have already been selected; if so, he will not be appointed, and instead a Sinhala colleague will be appointed. Clearly such selection will be on account of race. The Petitioner does not claim a right, or a fundamental right, to be promoted, but only a right to be *considered* for promotion; and in respect of such consideration, he says, Article 12 entitles him to be considered equally with other eligible officers; apart from merit and seniority, the criterion of race or ethnicity cannot be taken into account. Since the implementation of the Circulars will significantly diminish his chance of being considered for promotion, his right of equality, or equality of opportunity, will be abridged or impaired, even though not completely denied.

Secondly, learned Counsel for the Petitioner submitted that the Circulars did not contain a proper classification; the criteria specified were not all "ethnic", but a mixture of ethnic and other factors; there were anomalies and ambiguities, and it did not provide for persons of mixed parentage.

Finally, apart from inconsistency with Article 12, it was contended that the Circulars were not authorised by Article 55 (4).

1. INCONSISTENCY WITH ARTICLE 12:

The question whether the Circulars contravene Article 12 requires consideration of the principle of equality enshrined in Article 12, and the circumstances in which affirmative action is permitted, despite that principle. These matters have been judicially considered by the Supreme Courts of the United States, India and Sri Lanka, and reference to some of these decisions is useful.

In *Regents of University of California* v. *Bakke,* (10) a white male, whose application to the State medical school was rejected, challenged the

legality of the school's special admissions program, under which 16 out of 100 vacancies were reserved for "disadvantaged" minority students. In a 5-4 decision, the majority held that this special admissions program was illegal; but that race may be one of a number of factors considered in deciding on admissions. Since it was not established that the applicant would have failed to gain admission in the absence of the special admissions program, he was held entitled to be admitted.

The factual background in which the constitutionality of affirmative action was considered is illuminated in the minority judgments, particularly that of Justice Marshall on whose judgment I rely extensively. Three hundred and fifty years ago, the Negro was abducted to the North American continent in chains, to be sold into slavery; then deprived of all legal rights; penal sanctions were imposed upon anyone attempting to educate him; he could be sold away from family and friends, at his owner's whim. Conscious of this inhumanity, Thomas Jefferson submitted a draft of the Declaration of Independence, in which he included among the charges against the King that he:

> ". . .has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere . . ." (388)

However, colonists themselves were implicated in the slave trade, and had this charge been included they could not have justified slavery after independence; accordingly it was not included in the Declaration of Independence, which nevertheless proclaimed the self-evident truth that all men are created equal and endowed by their creator with certain inalienable rights. Although it was later asserted that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" *(Hirayabashi,* (1) compromised this principle of equality with its antithesis: slavery. While guaranteeing their own freedom and equality, the colonists ensured the perpetuation of a system that deprived a whole race of their rights: "We the people" did not include persons whose skins were the wrong colour. It was not Colonists, Constitution - makers, and Congressmen alone: the position of the Negro slave as mere property was confirmed by the Supreme Court itself *(Dred Scott,* (19)), holding that the Missouri Compromise, which prohibited slavery, was unconstitutional because it deprived slave owners of their property

without due process: a slave was property, and "the right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States"; Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

Almost a century later, after the Civil war, the Negro was officially emancipated. The iron chains of slavery were, however, replaced by the fettors of a system of laws imposing disabilities and burdens, in respect of rights of property, contract and the franchise, so severe that freedom ceased to have any real value *(Slaughter-House* Cases (20). Congress did try, but unsuccessfully, to use its powers to promote racial equality; the provisions of the Civil Rights Act of 1875 which made it a crime to deny access to inns, public conveyances, theatres and other places of public amusement, were struck down by the Supreme Court, which held *(Civil Rights* cases, (21) that the 4th Amendment gave Congress the power to proscribe only discriminatory action *by the State.* (This view of fundamental rights has, despite obvious differences in the corresponding Constitutional provisions, been too readily echoed in some of our own decisions, e.g. *Goonewardene v. Perera* (22). The Court ruled that Negroes excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that; since beneficent legislation had removed the chains of slavery, the stage had been reached when the Negro ceased to be " the special favourite of the laws" In *Plessy* v. *Ferguson* (23) a Louisiana law requiring "equal but separate" accommodation for whites and Negroes was upheld: the 14th Amendment was not intended "to establish distinctions based upon colour, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either". Segregation was extended to residential areas, parks, hospitals, theatres, waiting rooms, bathrooms, phone booths, children's text books, and prostitutes. An 1898 parody of these "Jim Crow" laws suggested that there should be a Jim Crow section of the Jury box, a Jim Crow dock and witness stand, and a Jim Crow Bible for coloured witnesses to kiss: and, says Justice Marshall (393), the irony was that before many years had passed almost all these suggestions, derisively made, had been implemented, including the Jim Crow Bible. The Equal Protection clause was "virtually strangled in infancy by post-civil-war judicial reactionism" (291). As late as 1908 the

Supreme Court upheld a State criminal conviction against a private college for teaching Negroes together with whites (371).

