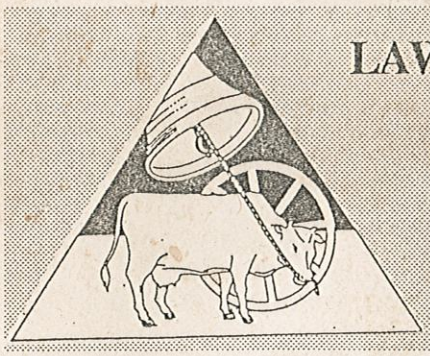

LAW AND SOCIETY TRUST

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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events of legal interest and personalities associated with the Trust.

With this double issue the Fortnightly Review completes its first year of publication. This issue will deal with the complex and elusive quest for equality in plural societies with reference to recent constitutional experiences in Sri Lanka, India and the United States.

Special Issue

The Quest for Equality:

Equity in Employment

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The Reluctant Dragon
The State and Minority Issues

By Radhika Coomaraswamy

Ramupillai vs Festus Perera et al (SC. Application No. 49/90) is an illustration of the anomaly which results when the facts of a given case are at variance with the reality envisioned by the drafters of an executive decree. This tension between the facts of a specific case and the drafter's intention is often a healthy tension in the law for it allows for flexibility in dealing with individual cases while pointing to the flaws in the drafting of legislation and executive circulars.

The drafters of Public Administration Circular No. 15/90, envisioned a reality where after years of ethnic conflict, the Sri Lankan Tamil intake into the public sector had diminished to well below 3% [1] – their representation in the population being 13% . In addition, the Muslims and Indian Tamils have been requesting ethnic percentages with regard to admission into University and employment in the public sector. The circular framed in the broadest possible terms

a) applied to <u>all</u> appointments and promotions at all levels of the public sector – to be construed in the widest possible terms
b) Ethnic quotas in terms of 75% Sinhalese, 12.7% Tamils, 5.5% persons of Indian origin and 8% Muslim were to be applied in all the above appointments and promotions.

The facts of the case, on the other hand, defied that envisioned reality at least in the case of promotions within the Customs Department. The petitioner applied for the post of Superintendent of Customs for which there were 22 vacancies and 53 applicants. If the circular was to be applied 19 Sinhala officers and 3 Tamil officers would be appointed. The petitioner claimed that he was the tenth officer in order of seniority and the 5th Tamil officer. If merit was the criteria, he would most probably get the promotion; but under the new circular, his chances were extremely slim.

The facts of the individual case clearly point to the relief that was awarded by the Court in terms of an individual right to equal protection. One cannot really quarrel with the holding of the Supreme Court. At the same time, the need to remedy ethnic imbalance in the State sectors especially at the level of intake remains a serious problem. Some may argue that the two positions cannot be reconciled. As in the case of standardization of University admission with its opposite impulse of trying to increase majority Sinhalese intake and restrict Sri Lankan Tamil admission, a quota system per se is seen by some to be inconsistent with the Equal Protection Clause of the Constitution. The U.S. Supreme Court came to the same conclusion in *Regents of University of California v Bakke*, 1978 (438 US 265) and the ensuring line of cases. In India the situation is different because the Constitution itself spells out the groups that should receive preferential treatment.

A quota system in any Constitutional regime which respects equal protection is problematic enough but the drafters of Public Administration Circular No. 15/9 made a difficult task next to impossible and appear to have little sensitivity to constitutional issues with regard to equal protection.

1) Firstly, it is easy to argue that there is a distinction between appointment and promotion. The former will determine the "ethnic nature" of the State sector; the latter its efficiency. It may well be argued that if there is inadequate minority representation in the state sector as a whole, the state may be accused of systematic discrimination resulting from structural inequality. Under international human rights norms, such allegations have already been made. But, promotions are a different set of issues

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[1] These were the figures for 1980 given in parliament by the Leader of the Opposition during the 1980 budget debate. See also Census of Public and Corporation Sector Employment, 1980 Table 5 of Public Sector Employees by major Occupational Group and Race.

and very few countries have ethnic quotas in that sphere, for to do so would be to strike at the efficiency of the system as a whole. By lumping together both appointments and promotions, the drafters made the circular easily challengeable under the equal protection clause.

