

Human Rights, Human Values
and The Rule of Law

RIGHT TO EQUALITY : THE NEW FRONTIER OF JUDICIAL ACTIVISM

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The jurisprudence of the Supreme Court on the equality clause (Article 12) of the 1978 Constitution of Sri Lanka has, in spite of an inauspicious start, undergone a dramatic evolution in the past two decades. Mostly inspired by the jurisprudence of its Indian counterpart, the Sri Lankan Supreme Court has moved the doctrinal parameters of equal protection of the law from the traditional reasonable classification doctrine to one that champions administrative justice on a sweeping scale. Progress in this area parallels, and even perhaps surpasses, revolutionary changes in judicial philosophy relating to the limits of executive power in times of public emergency that the author has discussed elsewhere¹. In the context of equality too the apex court has sharply distanced itself from a judicial philosophy that was deferential to executive and administrative action.

This essay will first explore the substantive guarantees of equality enshrined in the Constitution. Part II will examine the Supreme Court's interpretation of the equality clause using the traditional classification doctrine. The Supreme Court's treatment of the concept of affirmative action will be discussed in Part III. The introduction into Sri Lankan jurisprudence of the "new doctrine" on equality, developed by the Indian Supreme Court, will then be examined in Part IV. Finally, part V will set out the conclusions.

I. Substantive Guarantees of Equality

An examination of constitutional history since Sri Lanka (then Ceylon) gained independence in 1948 reveals that attempts at protecting equal rights of its citizens, although to varying degrees, was a

common feature among the three constitutions that have successively been in force since then. The Soulbury Constitution which was in operation immediately after independence did not include a Bill of Rights emulating British tradition. Sir Ivor Jennings, a principal architect of the Soulbury Constitution had scoffed at the “alien” idea of incorporating a Bill of Rights, citing the success of protecting individual liberties in Britain in spite of the absence of one.² The Soulbury Constitution, however, contained Article 29(2) that prohibited the enactment of legislation infringing religious freedom or discriminating against persons of any community or religion.

The drafters of the 1972 Republican Constitution of Sri Lanka incorporated into the document a Bill of Rights. It guaranteed, *inter alia*, the right of all persons to equality before the law and equal protection of the law (Article 18 (1) (a)), and the right of every citizen to engage in employment in the public service without discrimination on grounds of race, religion, caste or sex (Article 18 (1) (h)). The Constitution, however, did not provide for a specific mechanism to enforce the Bill of Rights, thereby retarding the development of a fundamental rights jurisprudence. Cases involving denial of promotions, appointments and the like, which today would be considered under the equality clause of the 1978 Constitution, were then dealt with under the writ jurisdiction according to principles of administrative law.

The 1978 Constitution marked an improvement in providing for a specific constitutional remedy to enforce recognized fundamental rights.³ Also, there is an expansion of the substantive guarantee relating to equality. Article 12 (1) guarantees equality before the law and equal protection of the law to all persons. Article 12 (2) provides protection against discrimination on grounds of race⁴, religion, language, caste, sex, political opinion or place of birth.

The latter clause, however, applies only to citizens. The imposition of any disability, liability, restriction or condition in accessing public places on discriminatory grounds is also prohibited (Article 12 (3)). Constitutional sanction is also given to special measures taken to advance women, children or disabled persons (Article 12 (4)). These guarantees closely resemble corresponding provisions in the Indian Constitution (Articles 14 and 15). The Indian Constitution contains an additional clause that guarantees equal opportunity in public employment (Article 16), that probably inspired a similar provision in the 1972 Republican Constitution of Sri Lanka. A comparable provision is not included in the present Constitution.

In addition to the constitutional provisions on equality under the chapter on fundamental rights, the Thirteenth Amendment to the 1978 Constitution recognizes parity of Sinhala and Tamil as official languages. Chapter IV of the Constitution lays down language rights. Article 126 of the Constitution, in addition to fundamental rights jurisdiction, confers powers on the Supreme Court to examine petitions alleging an infringement or an imminent infringement of language rights.

In examining the substantive legal framework protecting equality, it is imperative to consider the international human rights obligations of Sri Lanka. Sri Lanka has, among other international instruments, ratified the International Covenants on Civil and Political Rights⁵ (ICCPR) and Social, Economic and Cultural Rights⁶ (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination⁷ (ICERD), and the International Convention on the Elimination of All Forms of Discrimination Against Women⁸ (CEDAW). The ratifications were entered upon without a single reservation which means that the instruments bind Sri Lanka in their entirety.

Both Covenants require States Parties to guarantee rights recognized by them to all without discrimination (Article 2 of both Covenants). The ICCPR requires States Parties to ensure equality before the law and equal protection of the law and prohibits them from engaging in discrimination on grounds **such as** race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth (Article 26). Article 12 of the 1978 Constitution complies with the ICCPR requirements in this respect to a great extent. One weakness in Article 12, however, is the absence of an open-ended non-discrimination clause that can be expansively interpreted by the courts recognizing newly evolving grounds of non-discrimination.⁹ Article 27 of the ICCPR recognizes cultural, religious and language rights of minorities.

ICERD and CEDAW require States Parties to undertake measures to eliminate racial discrimination¹⁰ and discrimination against women respectively. It is significant that both Conventions sanction affirmative action to uplift the lot of groups whose rights they protect.¹¹

Because of the dualist nature of Sri Lanka's legal system, provisions in those international instruments cannot be directly enforced in Sri Lanka. However, they can be used as interpretive guides to persuade courts in interpreting Constitutional provisions.

I. Pursuing Orthodoxies-Use of the Reasonable Classification Doctrine

The early phase of jurisprudence of the Supreme Court relating to equality revolved around the traditional doctrine of reasonable classification, mainly developed by the US Supreme Court.

The very first fundamental rights petition examined by the Supreme Court pertained to an alleged denial of equality. In *Palihawadana v. AG*¹², the petitioner claimed that his rights under Article 12 (1) and (2) were violated by the failure of the Member of Parliament (MP) of his electorate to issue him an application under the "job bank" scheme introduced by the then government as the sole means by which vacancies in the non-staff grades in the public sector were to be filled. Under that scheme each MP was given the power to select a thousand eligible persons from his/her electorate and issue them with applications for registration in the Job Bank. The eligibility criteria were as follows:

- (a) the person must be unemployed;
- (b) the unemployed person must be between the age of 18-40 years;
- (c) there should be no income-earner in the family of the nominee *or* the income must be so low that it is inadequate to sustain the unemployed person and other members of the family. Preference should be given to candidates who come from families where no one is employed with a view to providing a job to at least one person in such families;
- (d) the nominee must be a resident of the electorate of the MP concerned.¹³

The petitioner claimed that he, upon learning of the scheme through the newspapers, wrote to the respondent MP requesting an application but did not receive a reply. His contention was that he was discriminated against because of his membership in an opposition political party. To buttress his argument he forwarded to court information about other persons in the electorate who were similarly situated as he but who were given application forms. The denial of an application form meant that he was deprived of the opportunity to obtain employment in

the public sector. This he claimed was a denial of equal opportunity and discrimination on the basis of his political opinion.