Not until *Brown* v *Board of Education* (24) was the odious "separate but equal" doctrine repudiated; even then inequality was not eliminated with all deliberate speed; "in 1968 and again in 1971 we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. A glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past" (327). Even in the 1970's, minorities were yet struggling to overcome prejudice: "members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religious and/or national origin" (292). The minority judgment concludes that the persons for whose benefit a quota was sought to be reserved in the *Bakke* case, were a "generation of minority students . . . most of whom were born before or about the time *Brown* was decided (who) clearly have been victims of this discrimination" (371 - 2). These were not superficial impressions or hasty perceptions; the minority judgment described (395) the indelible legacy of prolonged discrimination: A Negro child has a life expectancy shorter by five years than a white child; its mother is three times more likely to die of complications in childbirth; the percentage of Negro families below the poverty line is four times greater . . .; the Negro child reaching working age finds that America offers him significantly less than his white counterpart; for Negro adults and teenagers, the unemployment rate is twice and thrice that of whites. Although Negroes constituted over 11% of the population, they were only 1.2% of the lawyers and judges, 1.1% of the engineers, and 2.6% of university professors.

Bakke dealt with a California medical school which reserved a quota of only 16% for minorities, although Negroes and Chicanos alone constituted 22% of California's population, in this context:

> "Until at least 1975, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites. in 1950, while Negroes constituted 10% of the total population, Negro physicians constituted only 2.2% . . . the overwhelming majority of these, moreover, were educated in two predominatly Negro medical schools

> . . . By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population *had widened:* the numbers of Negroes employed in medicine remained frozen at 2.2%, while the Negro population had increased to 11.1%. The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years 1955 to 1964". (369)
>
> "The relationship between those figures and the history of equal treatment afforded to the Negro cannot be denied. At every point from birth to death, the impact of the past is reflected in the still disfavoured position of the Negro. In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a State interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society." (396)

There was also material (377) which, in the view of the minority, indicated that this objective could not be attained by a general preference for the economically disadvantaged or for the children of parents of limited education. The remedy had to take account of race, just as the problem was created by race.

Having reviewed the history of the American Negro for 350 years, the minority justifiably concluded (365 - 366, 369 - 371) that there was substantial, chronic, minority under-representation, in general, and in the field of medicine, in particular, and that it was reasonable to believe that this was the product of pervasive past racial discrimination, in education, in society generally, and in the medical profession (though not attributable to the University or to Bakke); race-conscious remedial action was therefore permissible.

The majority, however, took the view that affirmative action based on ethnic classifications was permissible only when the burden thereby placed on others "is precisely tailored to serve a compelling governmental interest" (299); moreover, the majority seemed to require proven discrimination or violations, in the form of clearly determined findings by legislative, judicial or administrative authorities 301 - 302, 307), and was not prepared to uphold preferential classifications without such prior findings (thus closing the door to voluntary affirmative action programs). Although the State has a legitimate interest in ameliorating or eliminating the disabling effects of proved discrimination, the majority was not willing

to remedy "the effects of 'societal discrimination', an amorphous concept of injury that may be ageless in its reach into the past." (307). All nine Judges thus accepted the principle that affirmative action was not inconsistent with the right to equality, and the disagreement was only as to the proper mode of proof of discrimination and the nature and scope of the permissible remedial action.

Subsequent American decisions appear to be more in line with the minority judgment in *Bakke. United Steel Workers of America* v *Weber,* (25), considered a private voluntary affirmative action plan, for the benefit of black workers who had long been excluded from craft unions; in consequence the percentage of black craft workers was only one-twentieth their percentage in the local labour force. The employer only hired persons with prior experience, and accordingly few blacks were eligible. The plan was designed to break down old patterns of racial segregation and hierarchy and to open employment opportunities for Negroes in occupations which had traditionally been closed to them, by reserving 50% of the vacancies in craft-training programs for black employees until the percentage of black craft employees approximated to their representation in the local labour force. It was upheld; the reservation did not unfairly deny opportunities to individual white employees, or affect their interests because it did not "require the discharge of white workers and their replacement with new black hirees," nor "create an absolute bar to the advancement of white employees" who were eligible for the remaining places in the craft training programs not reserved for black workers; further, the plan was a temporary measure, and was "not intended to maintain racial balance, but simply to eliminate manifest racial imbalance."

Fullilove v *Klutznick,* (26), upheld the Public Works Employment Act which required that at least 10% of federal funds granted for local public works projects must be used to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts". A Committee of the House of Representatives had found that -

> "The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognised the reality that past discriminatory practices have, to some degree, adversely affected our present economic system. While minority persons

comprise about 16% of the population, of 13 million businesses only . . .3% are owned by minority individuals . .. .the gross receipts of all businesses . . .totals about $ 2,540.8 billion, and of this amount only . . . 0.65% was realized by minority business concerns. These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy."