2) Secondly, the defense of the circular in the court of law was not supported by statistical data. As the Court argues, quota systems are extreme measures and, to be justified in any way, the legal argument had to be supported by empirical evidence which shows systematic discrimination. At the very least statistics with regard to intake of minorities into the State sector since 1947, especially in the last two decades should have been produced. Without such an empirical base, no court can be expected to uphold the constitutional validity of ethnic quotas. The only material furnished by the respondent was an affidavit of the Secretary, Ministry of Public Administration stating a basic political argument that this was done to assuage certain "perceptions" among minority communities. The Court correctly states "perception is not enough". Is this perception or is it fact? – the public too has the right to know."

In retrospect one could argue that the State drafted a circular which was both broad and vague and went to court without the empirical evidence to support its claim. And so, the Reluctant Dragon... The state's presentation both in terms of the wording of the circular and its argument in court as reflected in the judgement clearly raise the issue as to whether minority rights, or any other form of rights, can be vindicated by state organs. and whether arguments for rights protection have to be put forward instead by powerful civil liberties organizations as in the U.S. and in India. The Seventeenth Amendment may provide for such opportunities in the future.

In reviewing the Supreme Court judgement, one must also point to areas where the Court did not pass judgement; areas available for future legislation/litigation in this field of equal protection.

a) if there is evidence of historic discrimination, even in terms perhaps of language policy, affirmative action may be considered;

b) where there is "reasonable" classification in relation to a legitimate object supported by empirical fact – (ie, a narrow, clear policy with identifiable targets) and necessary proof, affirmative action may be considered

c) Affirmative action or preferential consideration may be more easily upheld than inflexible quotas.

In some sense the Court does not close the door for affirmative action; it requires that such action be better targeted and the need for such action be supported by empirical evidence. In addition it requires that more flexible strategies be employed to achieve the same ends.

However, there is one area of this judgement which may prove a problem for minority rights litigation. The court states that Sri Lankan law does not recognize "race" or "ethnicity" and therefore classification on that ground would be invalid. However, despite this, the Court does not pass judgement on a classification based on language or religion. If that is the case then Ceylon Tamils and Tamils of Indian Origin who speak Tamil will be seen as a linguistic group, and the Moors and Malays as one religious grouping. Given the serious differences within the communities, this classification may pose serious problems in the future.

Towards a Pragmatic Approach

Three decades of experience with quotas and other such measures in India, the US, Malaysia and Sri Lanka can only point to the fact that broad, general attempts at quotas and other inflexible, measures, unlimited by time cause unnecessary damage and dislocation. And yet, it is also important in any democracy that the State sector fully represent all communities that it attempts to serve if the interests of the whole country are to be protected. In such a context one may point to a principle outlined in the Youth Commission Report which may be useful in trying to rectify ethnic as well as class and regional imbalances in the state sector. With regard to recruitment, the Report states:

"advertence 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." (p 6-7)

This type of flexible principle which recognises the need for remedy, but does not endorse special rights may be the pragmatic compromise toward which we should work in the area of ethnic imbalance and ethnic representation.

SUPREME COURT VETOES ETHNIC QUOTAS

Ramupillai v Festus Perera

Supreme Court Application No 49 of 1990
Argued on 7, 8, 9 November 1990
Decided on 7 January 1991

By Mario Gomez

A Sri Lankan government experiment at solving its ethnic problem received a setback recently, when the highest court in the country struck down the exercise as being unconstitutional. The unanimous view of the Supreme Court was that, the use of quotas, based on ethnic grounds, with regard to promotions within the public service, violated the equality provisions of the constitution.

The issue came up before the court when a customs officer belonging to the minority Tamil community, complained that his chances of promotion were slimmer if ethnic quotas were applied, than if they were not. The Court upheld his argument and directed that promotions in the customs service be made without reference to ethnic criteria.

The Court argued that individual rights could not be sacrificed merely because a citizen's rights as a group were upheld. The Court further reasoned, after a survey of local and foreign authorities, that the state had failed to produce evidence of pervasive and widespread discrimination and had thereby failed to justify the introduction of a scheme of recruitment and promotions, based on ethnic quotas.