Counsel on behalf of the petitioner averred that the scheme was unconstitutional because by conferring unbridled discretion on MPs it lent itself to discriminatory treatment and abuse. The alternate criterion in (c) above—that the MP must be satisfied that the income is so low that it cannot support the nominee and his family—was vague and did not give proper guidance to the MPs. Furthermore, the scheme was not publicized within the electorate at all. The MP arbitrarily selected a thousand persons from his electorate and issued them application forms.

The MP averred that by the time the petitioner wrote to him he had already completed distribution of the application forms to a thousand persons from his electorate. He denied that he discriminated against the petitioner.

The three judge bench were unanimous in the finding that the petitioner was not entitled to relief. However, the three justices gave different reasons for coming to that conclusion.

Justice Sharvananda was of the opinion that part of the scheme was constitutional as it laid down eligibility criteria to guide the MP; the other part, that required the MP to select a thousand candidates from the electorate was without guidance and therefore conferred unfettered discretion to the MP that was open to abuse and therefore was unconstitutional.¹⁴ He was very critical of the fact that the scheme had not been advertised for the information of the residents of the electorate. Further, the scheme's validity was questionable as it had entrusted the whole selection to a politically partisan authority such as an MP.

An M.P. however who has emerged victorious in a contested election cannot in the nature of things inspire confidence—at least in those who did not support him in the election...Hence any law or scheme which commits to the unrestrained will of such a person a discretion or power, the exercise of which will affect the citizens for the better of his electorate, or the worse, vitally may tend to strike at the roots of the concepts of justice and equality which are the corner-stones of the Constitution.¹⁵

However, it was held that the petitioner had no *locus standi* (legal standing) to bring a claim as he could not in any event satisfy the eligibility criteria because he came from a family with adequate means.¹⁶

Justice Wanasundera was of the opinion that the scheme is "valid and in order" but that the second limb of criterion (c) above has been wrongly interpreted and applied by the MP in an arbitrary and discriminatory manner.¹⁷ The fact that the manner in which that criterion was formulated lent itself to abuse did not, in the learned Justice's opinion, render that part of the scheme in violation of the equality clause. Finally, the Justice threw out the petition on the basis that in any event the MP's action did not attract the application of constitutional provisions as it had taken place before the entry into force of the 1978 Constitution. However, it was pointed out that future selections will have to conform with the Constitution.¹⁸

The third judge, Justice Ismail, reasoned in the same manner as Justice Sharvananda. He found the scheme objectionable as it gave unregulated powers to MPs to select a thousand candidates from each electorate and also with regard to the application of the second limb of

criterion (c). He too found eventually that the petitioner lacked *locus standi* as he could not satisfy the criteria for eligibility.¹⁹

Needless to say, the *Palihawadana* judgment marked a dismal beginning for fundamental rights jurisprudence of the court. Although the justices, especially Justices Sharvananda and Wanasundera, did go to some lengths to explain the applicable principles relating to the use of the reasonable classification doctrine in assessing whether in a given situation the right to equality has been violated or not, the manner in which those principles were applied to the instant case is very unsatisfactory.

The court recognized the following fundamentals of the doctrine as laid down by US and Indian jurisprudence:

(a) not every person could be always treated equally and that therefore classification of persons by the law is permissible as long as it is done for a legitimate objective and is reasonable; and

(b) that in order for a classification to be reasonable it must be based on clear and intelligible differentia that bear a reasonable relation to the objectives sought to be achieved by the State;

(c) that a system of classification must be applied treating similarly situated persons equally (equals must be treated equally).²⁰

The court accepted that the objective of the State in creating the scheme was to find a solution to the high level of unemployment among the youth²¹. The eligibility criteria discussed above and the selection of a 1000 candidates per electorate were the means of

classification adopted by the government. Justices Sharvananda and Ismail found that **some** of the features of the classification employed were unsound as they involved the exercise of unbridled discretion by the MP. In other words, they found those features of the scheme as not having a rational nexus to the State's objectives. Surprisingly, Justice Wanasundera, having applied the reasonable classification doctrine, did not find the scheme, or any aspect of it, unconstitutional; what he found objectionable was the manner in which the MP had used his discretionary powers and not the conferment of those absolute powers.

It is submitted, however, that the whole scheme was tainted by the conferment of unregulated discretionary powers to administer the programme and that too to MP s, who by the very nature of the political culture of this country, would give priority to their supporters and act in a partisan manner, making a mockery of the principle of equal opportunity. This deadly combination of factors were made even more deadly by the fact that this was the **sole means by which vacancies in the non-staff grades in the public service was to be filled**. One wonders then about the rationality of the nexus of such a scheme of classification with the stated objective of the State. In the final analysis, youth unrest among the unemployed only stood to worsen by the introduction of such a blatantly discriminatory and unsound policy.

If this case were to be decided today, one can safely predict that the court would strike down the whole scheme. In the recently decided case pertaining to the constitutionality of the Sri Lanka Broadcasting Authority Bill²², the Supreme Court concluded that the entire Bill was unconstitutional, *inter alia*, because the conferment of regulatory powers without clear guidelines would result in those powers being used by the Minister and/ or the Authority—containing a number of political appointees—in a discriminatory manner, thereby violating Article 12 of the Constitution.

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In addition, it is submitted that it was incorrect to hold that the subject matter of the petition was time barred in that it dealt with a matter (selection of candidates) that had taken place before the promulgation of the 1978 Constitution. There was nothing to indicate that the scheme, introduced in early 1978, was to apply only to that year; all indications were that it was to continue as a scheme. The non-issuance of an application form to the petitioner, therefore, was a continuing issue. As to the issue of *locus standi* too, the court merely stated that the petitioner came from a family with means and therefore did not satisfy the eligibility criteria, completely ignoring the fact that other persons who were similarly circumstanced as the petitioner had been issued with application forms to register in the Job Bank. Surely, the petitioner had the right to challenge the scheme and its operation, as equals had been treated unequally under it? It is not surprising, therefore, that the *Palihawadana* judgment has been roundly criticized and has been characterized as somewhat of a fiasco.²³

Fortunately, *Palihawadana* proved to be an aberration than the rule. In *Perera v. University Grants Commission*²⁴, decided one year later, the court invalidated a university admission scheme on the basis that the classification scheme employed did not have a rational nexus to the objective of the State.