It was also held that although these provisions would deprive non-minority businesses, innocent of prior discriminatory actions, of some contracts, this was not the objective, but only an incidental consequence of the program; "when effectuating a limited and properly tailored remedy to cure the effects of past discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

In *Local 28, Sheet Metal Workers International Association* v *Equal Employment Opportunity Commission* (27), a District Court, in 1975, had found the Union guilty of discriminatory practices against non-whites, and established a 29% non-white membership goal, based on the percentage of non-whites in the labour pool of the area, to be achieved by July 1981; the Union was ordered to implement procedures to achieve this goal, to remedy the Union's pervasive and egregious discrimination. While the imposition of a racial balance, for its own sake, or merely because a racial imbalance existed, was not permissible, yet proved discrimination justifies a racially classified remedy: "as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance."

Another Court-ordered numerical affirmative action plan was upheld in *United States* v *Paradise* (28) . For 40 years blacks had systematically been excluded from employment as state troopers in Alabama in violation of the 14th Amendment; in 1972 a District Court imposed a recruitment quota and directed non-discrimination in employment and promotion; in 1979 no blacks had yet attained the upper ranks of the department. In 1983 the Court directed that 50% of promotions go to black police officers until a given rank was 25% black or until the department implemented an acceptable promotion plan. Some of the relevant considerations for determining whether race-conscious remedies may

be judicially imposed are: "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labour market; and the impact of the relief on the rights of third parties". It was held that the quota so fixed did not disproportionately harm the interests or unnecessarily trammel the rights, of innocent individuals, was flexible in application, could be waived if no qualified black candidates were available, and did not apply if external forces, such as budget cuts, necessitate a promotion freeze; did not require the layoff or discharge of white employees, but instead merely postponed some white promotions - a "diffuse burden" even less onerous than the denial of future employment occasioned by a racial hiring goal.

In *Johnson* v *Santa Clare Transportation Agency* (29) the Court upheld a voluntary affirmative action plan providing that in making promotions within a traditionally segregated job classification in which women had been significantly under-represented, the sex of a qualified applicant may be considered, among other factors; the plan did not set aside a quota for women, nor did it fix a date for its termination. The promotion of an eligible woman employee, in preference to a male who had scored two marks more, was upheld.

In *Seneviratne* v *University Grants Commission* (3), several Indian decisions were discussed with the necessary caution that, unlike the United States and Sri Lanka, India has a series of Constitutional provisions designed to identify various categories of "unequal" persons - scheduled castes, scheduled tribes, and socially and economically backward persons. In addition to these categories, it was pointed out that the Indian Supreme Court had sanctioned departures from the merit principle in regard to admissions to educational institutions, upholding reservations for a number of other classes: including children of armed forces personnel and of public officers serving abroad, certain foreign scholars, recent repatriates and immigrants, and students from districts with inadequate facilities.

It was held that the imposition of District quotas and an under-privileged Districts quota, resulting in the departure from merit as the sole criterion for University admission, was not violative of Article 12 because past discrimination had been established - namely that the State had for a long period lavished much of its resources for the advancement of some (urban) areas to the detriment of other (rural) areas; this had resulted

In well-equipped and well-staffed schools in cities and towns, and a distressing and disturbing discrepancy ("a woeful lack of teachers and facilities") so far as rural areas were concerned. Thus the Court regarded the Districts as not being equal in their facilities, so that students from the different Districts were not competing on equal terms; being unequal, affirmative action to mitigate the effects of inequality, or preferential treatment to the under-privileged, was justified. Prior findings by legislative, judical or administrative bodies were not insisted upon as essential pre-requisities. It is also significant that the imposition of those quotas was intended to be "a temporary measure, valid for admission in 1979 and to be reviewed thereafter". While I am in respectful and wholehearted agreement with the principles applied, I have reservations as to the constitutionality of that "temporary measure", a decade later, in today's known circumstances. It would seem that the plight of the student in the "deprived" schools of the "privileged" Districts was not considered, especially *viz-a-vis* the student in the "good" schools in the less privileged Districts; the latter may gain admission, because the cut-off point for his District is lower, while the former may be shut out despite obtaining a much higher aggregate (*cf.* Report of thte Presidential Commission on Youth, Sessional Paper No. 1 of 1990, p 101). The need to focus more closely on the actual victims of past discrimination, namely students from the schools lacking proper facilities, is emphasised in the observations of the Youth Commission:

> "The Commission does not challenge in any way the duty of the system to give the poor child from a rural school who does not have access to facilities the opportunity to enter University. But serious questions were raised as to whether that was actually happening. There appears to be a wide chasm between the objective and the reality. There was certainly a belief that the district elites benefit more from the system than does the rural student. For this reason, the Commission is of the view that any district quota should be supplemented by grading of schools so that the poor child in schools with 'deprived' facilities - not districts - will be the actual beneficiary of the system." (pp 34 - 35; cf also p 92)

Seneviratne and the minority judgment in *Bakke* applied similar principles in upholding affirmative action.