The case is important for several reasons. First, it deals with the circumstances in which a deviation from the principle of equality is permissible, on grounds of ethnicity. This issue is additionally important since the court was called upon to assess the validity of quotas; different in form and substance from conventional programmes of affirmative action.

The case is also important in its attempt to sketch the scope and ambit of Article 12 of the Constitution of Sri Lanka. The scope that is laid down is broader than that previously sketched, by the Supreme Court.

The judgement also highlights the growing political role the Supreme Court is being called upon to play. The links between politics and judicial decision making have seldom been highlighted in our judicial discourse. However in the area of public law courts are inevitably drawn into deciding 'political' questions. The Sri Lankan appellate courts have always had to deal with political issues. But the political content of judicial decision making has become more apparent after the adoption of the Second Republican Constitution.

The judgement is important for a further reason. The case was argued before a 7 judge bench since it raised issues of fundamental importance. Judgements of varying lengths were delivered by five of the judges: Chief Justice Ranasinghe, Justice Mark Fernando, Justice Tambiah, Justice Jameel and Justice G P S de Silva. Justices

Dheeraratne and Ramanathan agreed with the views laid down in Justice Fernando's judgement. Justices Fernando, Ranasinghe and Tambiah delivered fairly lengthy judgements. Justice Jameel in a short judgement dealt primarily with the definition of a Muslim. Justice de Silva agreed with the arguments of Justice Mark Fernando, but added a few comments of his own.

Of the three primary judgements, that delivered by Justice Mark Fernando is undoubtedly the most cogently reasoned. The judgement is important also because of the style it is written in – reminiscent of Llewellyn's 'grand style'; and its almost total rejection of Sri Lankan caselaw on the subject, despite an abundance. Juxtaposed besides the Chief Justice's judgement – who cites extensively Sri Lankan authorities and writes in the traditional style – it affords a healthy contrast. One hopes that this remarkable piece of judicial writing (despite its flaws) is an indication of the sort of literature to come from the court in the future.

The Court has in the last two years undergone a transformation of sorts. There is evidence that the court is in the process of devising a new approach to human rights jurisprudence in this country. This case is also illustrative of this trend.

Judges possess the unique ability of taking controversial political issues, setting them in fundamental constitutional values, and then extracting from these issues a lot of the controversy which surrounds them. In this case the Supreme Court takes the issue of ethnic quotas, assesses it against the universally accepted criterion of equality, and then reasons that it fails the test.

Courts posses the ability to 'de-politicize' crucial political issues. This is often done – in the area of constitutional law – by invoking constitutional doctrines and values. In the field of administrative law it is often done by the use of other widely accepted judicial doctrines, like the rules of natural justice and reasonableness.

Ramupillai v Festus Perera shows us how the Supreme Court has undertaken an attempt at de-politicisation in relation to ethnic quotas.

The Backdrop

Sri Lanka has been wracked by ethnic conflict for several decades. Tensions between its two principal communities have torn apart its social fabric. Relations between the two major ethnic communities – the Sinhalese and the Tamils – have been progressively deteriorating since independence. The process of polarisation accelerated considerably in the eighties, with unprecedented anti Tamil riots in 1983. Currently there is raging a civil war in the Northern and Eastern parts of the country, and a de facto division of sorts exists, between the Tamil populated areas and the Sinhala populated areas.

The conflict descended into a spiral of violence in the seventies. A secessionist movement emerged, with the objective of carving a separate Tamil state in the Northern and Eastern parts of the country. The violence has continued since then, extracting enormous costs – both in monetary and human terms. In 1987, the governments of Rajiv Gandhi and Junius Jayewardene, signed an accord, by which India undertook to disarm the separatists and the Sri Lankan government undertook to give Tamil areas some sort of autonomy. A quasi-federal system was introduced as a result, but the Accord failed in weaning the separatists from violence. (See Premdas and Samarasinghe)

The ethnic conflict has affected significantly, Sri Lanka's economy. Tourism – a major foreign exchange earner – has suffered considerably. Defence expenditure has ballooned, from 4 per cent of the national budget in the mid seventies, to 17 per cent 10 years later. (Premdas and Samarasinghe, 677).