The respondent UGC had adopted a scheme that admitted students to the state-run university system on the basis of a ratio between students who had qualified at two separate examinations held in the same year. The Education Ministry had decided to hold two General Certificate of Education (GCE-Advanced Level) examinations in 1979 for students who had prepared under two sets of syllabi. One exam was held in April and the other in August. For all purposes the two examinations were treated as equal by the authorities, with both

sets of students having to score the same aggregate of marks to qualify for entry into the university. However, the respondent UGC which is empowered to set policy on, *inter alia*, university admissions, had adopted a policy to admit qualified students from the two examinations on the basis of a ratio of 7.2:2.8. The ratio reflected the proportion of students from each examination who had obtained the minimum qualifications to enter the university.

The plaintiff, on behalf of his minor daughter Ruvini, petitioned the Supreme Court alleging an infringement of her right to equal opportunity. It was argued that if not for the ratio Ruvini would have qualified to enter medical school. The two examinations were treated as equal in every respect including the aggregate of marks students had to obtain to qualify for university admission. Therefore, to differentiate between the two exams on the basis of the ratio was irrational and unwarranted as it treated equals unequally.

Sharvananda J. delivering the judgment of the court, pointed out that the classification on the basis of the ratio had no rational nexus to the objective of the State, viz., the admission of the best qualified students to the university. The first classification on the basis of the marks obtained at the two examinations did bear a rational relationship to the objective. To introduce a further classification on the basis of the ratio upset that equation as it artificially differentiated between students who belonged to the same pool.²⁵ The judgment was well reasoned and had a major impact on at least the education authorities.

Perera marked the beginning of the development of a progressive body of jurisprudence on Article 12. The Supreme Court has gone on to apply the reasonable classification doctrine to various situations with salutary results.²⁶

One of the most significant among those judgments is that in the recently decided Sri Lanka Broadcasting Authority Bill case referred to above.²⁷ There the constitutionality of the Bill was canvassed under Article 121 of the Constitution. One of the contentions of the petitioners was that the Bill, in effect, made a distinction between the State-run Sri Lanka Rupavahini and Broadcasting Corporations on the one hand and private broadcasting institutions on the other for purposes of bringing them under the control of the proposed Authority for the regulation of contents of programmes. It was argued that the former were given the privilege of self-regulation whereas the others had to submit to the control of the Authority. The Supreme Court accepted this argument stating that there was no rational basis for such a differentiation between the two categories of institutions. Therefore, the court concluded that the classification was “invidious and offensively discriminating” and was in direct violation of Article 12 (1) of the Constitution.

The court also has gone on to hold that executive or administrative regulations that may appear to be non-discriminatory on the face but may, in effect, work out discrimination are unconstitutional. In a landmark judgment the Supreme Court in *Joseph Perera v. Attorney-General*²⁸ citing the famous US case *Yick Wo v. Hopkins*²⁹ invalidated an emergency regulation (ER), *inter alia*, on the basis that it conferred unbridled power to the police to engage in prior censorship thereby permitting them to engage in discrimination. This was the first time that the court invalidated an ER.

The impugned ER required **any** poster, handbill or leaflet to be submitted to the police for their permission before distribution. Chief Justice Sharvananda in the course of perhaps one of his best judgments stated—

...the regulation would be violative of the equality provision because it would permit arbitrary and capricious exercise of power which is the antithesis of equality before the law. No regulation should clothe an official with unguided and arbitrary powers enabling him to discriminate...There is no rational or proximate nexus between the restriction imposed by Regulation 28 and national security/public order [the protection of which was the objective of the ER].³⁰

In spite of these successes, the nine-judge bench judgment in *Elmore Perera v. Minister of Public Administration*,³¹ decided in 1985 remained a blotch on the evolving equality jurisprudence. There the petitioner, a public servant, complained that his right to equal protection of the law was denied when he was arbitrarily sent on compulsory leave. He attributed action against him to a disagreement the minister had with him. It was alleged that relevant administrative circulars and the procedure prescribed by the Establishment Code were not followed or were misapplied to his case.

Five of the justices took the position that in order to plead discrimination the petitioner had to prove that there were others, or at least one other, who were similarly situated but were treated differently and that he was singled out for discriminatory treatment ; it was not sufficient to prove that the petitioner constituted one class without reference to others similarly situated. The petitioner’s claim was, therefore, disallowed by the majority.

The unsoundness of that position is clearly manifest. A petitioner would always have to find those who are similarly situated but who were treated differently to prove a breach of equal protection of

the law with regard to her/him. What if a petitioner constitutes a lone pool and is treated arbitrarily? For instance, if A is the sole candidate who fulfills all the requirements for a job and yet, is not given the job, how does s/he challenge that on the basis of a denial of equal protection of the law? In contrast to *Elmore Perera*, Indian jurisprudence recognize that a single individual could constitute a class all on his/her own.³²

The damage done by the judgment was compounded by the fact that it was delivered by a nine-judge bench. Therefore, it is binding on subsequent courts until overturned by a bench of equal or greater strength on the basis of the principle of binding precedent. The Supreme Court recognizing the negative consequences of the judgment, has fortunately, sought to distance itself from it by taking judicial notice of the fact that if there were other similarly circumstances persons they would have been treated in a regular manner.³³

Most of the fundamental rights petitions based on an infringement of equality have been based on Article 12 (1). The non-discrimination clause (Article 12 (2)) has been invoked mostly to challenge alleged political discrimination, although discrimination is prohibited also on grounds of race, religion, language, caste, sex or place of birth.

Interestingly, in the past twenty years there has not been a single occasion on which the Supreme Court was presented with the opportunity of deciding a case alleging sex discrimination. This fact could partly be attributed to the inability to review the constitutionality of legislation and unwritten customary law that was in existence when the 1978 Constitution entered into force.³⁴ Sex and gender discrimination were, on the most part, institutionalized under pre-existing legislation. The legitimization of such laws, which are clearly at odds with constitutional guarantees of fundamental rights, is one of the major

weaknesses of the scheme introduced by the 1978 Constitution to protect fundamental rights.

III Affirmative Action —In Search of Substantive Equality

Today it is a well-accepted principle, at least in the developing world, that what equal protection of the law seeks is not mathematical equality or formal equality, but substantive equality among various groups in society. Formal equality would not be concerned with whether there is an even playing field for all players; on the other hand it assumes there is an even playing field where every person competes on an equal footing. It does not consider relevant the fact that persons come from varied back grounds where some are handicapped because of historical, social, economic and political factors and, therefore, cannot compete on the basis of parity.

Affirmative action programs, therefore, strive to provide a special helping hand to those who are disadvantaged. That is done by classifying those who are disadvantaged into a class in order to provide them with opportunities which they otherwise would not have had. This system of classification is not at odds with the reasonable classification doctrine; on the contrary, it could be called a logical extension of that doctrine. Affirmative action strives to achieve a positive social goal by treating unequals unequally.