In *Triloki Nath* v *Jammu and Kashmir,* (16), promotions were made on a communal basis: 50% of the vacancies to Muslims from the entire

State, 40% to Hindus from the Jammu province, the majority of whom were Dogras, and the remaining 10% to others, purportedly on the basis that Muslims of the entire State and Hindus of the Jammu province constituted "backward classes" for the purpose of employment. The Court called for a report from the High Court as to whether they were in fact backward classes, and whether they were not adequately represented in the State services; on the material before it, the Supreme Court held that while all the members of a caste or community may in the social, economic or educational scale of values at a given time be backward, and may on that account be treated as a backward class, that is not because they are members of a caste or community, but because they form a class. But for the purpose of Article 16(4), in determining whether a section of the people forms a class, a test solely based on caste, community, race, etc, cannot be adopted because that would directly offend the Constitution. The distribution of posts on the aforesaid communal basis was held to violate Articles 16(1) and (2). Ingenious devices were adopted to circumvent this decision, and in *Makhan Lal* v *Jammu and Kashmir* (30), it was held that the State was obliged to give effect to the previous decision, whether the majority of the respondents were parties or not to the previous decision.

In all these cases, it is significant that preferential treatment was upheld only upon satisfactory proof of past discrimination or present disadvantage; mere perceptions have not been considered suffiicient. In *Seneviratne,* decided before the two month rule in Article 126(5) began to be considered as not being mandatory, the University Grants Commission and its legal advisers were able, in a very short time, to furnish the Court with material comprehensively explaining the history of the problem, and of the solutions attempted from time to time, as well as the objectives of the new admission system and the basis of the classification adopted. In the case before us, while it is acknowledged that the proposed ethnic quotas are a *bona fide* attempt to solve a perceived problem of national harmony, the only material furnished by the Respondents was that contained in the affidavit of the Secretary, Ministry of Public Administration, Provincial Councils and Home Affairs:

> "In the recent past the national security of the country was threatened by force and violence. One of the causes of such force and violence was the perception among minority communities and other disadvantageous (sic) groups of this country that they have been denied of opportunities (sic) to and promotions within the public

service and the other public sector organisations. In order to meet such manifestations of force and violence, as an immediate measure, steps were taken to restore peace, order and good Government by the utilization of law enforcement agencies.

It was further decided that whilst these measures were required to deal with such manifestations of force and violence that a permanent and lasting solution necessarily involved the removal of the root causes for such situations. Therefore, as a measure of national policy it was determined that such perception would be favourably assuaged, without creating a reverse reaction, by the promulgation of a scheme of recruitment and promotion which manifestly ensured that no ethnic group would be denied entry or opportunity of appointment in the government service and other public sector organisations on account of their ethnicity.

Taking cognizance of the matters set out above, it was considered necessary that the apportionment of the recruitments and appointments on the relevant ethnic ratio at the national, provincial and district levels on the basis of the (national, provincial and district population) was the most reasonable criteria that would remedy the unfavourable situation referred above, in order to eradicate the prevailing condition and instil confidence in the minds of the different ethnic groups. Therefore the Cabinet of Ministers approved the said criteria and, accordingly the Public Administration Circulars . . . were issued."

This is quite inadequate. It fails to identify the minority groups who had this "perception" of discrimination. It does not explain the imposition of quotas in relation to the majority community. It was submitted at the hearing by the learned Attorney-General that the other groups referred to were disadvantaged sections of the majority community; if that be so, the reservation of a quota for the majority community will not ensure that those disadvantaged sections will gain any representation, let alone better or proportionate representation. In any event, perceptions are not enough: while past discrimination against members of one group may well have effects which render that group a distinct class (and therefore no longer "equal") to other groups, perceptions alone cannot transform equals into unequals. Further, accepting that "a permanent and lasting solution may necessarily involve the removal of the root causes", the material before us does not suggest that the imposition of ethnic quotas

can be equated to, or will result in, the "removal of the root causes", Faced with this paucity of material, the learned Attorney-General referred, without objection from learned Counsel for the Petitioner, to the Report of the Presidential Commission on Youth, but that Report does not support the suggestion of any, let alone widespread, ethnic discrimination in public employment, or even a general perception to that effect. Quite clearly, the tenor of the Report is that the root causes are political, economic, educational, social and other factors, as would appear from the extracts cited to us by the learned Attorney-General, supplemented by passages referred to by learned Counsel for the Petitioner in reply:

"There is little doubt that all peace-loving, law-abiding and concerned citizens will agree on certain fundamental principles which should govern national policy in general:

(b) Equality of opportunity and non-discrimination in every sphere. "(p. xviii)

". . .the crucial national problems and issues . . .

(d) employment - . . . equality of opportunity; non - discrimination, particularly in recruitment. "(p. xix)

"The oral and written representations made to the Commission indicated virtual unanimity that politicisation and perceptions about the abuse of political power are some of the main causes of youth unrest in contemporary Sri Lanka... There were many representations made before the Commission which involved perceptions about the abuse of political power in the recruitment, promotion, transfer and dismissal of personnel in the public services. We have no doubt that this is a fundamental problem which needs to be addressed in earnest. There was a general belief that such practices are incompatible with the basic elements of fairness and equity, and that merit and objective criteria are not given their due place, having to yield to the 'chits' and whims of individual politicians. " (pp. 1 - 2)

"Depoliticisation of Recruitment - Guidelines:

(a) an open competitive examination:
(b) structured interviews by trained interviewers . . .