Charges of discrimination, have been hurled from both sides of the ethnic fence. The Sinhalese contend that the Tamils wielded a disproportionate amount of public power when Sri Lanka was known as Ceylon and a British colony. It is argued by the Sinhalese that this was part of a deliberate policy on the part of the British to 'divide and rule'. A consequence of this policy was a disproportionate number of public service appointments, disproportionate that is to their population ratio, was held by the Tamils at the time of independence. It is also

alleged that educational and other facilities in the Northern province, which is almost 90 per cent Tamil, were at a better stage of development than other predominantly Sinhalese areas, at the time of independence.

From the Tamils come allegations that there has been a consistent policy of discrimination by Sinhalese dominated governments since independence. Few government resources have been channelled into areas where Tamils reside, and they have been discriminated against with regard to the use of the Tamil language, educational opportunities, and access to public service jobs.

In 1956, the government of Solomon Bandaranaike – former secretary of the Oxford Union – swept into power on a platform that had as its cornerstones the widespread use of the Sinhala language and the 'enthronement' of Buddhism. From then on there has been a steady decline in relations between the two communities. In the seventies, Bandaranaike's wife, Sirima, introduced a policy of 'standardisation', with regard to university admissions. The policy attempted to regulate, on ethnic criteria, admissions to tertiary institutions. This policy evoked streams of protest from the Tamils, who saw in tertiary education, a fairly established avenue of social mobility and prestige.

Other activities like government sponsored colonisation programmes in the Northern and Eastern provinces, which have sought to alter the demographic composition of those provinces, have also exacerbated tensions.

Tamils are found primarily in the Northern and Eastern provinces of the country, and the Sinhalese dominate in the rest of the regions. A small pocket of Tamils, of more recent Indian origin, are found in the tea plantations, in the central highlands. In the Northern province Tamils constitute around 90 per cent of the population. In the Eastern province, the figure is around 30 per cent, with the Sinhalese and the Muslims also constituting about 30 per cent each. In the rest of the country, except the central highlands, the Sinhalese dominate.

Ethnicity and Litigation

Ethnicity, language rights and the rights of minorities, have not been the subject of litigation as often as one might have expected, given the plural composition of Sri Lankan society. Sri Lankan minorities, especially the Tamil minority, do not seem to have viewed litigation as holding out an effective remedy for their perceived grievances. Despite a growing 'ethnic problem' since independence, and an increasing polarisation of the two principal races in the country, a 'legal' or 'judicial' resolution of ethnic grievances has seldom been sought.

As de Silva notes

> The strategy of the political leaders of the Tamil community, which was the only significant vocal group, was in the main directed at securing greater representation in the legislature and the leadership does not appear to have had much faith in legal safeguards for the protection of these rights and interests. [p 86]

This disillusionment with the judicial process can be traced to the attitudes of the courts soon after independence. Several issues of fundamental constitutional importance surfaced, including those relating to minority rights, but courts tended to bypass them deciding these cases on narrow technical issues. The central questions were often addressed only superficially, if at all, the conclusions being based on technical and 'legalistic' reasoning.

This tendency of the Sri Lankan courts – to decide crucial issues relating to the social and political life of the country on technical grounds – does not seem to have been abandoned. Two judgements in the present case – those of Chief Justice Ranasinghe and Justice Tambiah – demonstrate a similar tendency.

In the cases of *Kodakan Pillai v Mudanayake* and *Mudanayake v Sivagnanasunderam* the validity of two acts of Parliament were challenged. The Citizenship Act and the Ceylon (Parliamentary Elections) Amendment Act were challenged on the ground that they violated section 29 of the then Soulbury Constitution. The cumulative effect of these Acts were to disenfranchise a large number of Tamils of recent Indian origin.

Section 29 of the previous constitution provided that Parliament should not make any law which either conferred a privilege or imposed a disability on any person from any community or religion, which was not conferred or imposed on persons of other communities or religions.

In a later case, *Bribery Commissioner v Ranasinghe*, Lord Pearce made the now oft quoted comment, that section 29 represented

> the solemn balance of rights between citizens of Ceylon, the fundamental condition on which *inter se* they accepted the Constitution and these are unalterable under the Constitution.