In the US affirmative action programs have become politically controversial with some quarters accusing such programs of “reverse discrimination” against those who deserve opportunities purely through merit. The exact constitutional position of affirmative action programmes in the US remains unsettled.³⁵

On the other hand, such programmes have received direct constitutional blessings in the developing world. The Indian Constitution expressly recognizes the legitimacy of “special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes”³⁶ and also “reservations” or quotas in the public service in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in that service.³⁷ The much idealized 1996 South African Constitution too recognizes the validity of measure taken to protect or advance persons or categories of persons “disadvantaged by unfair discrimination”.³⁸

As discussed earlier the 1978 Constitution of Sri Lanka also gives constitutional imprimatur to special measures to advance the lot of women, children and the disabled.³⁹ Below we consider the cases in which the Sri Lanka Supreme Court has dealt with the constitutionality of affirmative action programmes. Petitions have challenged fixed quotas adopted by the Executive relating to university admissions and public sector employment.

In *Seneviratne v. University Grants Commission*⁴⁰, the petitioner challenged one limb of the quota system adopted by the respondent UGC with regard to admission to the public university system (that provides free education) on the basis that it violated Article 12 (1). Under the impugned scheme 55% of the available placements were to be distributed on the basis of the population ratio in the 24 districts in the island; 15% was reserved for students from areas designated as underprivileged to be distributed at the discretion of the UGC; 30% of the placements were to be filled purely on the basis of merit. The petitioner challenged only the first limb, on the basis that distributing placements on the basis of a population ratio had no rational nexus to the objective of the government

The UGC, on the other hand, justified the admission scheme on the basis that it had to be always mindful of the acute disparities in educational facilities in various parts of the country. Taking the population ratio of various districts, it maintained, was the only non-arbitrary and neutral way of ensuring that students all over the country stood a fair chance of gaining admission to the university system. If the population of school-going children or the number of students who attained the minimum qualifications to gain admission to university were to be the bases of admission, such criteria depended on the resources and educational facilities to the children in various districts. On the other hand, merely to go on the basis of merit would negate the objective of the system of free education that the State is committed to. The UGC cited the Directive Principles of State Policy in the Constitution (Article 27) that declare that the State is pledged to a social order in which social, economic and political justice shall guide all national institutions and where illiteracy will be eradicated. To admit students purely on the basis of merit would only provide opportunities to urban-based students who have access to better facilities.⁴¹

The three-judge bench was of the unanimous opinion that the system was, under the circumstances, rational in relation to the objective of the State and, therefore, did not offend Article 12 (1). Justice Wanasundera delivering the judgment of the court stated that:

[t]he increasing number of students pressing for admission and the woeful lack of teachers and facilities in most of the provinces had compelled the authorities to modify the merit principle to meet the ends of justice...The departure from the merit principle, though unfortunate, is inevitable.⁴²

It is significant that the court cited with approval *Kesavananda Bharati v. State of Kerala*⁴³ and *State of Kerala v. Thomas*⁴⁴ where the Indian Supreme Court used Directive Principles of State Policy in the Indian Constitution— described as “the social conscience of the Constitution” in the latter case—to give pith and substance to justiciable fundamental rights. Justice Wanasundera went on to declare:

[i]t has been said that the Directive Principles are in the nature of an instrument of instructions which both the Legislature and executive must respect and follow. The expressive language in the above citations [the Indian judgments] is intended to emphasize, the fact that these provisions are part and parcel of the Constitution and that the courts must take due recognition of them and make proper allowance for their operation.⁴⁵

That was a sensitive and proactive approach to ascertaining the objectives of the State congruent with the stated policy framework enshrined in the Constitution. What is also significant about the *Seneviratne* judgment is that its analysis of the scheme was totally centered around Article 12 (1) and the reasonable classification doctrine; it did not limit its reasoning to Article 12 (4) which declares somewhat weakly that nothing in the Constitution will stand in the way of special measures to advance women, children and the disabled.

The responses to the *Seneviratne* judgment reflect the divisions within many societies *vis-a-vis* affirmative action programmes. Justice Sharvananda in his book *Fundamental Rights in Sri Lanka* in no uncertain terms criticizes the judgment and concludes that the 55% quota is clearly in violation of Article 12. He argues that Article 12 guarantees the **individual** right to equal protection and does not

guarantee group rights; that an individual must be able to compete on an equal footing on the basis of merit. He is of the opinion that the objective of the State should be to take in the best students into the university system rather than social justice considerations contained in the Directive Principles of State Policy which, according to him, do not bind the State. Further, taking a strict constructionist view of Article 12 he reasons that the only special measures permitted by the Constitution are contained in Article 12 (4) and that other schemes are clearly constitutionally impermissible.⁴⁶

Wickramaratne, on the other hand, favours a position where certain “handicapping” factors are taken into account in devising such schemes. He agrees with the *Bakke* judgment that race may be taken into consideration for certain purposes such as university admissions. By analogy here, then, lack of educational facilities must be taken into account. However, he argues that the 55% district-basis quota and the 15 % quota for underprivileged districts must be done away with and a more rational basis be adopted. He argues that even within one district disparities in facilities exist and advocates a system whereby schools islandwide are graded. Admissions must be on the basis of that grading system than on the district system.⁴⁷

The author is inclined to agree with the latter view. The fundamental weakness in Justice Sharvananda’s argument is that he does not in any way take into consideration the fact that individuals cannot compete on an equal footing in an unequal playing field. The State maintaining disparate educational facilities in various regions is in itself a violation of equality. Just as much he argues that students with high marks are penalized by the system for no fault of their own, it has to be recognized that students having to be content with poor educational facilities suffer the consequences through no fault of theirs.

The fault lies squarely with the State. Until the State remedies that situation there is no other equitable way of meeting the demands of equality other than to adopt affirmative action programmes that advances the lot of disadvantaged students who do not have access to good educational facilities. That is the price society has to pay for social justice.

Secondly, it is submitted that even if one adopts a strict construction of Article 12, as Justice Sharvananda has, one cannot escape the fact that affirmative action programmes can be justified on the principle of equal protection of the law enshrined in Article 12 (1) independently of Article 12 (4).⁴⁸ Just as much as equals have to be treated equally, unequals have to be treated unequally in order to achieve equal protection of the law.

In *Ramupillai v. Minister of Public Administration*⁴⁹ the petitioner, a Superintendent of Customs, challenged a public administration circular that stipulated that promotions in the public sector had to be made adhering to an ethnic quota based on the national ethnic ratio of — Sinhalese- 75%, Tamil- 12.7%, persons of Indian origin-5.5% and Muslims-8%. He petitioned the court alleging an imminent infringement of his right to equality arguing that if not for the quota his chances of being promoted to the post of Assistant Director of Customs were very high.