(c) interviews to be conducted in the language chosen by those to be interviewed;
(d) advertence to to equity considerations pertaining to district, ethnic identity, caste and other relevant factors. It is contemplated that the necessary "handicaps" be given on a rational basis after an yearly review of past recruitment patterns. " (pp 6 - 7)

"Youth Representation: There is always hesitancy with regard to evolving "Separate Constituencies" since other interest groups, especially ethnic minorities, may press for such constituencies . . Unlike special constituencies with regard to ethnic and other minorities, this arrangement will not lead to emotive reactions which could disturb racial and religious harmony." (p 15)

"The Public Service: The previous Chapter ("Depoliticisation of Society") dealt extensively with the most emphatically ventilated grievance in respect of the public sector, the selection and appointment of new recruits. " (p 22)

"Language Policy: The notion of *Kaduwa* has two components. The first refers to a pervasive discrimination in all spheres of life, especially employment, directed against monolingual Sinhala and Tamil speaking youth. The Commission is firmly convinced that such discrimination does take place, consciously or otherwise, in all sectors of employment; the private sector, the public sector, the corporation sector and the plantation sector. This stifling of youth is one of the major reasons for contemporary youth unrest. " p (79)

"Bilingualism: The Sixteenth Amendment . . . gave official recognition to bilingualism . . . The representations made in Jaffna were unanimous in their belief that the alienation of the Tamil community began in 1956 with the Sinhala Only Act. Tamil nationalism in Sri Lanka, as in India, has its roots in perceived liguistic discrimination. " (p. 82)

"Causes of Youth Unrest in the North: Representations by the Tamil youth in the North and the East when the Commission visited Jaffna made it clear that the causes of youth unrest in the North and the East remain primarily political. The Sinhala Only Act of 1956 and

the policies of standardisation of the 1970's were presented as the major political reasons leading first to the demand of federalism and then to a separate state . . . the language requirements which prevented employment of particularly Tamil youth in the government sector." (pp 87 - 88)

"Youth Rehabilitation: It is therefore necessary that there be negotiations and strategies developed for a comprehensive plan for youth rehabilitation. Such a plan should involve employment projections, investment for industries and also include plans for training as well as counselling. " (p 91)

"Muslim Youth: With regard to the ethnic quota for university entrance, the Commission is of the view that "ethnic quotas" are not an answer to Muslim representation in the Universities. The introduction of such quotas has in the past led to a great deal of unrest and a sense of discrimination. Any advances made by such schemes are negated by the political repercussions in a multi-ethnic society. For this reason, the Commission is of the view that admission "handicaps" or quotas, should be targeted more directly towards students from schools which do not have proper facilities. " (p 92; cf also pp 34-35)

This was the Report of a Commission, appointed in 1989 as the manifestations of force and violence were beginning to abate somewhat, to inquire and report on

"(a) the causes for . . .disquiet, unrest and social discontent sometimes manifesting itself in the rejection of existing institutions and in acts of violence,

(b) any existing or perceived grievance, improper discrimination or lack of equal treatment leading to such attitude, behaviour or conduct,

(c) any inadequacy in the policies and the administration of any governmental agency or other public body, educational institute, in the satisfaction of legitimate youth needs and aspirations."

The Report does not contain any finding as to actual or perceived grievance, discrimination or lack of equal treatment, in regard to any ethnic imbalance in recruitment or promotion; the extracts quoted however

establish serious grievances and discrimination arising from abuse of political power, political victimisation, and educational and language policies. Ethnic quotas were considered in regard to University admissions, and unhesitatingly rejected. In regard to employment, merit, equality of opportunity and non-discrimination were stressed; ethnic quotas were not even discussed, and the consideration of ethnicity, together with other factors, was recommended only where equity considerations justify it, and there too on a rational basis after an yearly review of past recruitment patterns. This is no more than a plea for affirmative action, where proven past injustice cries out for remedial equitable preferential treatment. The Respondents have thus failed to establish the necessary factual basis to justify promotion otherwise than by reference to merit and other objective criteria, and the imposition of ethnic quotas is thus contrary to Article 12.

In his written submissions the learned Attorney-General advanced the following additional contentions:

> ". . .the application of the circular at the point of selection of appointment -
>
> would operate as a safeguard against deliberate and conscious discrimination, based on ethnicity, by the board or panel evaluating the respective merits of the applicants,
>
> would ensure that persons who by virtue of past discrimination are placed on an unequal basis when compared with other aspirants for appointment are not discriminated against by being treated as equals . . .
>
> . . .that restricting the application of the above stated principle to initial recruitment would not suffice to allay the fears of a particular section of the community, that where there currently exists in any sector of the public service, a preponderance of members of a particular ethnic community, far in excess of its ethnic ratio, the imbalance would continue for many years more."