The Supreme Court in *Mudanayake*, rejected the contention that the statutes conflicted with Section 29 and refused to consider the social and political impact of the legislation or their motives.

On appeal (reported as *Kodakan Pillai v Mudanayake*) the Privy Council held with the Supreme Court that the legislation did not make persons of the Indian Tamil community subject to disabilities other communities were not subject to. The court held that it will not be 'astute' to attribute to Parliament objects or motives which are beyond its power. The petitioner had failed to show conclusively that the legislature had done an act indirectly, which it had no power to do directly.

de Silva notes

> *the rather restrictive view taken (in these cases) as to the efficacy of section 29 as a safeguard of minority interests appears to have demoralised minority groups to such an extent that they were discouraged from carrying on any further agitation before any judicial forum for many years thereafter. Had those decisions gone the other way, the political history of modern Sri Lanka would in all probability have been quite different.* [p 87]

In a subsequent case the courts took an even more technical approach with regard to minority rights. In *Attorney General v Kodeswaran* a government officer challenged the validity of a government circular. The circular was issued as a consequence of the Official Languages Act - which made Sinhala, the language of the majority community - the sole official language. The circular made it imperative that the officer, a Tamil, acquire a proficiency in Sinhala. The circular was challenged on the ground that it violated Section 29 of the Constitution.

The District Court upheld the plaintiff's contention. In the Supreme Court however Chief Justice H N G Fernando (father of current justice Mark Fernando) together with G P A de Silva, set aside the lower court's judgement on the ground that the plaintiff had no legal right which could be made the subject of a declaration. The major issues - the validity of the Official Languages Act and the circular were not addressed.

On appeal (reported as *Kodeswaran v Attorney General)*, the Privy Council too by passed the major issue. The decision of the Supreme Court was reversed, on very narrow grounds.

In two other recent cases, the issue of language rights came up before the courts. In *Coomaraswamy v Shanmugaratna Iyar* the petitioner succeeded in his argument that his language rights were violated.

Here in an ejectment action filed in the District Court of Colombo, the defendant sought to file his answer in Tamil, with a copy in English. This was rejected by the Additional District Magistrate, before whom the matter came up, and the defendant was directed to file an answer in Sinhala.

In the Supreme Court it was held that the defendant had a constitutional right to file an answer in Tamil and the judge erred when he asked for a Sinhala translation. It was the obligation of the state to provide a Sinhala translation.

In another recent case the petitioner was not so successful. In *Adipathan v Attorney General* the petitioner had received a cheque from the Employee's Provident Fund in Sinhala. His argument was that he had a right to

receive the cheque in Tamil. The Supreme Court rejected his argument and held that although the petitioner may have a right under the ordinary laws of the land, he does not have a constitutional right in this regard.

Undoubtedly the most significant decision with regard to ethnic relations was the Thirteenth Amendment Case (Reported as *In re the Thirteenth Amendment*), where the validity of the Indo-Lanka Accord was in issue. Here a slim majority of the Supreme Court held that the Thirteenth Amendment to the Constitution did not require the approval of the people at a referendum. A two thirds majority in Parliament would suffice. It was highly improbable, that given the state of public opinion at that time, a referendum on the issue would have succeeded.

Ethnic Quotas

In March 1990, a circular was issued by the Ministry of Public Administration, that all further recruitment to, and promotions within, the public service, should be according to ethnic ratios. The circular was issued pursuant to a Cabinet decision to this effect. This was part of a larger policy decision that quotas based on ethnicity would apply in as many areas as possible in the public life of the country. A recent government notice (after the case was decided) calling for applications for graduate scholarships tenable in India, stated that applicants would be selected according to their ethnic background.

This circular was to be applicable at national, provincial and district level and also with regard to government controlled companies, government owned business undertakings and universities. Universities are funded almost entirely by the state in Sri Lanka. In terms of the circular then, henceforth, recruitments and promotions were to be according to a person's ethnic background. Merit and seniority would operate as secondary criteria, applying **within** the boundaries of one's ethnic group.

The ethnic ratios were stated at 75 per cent for the Sinhalese, 12.7 per cent for the Tamils, 5.5 per cent for persons of Indian origin and 8 per cent for Muslims. The circular also permitted a deviation of 2 per cent either way in cases where there were difficulties in determining exact numbers. Within these ratios, appointments and promotions would be based on merit.