Ironically, the State argued that the ethnic quota was introduced *vis-a-vis* appointments to and promotions in the public service in order to address the law and order situation in the country which had deteriorated due to a denial of opportunities in recruitment to and promotions in the public service “perceived” by disadvantaged communities. It was not stated which communities had such a perception nor what the disadvantaged communities were.

A bench of seven justices unanimously found the circular that introduced the ethnic quota in relation to promotions as violative of Article 12 (1). It was irrational; the State had not justified the quota except in terms of mere “perceptions” of being discriminated against in the sphere of public employment without specifying on the part of which community or communities. In other words, the very objective of the scheme was in question. The ethnic classification itself was “uncertain, unreasonable and inconsistent”; it had subdivided certain ethnic groups (Tamils) and had also included religious groups (Muslims). As such, a departure from the principle of merit with regard to promotions was unjustified. The court found that the objective of promotions should be the advancement of the efficiency of the service.

In the course of his celebrated judgment Justice Fernando delineated the salient principles applicable to Article 12:⁵⁰

(a) Article 12 (1), read with Articles 3, 4 and 12 (2) of the Constitution, embodies a principle of equality broadly comparable to that recognized in the Constitutions of the US and India, but more extensive in nature and scope;

(b) Paragraphs (2), (3) and (4) of Article 12 are essentially explanatory and declaratory of the principle of equality. Article 12 (4) does not authorize “affirmative action”, but merely declares that nothing in Article 12 shall prevent affirmative action **apart from proved inequality** (emphasis added);

(c) Citizens shall not be discriminated against by anyone, the legislative branch and even private individuals included, although the special remedy under Article 126 is only available in respect of executive or administrative action;

(d) 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;

(e) For the purpose of applying those twin principles (in (d)), it is necessary to determine whether persons are equals or unequals. Neither immutable characteristics (such as ethnicity and sex) nor acquired characteristics (such as language, religion and political opinion) do not *per se* render persons unequal. 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;

(f) 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”;

(g) 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. For example, one cannot fault the exclusion of males when appointing a suitable person as a matron to a girls’ hostel;

(h) Even where race would not normally afford a permissible basis of classification, differential treatment would be justified where racial discrimination is proved even without antecedent legislative, judicial, executive or administrative findings. Precisely tailored race-specific

remedies may be devised by legislative, judicial, executive or administrative action to “make whole” the actual victims of proven racial discrimination. Such relief can be granted even as against respondents who did not themselves engage in discrimination or who did not benefit from such discrimination. **The objective of affirmative action is to remedy the present effects of past discrimination, and not to perpetuate fixed quotas** (emphasis added). Temporary or short-term remedial action with appropriate review mechanisms are more easily justified.

(i) Racial quotas for their own sake are not permissible because in a free, republican democracy one citizen is as good as another. 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;

(J) Affirmative action, where necessary proof exists, is permissible both at recruitment and promotion; but such action in the case of promotions will be strictly scrutinized on account of other competing needs and interests such as the efficiency in service, the higher levels of responsibility to be borne by those promoted, and the legitimate expectation of employees that merit and devoted service would be rewarded.

The above two judgments make it amply clear that the Supreme Court of Sri Lanka does recognize the concept of affirmative action as falling within Article 12 (1) . Justice Fernando’s judgment in the *Ramupillai* case, which one can safely assume is the most authoritative judgment on the subject, makes it clear, however, that while the court entertains no conceptual constraints with regard to accepting

affirmative action, it will uphold the constitutionality of such a scheme only where the reasons for adopting such a scheme are amply demonstrated by the State (State's objective) and the scheme of classification is tightly tailored to meet the demands of such a legitimate and well-defined objective. In *Ramupillai* the State failed miserably in discharging the required burden of proof, revealing appallingly poor policy-making by the Executive. The position taken by the Supreme Court is both congruent with jurisprudence in India and the US. It balances the rights of those victimized by past discrimination with the rights of those who may stand to lose by affirmative action programmes.

IV. The New Doctrine— In Pursuit of Administrative Justice

In the much maligned majority judgment in *Elmore Perera*, the argument of the petitioner that his being sent on compulsory leave by virtue of discriminatory action on the part of the minister in itself (without reference to the classification doctrine) violated Article 12 (1) was rejected. He based this argument on the "new doctrine" on equality recognized by the Supreme Court of India starting with *Royappa v. State of Tamil Nadu*⁵¹ decided in 1979. There Bhagwati J. (with Chandrachud and Krishna Iyer JJ. agreeing) expounded the new theory as follows:

[e]quality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is the antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it

that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14 [equality clause], and if it affects any matter relating to public employment, it is also violative of Article 16 [equality in public employment].⁵²

The court applied that theory in *Maneka Gandhi v. Union of India*⁵³ and *Ramana v. International Airport Authority*⁵⁴ both of which could have been decided by using the classification doctrine. The new doctrine was further explained by Justice Bhagwati in *Ajay Hasia v. Khalid Mujib*⁵⁵ as follows:

[i]t must therefore [that *Royappa* has been adopted in other judgments] now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not a paraphrase of Article 14, nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality.⁵⁶

In the *Elmore Perera*⁵⁷ case the majority of the court sought to distinguish the Indian legal position with that under the 1978 Sri Lanka Constitution. It was pointed out that Article 126 of the 1978 Constitution vests fundamental rights jurisdiction exclusively in the Supreme Court and that also only to remedy offensive executive or administrative acts. It did not possess jurisdiction to remedy an infringement or an imminent infringement of ordinary rights or infringement by legislative action unlike under Articles 226 [confers regional High Courts jurisdiction with

regard to fundamental rights and ordinary legal rights] and 32 [equivalent of Article 126] of the Indian Constitution respectively.⁵⁸ As Wickramaratne points out, the relevance of these differences in jurisdictional matters to the adoption of the new doctrine is questionable.⁵⁹

In any event, the majority had a conceptual problem beyond the jurisdictional issue; it refused to recognize that discrimination is inherent in every arbitrary act. According to the majority judgment, Article 12 strikes not at unjust treatment or unjust discrimination but unequal treatment of equals and equal treatment of unequals. Further, it was pointed out that where arbitrary action does not exhibit discrimination it may be reviewed on a writ application or in a declaratory action, but that such a situation will not attract the remedy provided for by Article 126.⁶⁰

Two of the justices in the minority, Justices Wimalaratne and Colin-Thome accepted arguments based on the “new doctrine”. The third justice, did not go as far as the other two, but relied on the classification doctrine. Wanasundera J. was of the opinion that where one person is affected by arbitrary action:

the notional comparison would be with the norms or the protection legally applicable to that person or office. In the case of a person in a group, it would be the norms or protection applicable to the group, and in the case of a group or category, the issue would be the reasonableness of the classification itself. The suggested view [of the majority] is therefore based on a misconception and is not supported either by law, logic or practice.⁶¹

In spite of the strength of the bench in *Elmore Perera*, by the early 1990s one can observe a clear swing of the Supreme Court toward its minority judgment by adopting the “new doctrine”. Even though the classification doctrine has not been entirely displaced, the court’s reasoning increasingly tends to emphasise denial of equal protection of the law through arbitrary use of discretionary administrative powers.