The second and third of these contentions can be accepted as the basis of affirmative action provided there is proof of "past discrimination" and such "a preponderance of members of a particular ethnic community, far in excess of its ethnic ratio" as would make it reasonable to believe

that this was the product of pervasive past racial discrimination; there is no such proof here.

The first of these contentions was pressed in a different form at the hearing. It was submitted that if all citizens had equal access to the education and training required to gain the necessary qualifications and experience for recruitment or promotion, then statistically it was probable, or even certain, that when the public service or public sector was considered in its entirety it would be found to reflect national ethnic proportions; from this, he argued that if in fact the national ratio *was not* so reflected, then that was proof that there had been some discrimination or impropriety in recruitment or promotion; the imposition of the national ethnic ratio in that situation would rectify an existing injustice; if on the other hand, the national ethnic ratio *was* reflected, then it meant that there had not been past discrimination, and the future imposition of ethnic ratios would cause no prejudice. In short, his approach to the question of discrimination was to consider not the *individual* who may be passed over for appointment or promotion by reason of the departure from the merit principle, but rather the ethnic *group* to which he belonged; if, considered statistically, the group was equitably represented, it was not unconstitutional for the individual to be prejudicially affected. He further submitted that provision would be made administratively to review the case of any such individual: but if relief is given to such individuals, the final result would be that although appointment was initially by reference to the ethnic quotas yet ultimately all those overlooked on grounds other than merit and other objective criteria would be appointed. Such a provision would negate the ethnic ratio principle, but it is unnecessary to consider whether it would save the Circulars, as the Circulars now before us do not contain any such provision. Apart from that, the question arises whether Article 12 deals with equal treatment of groups, or of persons (for citizens). I find it impossible to read "All persons are equal before the law . . ."and "No citizen shall be discriminated against . . ."as requiring equal treatment of *groups*, at the expense of individuals; primarily, those words are apt to require equal treatment of the *individual*; they do not permit an infringement of the fundamental rights of the individual to be overlooked, on the ground that the rights of his "group" have not been violated. It may be that *in addition*, and not in substitution, Article 12 also requires that groups be equally treated, but I cannot subscribe to the proposition that the individual may be discriminated against so long as the group to which he belongs is found, upon a statistical comparison with other groups, not to have been discriminated against. Such an approach also

gives rise to practical difficulties: is Article 12(3) violated if a person of a particular race (or religion or caste) is denied access to the places or institutions therein mentioned, or does the violation depend on a statistical assessment or comparison of the denial of access to the *group* to which he belongs, *vis-a-vis* other groups? One hesitates even to think of the consequences of that approach if applied to other fundamental rights, such as the right under Article 11. Further, how can this "group" test be applied in the case of a person of mixed parentage? It has been observed in *Mudiyanse* v *Appuhamy* (31), that there is no rule of law that makes the offspring of a mixed union belong to the race of either the father or the mother: if such a person is overlooked, is he to find comfort from the treatment received by the ethnic group to which his father belongs, or by that to which his mother belongs? I hold that it is the individual who is the prime repository of the fundamental right guaranteed by Article 12, and that the violation of his right cannot be excused or overlooked by reference to the treatment meted out to the group to which he is linked by race or ethnicity.

Decisions in other jurisdictions though extremely helpful, are not conclusive, especially since there are significant differences in the Constitutional provisions and their history, as well as in other respects. However, judicial reasoning in regard to the fundamental concept of "equality" is very relevant. Fortified by the approach in other jurisdictions, I am satisfied that the following principles should guide us in the interpretation of Article 12:

1. Article 12(1), read with Articles 3, 4 and 12(2), embodies a principle of equality broadly comparable to that recognised in the Constitutions of the United States and India, but more extensive in nature and scope.

2.1 Paragraphs (2), (3) and (4) of Article 12 are essentially explanatory and declaratory of the principle of equality, and do not add to or detract from that principle. Article 12(4), in particular, does not *authorise* "affirmative action" for women, children and disabled persons, but out of an abundance of caution declares that nothing in Article 12 shall prevent affirmative action; apart from proved "inequality", Article 12(4) would not permit, for example, a quota of 60% being stipulated for women, in any sphere.

2.2 Those paragraphs also emphasise that references to "the law" in Article 12(1) do not restrict the scope of equality to the province of legislation; paragraph (4) emphasises that subordinate legislation

and executive action must also abide by the equality principle; paragraphs (2) and (3) indicate that the non-discrimination principle is binding not only on the "State", but on all institutions and individuals. Citizens shall not be discriminated against *by anyone,* although the special remedy under Article 126 is only available in respect of executive or administrative action.

3. The principle of equality requires that equals be treated equally, and that unequals may (and sometimes must) be treated unequally. Affirmative action is preferential treatment: i.e. unequal treatment, of unequals. Affirmative action is therefore not a refinement or extension of, or an exception to, the principle of equality, but its necessary corollary; it is applicable whenever "unequals" are being considered.