The Argument of the Petitioner

The petitioner was a Tamil and Superintendent in the Department of Customs. In March 1990 there was a internal notice calling for applications to fill vacancies in the grade of Assistant Director of Customs. According to the petitioner there were 22 vacancies and had the circular regarding ethnic ratios been applied, 19 Sinhalese and 3 Tamils would have been appointed. There were no Muslim applicants.

Prior to this circular, the criteria for promotion in the Customs Department had been seniority and merit. The new circular sought to add to these criteria a person's ethnic category as well.

The petitioner argued that overall he was tenth in order of seniority. However if the ethnic quota was applied he would be only fifth among the Tamils. He argued that under the old scheme of promotion there was a great possibility of his being promoted, and he would be overlooked only if thirteen other officers were considered as being more deserving on the ground of merit. Under the new circular his chances of promotion were much less since he would be competing for only 3 places.

The petitioner did not claim a fundamental right to be promoted, but rather a right to be **considered** for promotion. The new circular he argued entailed a violation of his rights to equal treatment guaranteed under Article 12 of the constitution.

The only relevant criteria that should be taken into account he argued, were seniority and merit. Taking into account race and ethnicity abridged his rights of equal opportunity.

The Arguments of the State

The arguments of the state were based on the notion that ethnic quotas would act as a bulwark against future discrimination. In an atmosphere where charges of discrimination emanated from both major ethnic groups, quotas would be an effective means of ensuring that a policy of non discrimination was followed with regard to recruitments and promotions within the public service.

The Attorney General took the argument that ethnic quotas

> *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.*

In a badly drafted affidavit, the state made out the argument that one of the causes of recent violence in the country was the '**perception** among minority communities and other disadvantageous (sic) groups' that they had been denied access to and within the public service.

The affidavit further argued that a 'permanent and lasting solution' was needed to deal with the manifestations of violations, that this involved ensuring that members of all communities had equality of opportunity with regard to the public service. Quotas based on ethnicity were a method of ensuring that every citizen had a fair chance of entering and rising in the public service and was the 'most reasonable criteria' among several others.

This argument was pressed further in the Attorney General's oral submissions. The argument taken by the state (as contained in Justice Fernando's judgement) was that if all citizens had equal access to 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 as a whole, it would reflect national ethnic proportions. It was further argued that if national proportions were not reflected, then this was proof of discrimination with regard to recruitment or promotion. In such a situation the imposition of ethnic quotas would remedy an existing injustice.

However if the national ratios were reflected, then that implied that there was no discrimination and the imposition of quotas would not harm anyone. In an atmosphere free of discrimination, the public sector's composition should be proportionate to the population ratios of the ethnic groups.

The argument then is that so long as the group, statistically considered, is represented according to its national, provincial or district population ratios (as the case may be), the constitutional right to equality is not violated. The merit principle could be departed from in individual cases, so long as such a departure results in non discrimination with regard to the group considered as a whole. This approach, Justice Fernando argued, would mean that Article 12 could require equal treatment of groups at the expense of individuals.

The arguments of the state were based on the notion that quotas in fact entrench and emphasise the concept of equality. The Attorney General also submitted that there had been complaints at several times that recruitment in the Public Service was unfair to the majority or the minority. Hence this scheme based on quotas would ensure that members of all ethnic groups have a 'fair chance of being recruited' [P 8 of Justice Tambiah's judgement].

What the Court said

Justice Mark Fernando dealt extensively with the notion of equality as laid down in Article 12 and the circumstances in which a departure from this principle may be permitted.

He relied extensively on Justice Marshall's minority judgement in *Regents of University of California v Bakke*. In *Bakke*, a white medical student challenged the validity of the university's admission policy which reserved 100 places for black minority students. The Supreme Court of the United States in a 5–4 verdict, declared the admissions policy illegal. However the Court declared that race may be a factor in devising an admissions policy.