In the early cases of *Bandara v. Premachandra* and *Jayasinghe v. Attorney-General*⁶², decided in 1993 and 1994 respectively, the court underscored the principle that where a person is deprived of procedural fairness in administrative matters, that person’s right to equal protection of the law is violated. In *Bandara* the petitioners, a group of government-employed surveyors, alleged that they were served with vacation of post notices pursuant to their engaging in trade union action. However, the respondent, the Secretary to the Ministry of Lands, Irrigation and Mahaweli Development, had not given a reason for terminating their services. They claimed that others who were similarly situated as they, were treated more leniently by the State and that their (petitioner’s) rights under Article 12 (1) were violated.

The State argued that the petitioners, as public servants, held office “during pleasure” under Article 55 (1) of the Constitution and that therefore, no reasons had to be assigned.⁶³ The court disagreed:

[a]rticle 55 (5) makes the “pleasure principle” subject to the fundamental rights and the language rights...**The subjection of Article 55 (1) to the equality provision of Article 12 mandates fairness and excludes arbitrariness.** Powers of appointment and dismissal are conferred by the Constitution on

various authorities in the public interest and not for private benefit, and their exercise must be governed by reason and not caprice; they cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction.⁶⁴ [emphasis added]

The court found that, under the circumstances, the dismissal of the petitioners was “unreasonable, arbitrary and discriminatory”⁶⁵ and thus violated Article 12 (1). The salient point here is that the court found that, in addition to treating equals unequally, unfairness and arbitrariness in the disciplinary procedure adopted by the respondent contributed to the violation of equality of the petitioners.

In *Jayasinghe* the court found the undue delay in chargesheeting (14 years) and concluding disciplinary proceedings against a co-operative employee who was under interdiction without pay for that whole period (16 years) was clearly violative of the principle of equal protection of the law. Here again Justice Fernando delivering the unanimous judgment of the court stated:

[t]he aim of the protection of the law is to ensure justice, and so when there is inordinate delay, it can equally truly be said: protection delayed is protection denied.⁶⁶

However, Justice Fernando also went on to apply the reasonable classification doctrine:

[i]t is not enough for the Petitioner to show that he has been denied the protection of the law. He must also show that he has been denied **equal** protection—that

he was treated less favourably than others similarly situated.⁶⁷

The court, departing from the *Elmore Perera* “doctrine” that a petitioner had to prove at least one other similarly situated person was treated differently, took judicial notice of the fact that others in similar circumstances would presumably be afforded due protection of the law, i.e., in this case that a disciplinary inquiry will be held without an undue delay.

Jayasinghe also broke new ground by recognizing that the equality clause not only protects liberty, but also protects livelihood. The petitioner there had been arbitrarily deprived of his livelihood by the inordinate delay in filing charges and concluding a disciplinary inquiry. For all those reasons, the court found that the petitioner’s right to equality had been violated.

In contrast to both *Bandara* and *Jayasinghe*, *Gunaratne v. Ceylon Petroleum Corporation*⁶⁸ decided in 1996 found a violation of Article 12 (1) without reference to the classification doctrine: a unanimous three-judge bench found a violation purely on the basis of abuse of administrative/executive discretion. The court found that the termination of a petroleum dealership awarded to the petitioners had been without sufficient reasons. In another authoritative judgment Justice Fernando declared:

...I take the broader view that the principle of equality before the law embodied in Article 12 in a necessary corollary of the concept of the Rule of Law which underlies the Constitution [citing *Elmore Perera*⁶⁹]. **Article 12 therefore prohibits arbitrary, capricious**

and/or discriminatory action... It is now well settled that powers vested in the State, public officers, and public authorities are not absolute or unfettered, but are held in trust for the public, to be used for the public benefit, and not for improper purposes. Even assuming that the Board of the 1st Respondent was not obliged initially to disclose the reasons for its decision, nevertheless when that decision is being reviewed in the exercise of the fundamental rights jurisdiction of this Court, the burden is on the Respondents to establish sufficient cause to justify that decision, and this Court can scrutinize the grounds for the decision.⁷⁰ [emphasis added]

There is today a vast body of jurisprudence on equality that upholds the principles expostulated in *Gunaratne*.⁷¹ Most of the cases that have come up for adjudication relate to employment—recruitment, promotions, transfers and extensions of service. In all those cases the court has emphasized the need for fair and reasonable administrative procedures and substantive rules (such as schemes of recruitment and promotions). It is not an exaggeration to maintain that today, petitions alleging denial of equality far outnumber petitions on torture and arbitrary arrest, a clear reversal of the situation in the late 1980s and early 1990s.⁷²

An interesting feature of this new development is the extension of the principle of public trust to the airwaves as well. In two seminal judgments, *Athukorale v. Attorney-General*⁷³ (the Sri Lanka Broadcasting Authority Bill case) and *Ratnayake v. Sri Lanka Rupavahini Corporation*,⁷⁴ the Supreme Court held that the State holds the

airwaves on public trust and must therefore exercise its regulatory powers over the airwaves in a fair and reasonable manner; not to do so would result in a violation of, *inter alia*, Article 12.

The fundamental tenets of the new doctrine find succour in the concept of the Rule of Law—that the Rule of Law demands that powers vested in the State not be used in a capricious, unreasonable and arbitrary manner. That *grundnorm*, so to speak, gives rise to the principle that powers vested in the State are held in public trust and must be used for the public benefit. Therefore, it follows that executive and administrative powers should be exercised in a fair and reasonable manner affording to the public fair and reasonable procedures and substantive rules. In the final analysis, the new doctrine mandates administrative justice. It is significant that the much idealized 1996 Constitution of South Africa has expressly guaranteed the right to administrative justice as a fundamental right (Article 33⁷⁵).

V. Conclusions

Equality is the new frontier of judicial activism in Sri Lanka. The above discussion bears ample testimony to that fact. By embracing the new doctrine on equality, the Supreme Court has infused a new dimension to the guarantee of “equal protection of the law” by pronouncing that it also embraces the right of the public to administrative justice—to be free from the caprice of arbitrary executive or administrative action. The new doctrine, as the author sees it, is not used in a manner that excludes the traditional reasonable classification doctrine, but rather in a complementary manner. It is a reconceptualization of the guarantee of equality as a bulwark against arbitrary breaches by the State of the public trust in which State power is reposed. In the final analysis, the new doctrine is a reiteration of the social contract on which the system of democratic governance is based.