4.1 For the purpose of applying those twin principles, it is necessary to determine whether persons are equals or unequals. Differences in respect of "immutable" factors (such as race, ethnicity, ancestry, caste, sex, place of birth) do not *per se* render persons unequal; nor differences in respect of "acquired" or changeable factors, such as language, religion and political opinion. Differential treatment of citizens on account of factors set out in Article 12(2) is, *prima facie,* constitutionally odious, but there seems to be no such presumption in the case of other factors.

4.2 However, all differential treatment needs to be justified: there must be a legitimate object to be achieved, in relation to which it must be shown that there are intelligible and rational criteria which render a particular individual or group of individuals a distinct "class".

5. If in relation to a legitimate object, their race reasonably makes persons of one race a distinct "class", they may be differently treated. The same is true of sex, religion, and political opinion. Thus for the legitimate object of appointing a suitable person as (a) a matron of a girls' hostel, (b) a preacher or teacher of a particular religion, or (c) a propagandist or canvasser for a particular political party, it would be permissible to exclude from consideration (a) males, (b) persons of other religions, and (c) persons of opposed political opinions. The basis of classification is the same in other cases: thus in selecting a public relations officer for a Temperance Movement or an Anti-Smoking League, hard drinkers or habitual smokers may be excluded.

6.1 Even where race would not normally afford a permissible basis of classification, on proof of special circumstances differential treatment would be justified -

(a) Race-specific remedies may be devised by legislative, judicial, executive or administrative action, precisely tailored to "make whole" the actual victims of proven racial discrimination.

(b) Even without antecedent legislative, judicial, executive or administrative findings, if racial discrimination is proved, the victims can be afforded relief.

(c) Such relief can be granted even as against respondents who are not the wrongdoers, and even at the expense of persons who are not the beneficiaries of such discrimination; thus affirmative action can devise relief for the victims of "societal discrimination" (as in the case of the American Negro), the rationale being that such victims are not "equal" with others, who have not been handicapped by such discrimination, and are therefore entitled to preferential treatment.

(d) Perceptions and opinions are not enough: discrimination must be objectively established to the satisfaction of the Court, by evidence, or by relevant findings of other competent bodies.

(e) the objective of affirmative action is to remedy the present effects of past discrimination, and not to perpetuate fixed quotas; preferential *consideration* for the victims would generally be more easily upheld than rigid quotas or reservations (whether with "ceilings" or "floors" - upper and lower limits); temporary or short-term remedial action with appropriate review mechanisms are more easily justified.

6.2 Racial preference or quotas, for their own sake, are not permissible, because in a free, republican, democracy one citizen is as good as another, and is entitled to equal treatment, regardless of the group to which he belongs. Likewise, racial quotas cannot be imposed simply for the purpose of "correcting" an existing racial imbalance: except perhaps where there is serious, chronic, pervasive under-representation (or over-representation) sufficient to raise a presumption of past discrimination.

6.3 Affirmative action, where the necessary proof exists, is permissible both at the stage of recruitment and promotion; but the proposed remedy would be more strictly scrutinised in the latter case, on account of other competing needs and interests: such as the efficiency of the service, the higher levels of responsibility involved upon promotion, and the legitimate expectations of employees that merit and devoted service would be rewarded.

Applying these principles, I hold that the Respondents have failed to establish any justification for departure from the merit (or merit and seniority) principle in relation to promotions to the grade of Assistant Director of Customs, that the Petitioner is entitled to be considered for promotion without reference to the ethnic quotas specified in Circulars Nos. 15/90, 15/90/1(i) and 15/90 (ii), and that the application of those ethnic quotas to such promotion would be in violation of the Petitioner's fundamental rights under Article 12.

The validity of the Circulars in other situations, particularly in regard to recruitment, does not arise for decision, and I make no finding in that respect. The learned Attorney-General invited us to lay down general guidelines as to nature and extent of permissible ethnic quotas, but apart from indicating the broad principles which have guided my decision in regard to the specific matter before us, it does not seem appropriate to accede to this request. What is permissible depends entirely on the facts of each case, and the necessary factual material is entirely lacking. In any event, this Court has not been empowered (unlike the United States and Indian Supreme Courts) to make, or cause to be made, the kind of investigation necessary for that purpose into the facts in addition to the material furnished by the parties, nor has it been endowed with the resources necessary for such an investigation.