Justice Fernando also cited five other US judgements which he argued were more in line with the minority decision in *Bakke*. In *Bakke*, Justice Marshall surveyed exhaustively the history of the American black minority. He concluded 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, ... ; race conscious remedial action was therefore permissible.* [p 7 of Justice Fernando's judgement]

Justice Fernando also referred to *Seneviratne v University Grants Commission*, where the Sri Lankan Supreme Court had upheld the validity of the state's university admissions policy. Under this policy of admissions quotas were allocated for each district in the country. Other districts, classified as 'underprivileged' were given additional concessions.

The policy was upheld on the ground that there was evidence of past discrimination with regard to the development of educational facilities. As a result of state policy, educational facilities in certain areas of the country were far ahead of those in other parts. Students, in competing for limited university places, did not compete on equal terms. Thus the admissions scheme – which attempted to take into account the disparity in educational facilities – did not violate the equality provisions of the constitution.

After a survey of the six US authorities, *Seneviratne* and two Indian authorities, Justice Fernando concluded that

> *preferential treatment was upheld only upon satisfactory proof of past discrimination or present disadvantage; mere perceptions have not been considered sufficient.* [p 11]

Justice Fernando then argued that the Sri Lankan government had failed to produce evidence that met the above test, and this failure was fatal. The state had failed to provide substantial evidence to show a history of past discrimination as regards the Tamils and hence the scheme of quotas was invalid. In *Seneviratne*, the University Grants Commission, was able to produce in a very short timeframe, a substantial body of material to justify the scheme.

In this case the only material produced by the respondents, the Ministry of Public Administration, Provincial Councils and Home Affairs, was an affidavit.

To Justice Fernando, the arguments contained in the affidavit were inadequate. Firstly, the affidavit did not identify which minority groups had a 'perception' of discrimination. Nor did the material produced by the Attorney General, who argued the case for the state, show that the use of ethnic quotas will result in the removal of the 'root causes' of discrimination.

Justice Fernando cited extensively from the Report of the Presidential Commission on Youth Unrest. This report had been cited also by the Attorney General to support the arguments of the state. Justice Fernando, after referring extensively to extracts from the report, argued that there was no material in that document to support the imposition of ethnic quotas.

Instead the Commission in its report had referred to grievances and discrimination as a result of the abuse of political power, political victimisation, and with regard to educational and language policies. Ethnic quotas with regard to university admissions for Muslims were considered by the Commission, but rejected.

The individual v group rights argument was resolved in favour of the individual by Justice Fernando. The state had made out the argument that if an ethnic group was represented in the public service in proportion to its national (provincial or district) population ratios, then there is no discrimination. And that, that was what the system of quotas sought to do – to ensure that each ethnic group was represented according to its population ratios.

Justice Fernando categorically rejected this argument. He argued that Article 12 of the constitution did not permit an infringement of the fundamental rights of an individual on the ground that his or her rights as a

'group' were not violated. The article did not permit an equal treatment of groups at the expense of individuals.

Justice Fernando added

> *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.* [p 16]

He argued that it is the individual who is the prime repository of the fundamental rights contained in article 12 and the individual's rights could not be overlooked by the equal treatment of his or her group.

At the core of Justice Fernando's reasoning is the notion of 'inequality'. Proof of inequality would justify departing from the merit principle. Inequality would be according to his Lordship, a *sine quo non* for any deviation from the principle of merit. In the absence of such proved inequality, such a departure is not permissible. 'Perceptions' of inequality are not sufficient, unequal treatment 'must be objectively established to the satisfaction of the Court, by evidence, or by relevant findings of other competent bodies.' [p 18]

Justice Fernando further reasoned that there were certain practicalities which arose if one took the line advocated by the state. For example is Article 12(3) violated if a person is denied access to places or institutions mentioned therein, or would it depend on a statistical comparison of the denial of access to the group to which he or she belongs, *vis a vis* other groups? How would such an approach apply to Article 11 for instance? [p 16]

Chief Justice Ranasinghe (in a legalistic discourse) after an extensive citing of several Sri Lankan, Indian and US authorities argued that the application of quotas to the facts of the present case are violative of the equality provisions of Article 12. Officers of the customs service, at the point of recruitment were integrated into one class and he took the position that 'there should not ordinarily be any further classification, as amongst them '. The absence of any past discrimination within the service, or any other imbalance was also a factor for the Chief Justice.