The new approach of the court has resulted in the public perceiving their right to equality in broad terms. It would not be an exaggeration to state that a majority of fundamental rights cases filed today relate to denial of equality through arbitrary executive or administrative action, especially relating to employment. It is hoped that the growing body of constitutional jurisprudence on administrative justice would have the salutary effect of self-correction by State authorities.

While one can justifiably feel exuberant about the new direction taken by the Supreme Court, there are many things amiss in the 1978 Constitution with regard to protection of equality, and indeed fundamental rights as a whole. First, the Constitution does not permit judicial review of legislation. Secondly, all written and unwritten law existing at the time of the adoption of the Constitution remain in force in spite of inconsistency with the equality clause or any other enumerated fundamental rights. Those fundamental flaws of the Constitution have resulted in the perpetuation of legal regimes based on inherently discriminatory premises, especially personal laws discriminating against women. Thirdly, rules of procedure such as the need to petition within a month of an alleged infringement and restrictions relating to who can petition (*locus standi*) stand in the way of many aggrieved parties from seeking relief.

Also, in an era in which the private sector is increasingly taking over a significant portion of the functions hitherto performed by the State, especially as an employer, the need to bring private entities under the purview of either constitutional guarantees (as in South Africa⁷⁶) or at least statutory guarantees is imperative. Currently, there is no law in Sri Lanka that provides a remedy when the private sector denies the equal rights of its employees. Even the Human Rights

sion of Sri Lanka⁷⁷, that was established to provide the public with an easily accessible, informal redress mechanism, is not empowered to investigate abuses by the private sector.

In a society such as that in Sri Lanka, encumbered with various social disparities and an internecine ethnic conflict, one has to view equality predominantly from the point of view of social justice. The Supreme Court's views on affirmative action, therefore, are encouraging. It also means that not only an individual right but also the right of social and political groups to equality has to be championed. This has already been achieved at the normative level by Article 12 (2) which prohibits discrimination on the basis of race, religion, language, caste, sex, political opinion or place of birth and by the recognition of language rights. However, the recognition of secularism as a constitutionally entrenched principle, reinforcing the equality of all communities, is not recognized by the 1978 Constitution. It is a fundamental flaw in that constitutional scheme. In the final analysis, one has to acknowledge that one cannot go only half way or part of the way in recognizing that "[a]ll human beings are born free and equal in dignity and rights."⁷⁸

End Notes

- ¹ Deepika Udagama, *Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*, 11 Harvard Law Review 269 (Spring 1998).
- ² See Joseph A. L. Cooray Constitutional and Administrative Law of Sri Lanka 611 (2 edn., 1995).
- ³ Article 126 of the 1978 Constitution confers exclusive jurisdiction over fundamental rights and language rights to the Supreme Court, whereby the court could entertain and examine petitions alleging an infringement or imminent infringement of such rights by executive or administrative action and grant "just and equitable" relief.
- ⁴ The author is of the view that the what is more relevant in the context of Sri Lanka is non-discrimination based on ethnicity rather than on race. This position is reflected in the Draft Constitution presented by the Government of Sri Lanka in August, 2000.
- ⁵ General Assembly Resolution 2200 A (XXI) of 16 December, 1966, entered into force in January 1976.
- ⁶ General Assembly Resolution 2200 A (XXI) of 16 December, 1966, entered into force in March, 1976.
- ⁷ General Assembly Resolution 1904 (XVIII) of 20 November, 1963.
- ⁸ General Assembly Resolution 34/180 of 18 December, 1979, entered into force in September, 1981.
- ⁹ See Deepika Udagama, *Fundamental Rights: The Need for a Futuristic Vision*, in The Draft Constitution of Sri Lanka: Critical Aspects 117 (Panditharatne and Ratnam eds., 1998).
- ¹⁰ Article 1 of the ICERD defines "racial discrimination" to mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying human rights of the persons concerned.
- ¹¹ Article 2 (2) of ICERD and Article 4 (1) of CEDAW.
- ¹² 1 FDR 1 (1979).
- ¹³ *Id.* at 11-12.
- ¹⁴ *Id.* at 16.
- ¹⁵ *Id.* at 11 per Sharvananda J.
- ¹⁶ *Id.* at 16.
- ¹⁷ *Id.* at 29.

- ¹⁸ *Id.*
- ¹⁹ *Id.* at 33-34, 39.
- ²⁰ *Id.* at 6-10, 20-22. The court cited, *inter alia*, *Louisville Gas and Electric Company v. Coleman*, 72 US 770 (1928); *Sarpier v. Connelly* 28 US 923 (1885); *Dalmia' Case*, [1958] AIR 538 (SC); *State of Bombay v. Balsara*, [1951] AIR 318 (SC).
- ²¹ *Id.* at 18.
- ²² *Athukorale and Others v. Attorney-General*, Sup. Ct. S. D. No.1/97-15/97 (1997), S.C. Minute of 5 May, 1997.
- ²³ See Jayampathy Wickramaratne, Fundamental Rights in Sri Lanka 163-68 (1996).
- ²⁴ 1 FRD 103 (1980).
- ²⁵ *Id.* at 116-17.
- ²⁶ See, e.g., *Weligodapola v. Secretary, Ministry of Women's Affairs*, [1989] 2 Sri.L.R. 63 (1989); *Surendran v. University Grants Commission*, [1993] 1 Sri L.R. 344 (1993).
- ²⁷ *Supra* note 23.
- ²⁸ [1992] 1 Sri L.R. 199 (1987).
- ²⁹ 118 US 356 (1886).
- ³⁰ *Supra* note 28 at p.230.
- ³¹ [1985] 1 Sri L.R. 285 (1985).
- ³² See, e.g., *Chiranjit Lal Chowdury v. Union of India*, [1951] AIR 41 (SC); *Shastri v. Union of India*, [1964] AIR 1 (Delhi);
- ³³ See, e.g., *Bandara v. Premachandra*, [1994] 1 Sri L.R. 301 at 315 (1993); *Jayasinghe v. Attorney-General*, [1994] 2 Sri L.R. 74 at 88 (1994).
- ³⁴ Article 16 (1) of the 1978 Constitution declares that "[a]ll existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provision of this Chapter [on fundamental rights]".
- ³⁵ See Lockhart, Kamisar, Choper, Schiffman and Fallon, Constitutional Law: Cases, Comments, Questions 1226-70 (eighth edition, 1996). In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Court of Appeals invalidated an affirmative action programme implemented by the University of Texas Law School rejecting the position previously taken in the *University of California v. Bakke*, 438 US 265 (1978), that while racial quotas are unconstitu-

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- ¹ Deepika Udagama, *Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*, 11 Harvard Law Review 269 (Spring 1998).
- ² See Joseph A. L. Cooray Constitutional and Administrative Law of Sri Lanka 611 (2 edn., 1995).
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- ⁹ See Deepika Udagama, *Fundamental Rights: The Need for a Futuristic Vision*, in The Draft Constitution of Sri Lanka: Critical Aspects 117 (Panditharatne and Ratnam eds., 1998).
- ¹⁰ Article 1 of the ICERD defines “racial discrimination” to mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying human rights of the persons concerned.
- ¹¹ Article 2 (2) of ICERD and Article 4 (1) of CEDAW.
- ¹² 1 FDR 1 (1979).
- ¹³ *Id.* at 11-12.
- ¹⁴ *Id.* at 16.
- ¹⁵ *Id.* at 11 per Sharvananda J.
- ¹⁶ *Id.* at 16.
- ¹⁷ *Id.* at 29.