2. UNREASONABLENESS OF CLASSIFICATION:

Apart from the difficulty of classifying persons of mixed parentage, learned Counsel for the Petitioner also stressed other practical difficulties and anomalies in applying the Circulars, arising from the difficulty of determining "race". "Race" and "ethnic group" may broadly be considered as interchangeable: as in *Miller & Co* v. *Ratnasekera,* (32). The Kandyan Sinhalese and the Sinhalese of the Maritime Provinces were considered to be of the same "race", or of the "same stock": *Manikkam* v *Peter,* (33) . In *Fernando* v *Proctor* (40) a marriage between Tamils was not

considered to be between persons of "different race or nationality". In *Pasangna* v *Registrar-General,* (34), it was recognised that the "race" of a Tamil would be Tamil, and "Indian" or "Ceylon" would only be an adjective describing his domicile; however, for the purposes of the Births and Deaths Registration Act, the "Indian Tamil" race and the "Indian Moor" race have been recognised as distinct "races". Apart from such special purposes, our law does not recognise distinctions of "race" or "ethnicity" by reference to such sub-divisions. Indeed, Article 26 mandates that "there shall be one status of citizenship known as 'the status of a citizen of Sri Lanka'" and that "no distinction shall be drawn between citizens of Sri Lanka for any purpose by reference to the mode of acquisition of such status". While the Circulars do not sub-divide the Sinhala race, they seem to attempt to divide Tamil citizens using - quite inappropriately - the expression "persons of Indian origin", which is not an ethnic classification race. Further, the quota allocated to the Sinhala community must also accommodate all other minorities: with the result that the latter will be entitled to appointment purely on merit, unrestricted by ethnic quotas. In the instant case, had there been three Burghers among the first 19 non-Tamil officers, they would have been entitled to appointment regardless of ethnic proportionality. Finally, "Muslim" describes only a religious group, and does not purport to identify an ethnic group. Thus for a variety of reasons, the purported ethnic classification is thus uncertain, unreasonable and inconsistent, and on that ground too cannot be sustained.

3. **INCONSISTENCY WITH ARTICLE 55(4):**

Learned Counsel for the Petitioner submitted that the Government had no delegated power to make rules regarding appointment and promotion on ethnic quotas, which, he said, could only be done by an Act of Parliament (subject to Article 12). Secondly, he contended that even if the Government did have power to introduce ethnic quotas, this could only be done by an amendment to the Establishments Code. He relied on *Abeywickreme* v *Pathirana,* (12), where it was held that the Establishments Code had been duly made by the Cabinet of Ministers, and cited the *dictum* of Sharvananda, C.J., in regard to the nature of this rule-making power, that -

> "This power is a legislative power and this rule-making function is for the purpose identified in Article 55(4) of the Constitution as legislative, not executive or judicial in character." (p 138).

If that contention is sound, this application relates either to an *ultra vires* act, or to the threatened infringement of the Petitioner's fundamental rights by legislative action, and not by "executive or administrative action", and is thus outside the scope of Article 126. It seems to me that both limbs of this contention are not well-founded. There is no doubt that Article 55(4) authorised the Cabinet to make the Establishment Code, and to make express amendments thereto; it follows that the Cabinet also has power to make inconsistent provisions, howsoever described, which would in accordance with the ordinary principles of interpretation override, supersede or amend the existing provisions of that Code. An express amendment is not necessary. Since Article 55 (4) empowers the Cabinet "to provide for all matters relating to public officers, including the formulation of schemes of recruitment and . . . the principles to be followed in making promotions", it is open to the Cabinet to make a general rule that all recruitment, or promotion, shall be by reference to an ethnic quota (provided it does not conflict with Article 12), and may for that purpose amend all existing schemes either expressly or impliedly. In regard to the question whether the Circulars were made in the exercise of legislative power under Article 55(4), with respect, I cannot agree with Sharvananda, C.J., that this power is legislative power. It is, if at all, a power "to make subordinate legislation for prescribed purposes" within the meaning of Article 76(3). More likely, it is part of the executive power which the Cabinet exercises, or ancillary thereto. Such powers cannot always be neatly fitted into the traditional three-fold classification; there are residual powers which, historically or functionally, are ancillary to the legislative, the executive, or the judicial power (thus the power of nominating Judges to hear a case, seemingly executive in character, was held to be an administrative power ancillary to the judicial power: *R.* v *Liyanage,* (35). As Professor Wade observes, the boundary between legislative and executive power is not precisely demarcated:

> "There is no more characteristic administrative acivity than legislation. Measured merely by volume, more legislation is produced by the executive government than by the legislature . . . Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers . . . There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading." (Administrative Law, 5th edn, p 733).

I am therefore of the view that the Circulars in question have been made in the exercise of executive power, or are "administrative legislation", and thus constitute "executive or administrative action" within the meaning of Article 126; relief can therefore be granted in this application.

The Petitioner is entitled to a declaration that the application of the ethnic quotas specified in Circulars Nos. 15/90, 15/90(i) and 15/90(ii), to his application for promotion to the grade of Assistant Director of Customs will be in violation of his fundamental rights under Article 12, and that he is entitled to be considered for promotion without reference to the ethnic quotas specified in those Circulars. I direct the Respondents to consider the Petitioner's application for promotion without reference to the said ethnic quotas. i make no order in regard to costs.

DHEERARATNE. J. - I agree.

RAMANATHAN, J. - I agree.

Application allowed.
Ethnic quotas specified
in impugned Circulars
violate fundamental
rights under Article 12.