- ¹⁸ *Id.*
- ¹⁹ *Id.* at 33-34, 39.
- ²⁰ *Id.* at 6-10, 20-22. The court cited, *inter alia*, *Louisville Gas and Electric Company v. Coleman*, 72 US 770 (1928); *Sarpier v. Connelly* 28 US 923 (1885); *Dalmia’ Case*, [1958] AIR 538 (SC); *State of Bombay v. Balsara*, [1951] AIR 318 (SC).
- ²¹ *Id.* at 18.
- ²² *Athukorale and Others v. Attorney-General*, Sup. Ct. S. D. No. 1/97-15/97 (1997), S.C. Minute of 5 May, 1997.
- ²³ See Jayampathy Wickramaratne, Fundamental Rights in Sri Lanka 163-68 (1996).
- ²⁴ 1 FRD 103 (1980).
- ²⁵ *Id.* at 116-17.
- ²⁶ See, e.g., *Weligodapola v. Secretary, Ministry of Women’s Affairs*, [1989] 2 Sri.L.R. 63 (1989); *Surendran v. University Grants Commission*, [1993] 1 Sri L.R. 344 (1993).
- ²⁷ *Supra* note 23.
- ²⁸ [1992] 1 Sri L.R. 199 (1987).
- ²⁹ 118 US 356 (1886).
- ³⁰ *Supra* note 28 at p.230.
- ³¹ [1985] 1 Sri L.R. 285 (1985).
- ³² See, e.g., *Chiranjit Lal Chowdury v. Union of India*, [1951] AIR 41 (SC); *Shastri v. Union of India*, [1964] AIR 1 (Delhi);
- ³³ See, e.g., *Bandara v. Premachandra*, [1994] 1 Sri L.R. 301 at 315 (1993); *Jayasinghe v. Attorney-General*, [1994] 2 Sri L.R. 74 at 88 (1994).
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- ³⁵ See Lockhart, Kamisar, Choper, Schiffirin and Fallon, Constitutional Law: Cases. Comments. Questions 1226-70 (eighth edition, 1996). In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Court of Appeals invalidated an affirmative action programme implemented by the University of Texas Law School rejecting the position previously taken in the *University of California v. Bakke*, 438 US 265 (1978), that while racial quotas are unconstitu-

tional race could nonetheless be taken as a factor in university admissions. The Court of Appeal in *Hopwood* was of the opinion that race cannot be taken as a factor. The US Supreme Court refused to review *Hopwood* as the University Texas Law School had by then withdrawn the impugned affirmative action programme.

³⁶ Article 15 (4) of the Constitution of India (introduced by the First Amendment Act, 1951).

³⁷ *Id.* Article 16 (4).

³⁸ Article 9 (2) of the Constitution of the Republic of South Africa, 1996.

³⁹ See *supra* Part I.

⁴⁰ [1978-79-80] 1 Sri L.R. 182 (1980).

⁴¹ *Id.* at 213-14.

⁴² *Id.* at 219.

⁴³ [1973] AIR 1461 (SC).

⁴⁴ [1976] AIR 490 (SC).

⁴⁵ *Supra* note 40 at 216.

⁴⁶ Justice S. Sharvananda, Fundamental Rights in Sri Lanka: A Commentary 103-07 (1993).

⁴⁷ Wickramaratne, *supra* note 23 at 226-27.

⁴⁸ See *Ramupillai v. Minister of Public Administration*, *infra* note 49, Fernando J.'s judgment.

⁴⁹ [1991] 1 Sri L.R. 11 (1991).

⁵⁰ *Id.* at 69-72.

⁵¹ [1974] AIR 555 (SC).

⁵² *Id.* at 583.

⁵³ [1978] AIR 597 (SC).

⁵⁴ [1979] AIR 1628 (SC).

⁵⁵ [1981] AIR 487 (SC).

⁵⁶ *Id.* at 498.

⁵⁷ [1985] 1 Sri L.R. 285 (1985).

⁵⁸ *Id.* at 303-05.

⁵⁹ Wickramaratne, *supra* note 23 at 203-04.

⁶⁰ *Elmore Perera*, *Supra* note 57 at 323.

⁶¹ *Id.* at 339.

⁶² *Bandara v. Premachandra*, [1994] 1 Sri L.R. 301 (1993).

⁶³ *Id.* at 310-11.

⁶⁴ *Id.* at 312.

⁶⁵ *Id.* at 317.

⁶⁶ *Jayasinghe v. Attorney-General*, [1994] 2 Sri L.R. 74 at 86 (1994).

⁶⁷ *Id.* at 88.

⁶⁸ [1996] 1 Sri L.R. 315 (1996).

⁶⁹ [1985] 1 Sri L.R. 285 (1985).

⁷⁰ *Supra* note 68 at 324-25.

⁷¹ *Tennakoon v. Piyadigama*, [1996] 1 Sri L.R. 341 (1995); *Priyangani v. Nanayakkara*, [1996] 1 Sri L.R. 399 (1996); *Samarasinghe v. Air Lanka Ltd.*, [1996] 1 Sri L.R. 259 (1994); *Tennakoon v. De Silva*, [1997] 1 Sri L.R. 16 (1996); *Pinnawala v. Sri Lanka Insurance Corpn.*, [1997] 3 Sri L.R. 85 (1997).

⁷² See *supra* authority cited at note 1 at 289.

⁷³ Sup. Ct. S.D. No. 1/97- 15/97 (1997), S.C. Minute of 5 May, 1997.

⁷⁴ S. C. Application No. (FR) 867/96 (1998), S.C. minute of 11 June, 1998.

⁷⁵ Article 33 of the Constitution of the Republic of South Africa, 1996 declares:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal,

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

⁷⁶ Article 8 (2) of the Constitution of the Republic of South Africa, 1996, extends the application of the constitutional Bill of Rights to natural or juristic persons, depending on the nature of the right and the duty imposed by the right.

⁷⁷ Set up under the Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁷⁸ Article 1 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) of 10 December, 1948.