However he refused to impugn the entire circular on the grounds that it violated Article 12. After an extensive reliance on precedent, he reasoned that 'the authorities do seem to recognise the existence of certain circumstances in which classification based upon ethnic grounds could be considered permissible'. [p 19] He refused also to comment on whether the application of the quotas based on race at the point of recruitment, would be violative of Article 12, leaving that for a time when the matter arises directly before the court.

Justice Tambiah too adopted the 'class' argument. After citing extensively Indian and Sri Lankan authorities, he argued that superintendents of the Customs Service form a single class and that within that class there cannot be unequal treatment. They should all have equality of opportunity, irrespective of race, caste or religion.

He also took the approach taken by Justice Fernando in arguing that the right guaranteed in Article 12 is a 'personal right of any person, qua person, and not as belonging to a particular community.' [p 16]

That the Presidential Commission of Youth had made no recommendation for the adoption of national ethnic ratios in the area of education, was also referred to in Justice Tambiah's judgement.

Justice de Silva agreed with the reasoning and conclusions contained in Justice Fernando's decision. In addition to this he also made out the 'class' argument. That customs officers were members of a single class and that their promotion cannot now be regulated on a new criterion based on race. However the argument that officers of the Customs are all of a single class and therefore discrimination is not permissible within this class was not an argument taken by Justice Fernando.

Given that three judges agreed with Justice Fernando – Justices Ramanathan, Dheeraratne and de Silva – it could be argued that the reasoning contained in that judgement, should be looked upon as containing the ratio

of the case. However Justice Fernando too, preferred to leave the validity of the circular to other situations, for another time.

Affirmative Action and Ethnic Quotas

Race related criteria have been upheld in several jurisdictions. Most notably in the United States and India. They have been used most often, though not exclusively, in the areas of employment and education. In India the constitution mandates the use of special criteria for underprivileged castes and classes. [Article 16] In the United States several programmes of affirmative action for blacks have been justified as being lawful. [Erstling]

The rationale for these programmes is unexceptional, at least in the short term. Here are groups of people, who have either been subject to a process of conscious and deliberate discrimination; or for some other reason, been deprived of access to jobs and other resources. There is substantial evidence to show that the present plight or position of these groups of people is related to a lack of opportunity and access in the past. A clear nexus between present disadvantage and past discrimination can be established. As a result a system of preferential treatment is justified.

Programmes of affirmative action are designed to give or confer upon a group, a privilege or benefit not conferred on other groups. The justification for the privilege or benefit is that these groups have been the subject of disabilities in the past, and benefits of some sort need to be offered if they are to be placed on an equal plane.

The current system of university admissions in Sri Lanka is based on this principle. The present system of admissions has special quotas for each district in proportion to its total population and has additionally, quotas for districts identified as being 'underprivileged'. The scheme was given the stamp of legality in *Seneviratne v UGC*. The court here accepted the argument that educational facilities in the country were of varying standards. Because of the disparity in educational facilities, unequal treatment with regard to admissions was permitted.

The quotas that the Indian government of V P Singh sought to impose, based on the recommendations of the Mandal Commission, were also based on the principle of historical discrimination. [Nesiah]

Programmes of affirmative action or reverse discrimination, are in a way then a sort of 'compensation'. Compensation for a period of disability. Compensation is sought to be offered for historical discrimination suffered by a majority (as in the case of Malaysia) or a minority (as in the case of India and the US). Compensation in the form of easier access to jobs and other resources and positions. A compensation that takes the form of different criteria for the discriminated group in relation to vital issues of public life. Compensation however of a temporary nature.

They are, as Yale academic Days notes in relation to the US context

> *interim measures to bring an institution to the point where society can regard it as capable of acting in a colorblind and non discriminatory fashion.* [p 114]

The limited duration of these programmes and the fact that they confer a benefit or privilege not conferred on other groups, are the primary features of programmes of affirmative action.

Ethnic quotas however are of a different tenor. Ethnic quotas are not only (if they are at all) a form of 'compensation' for past discrimination. Rather they are an effort at 'guaranteeing' against future discrimination. They are not geared solely at placing a hitherto disadvantaged group on an equal plane with the privileged group. Instead they are more directed at preventing discrimination in the future. At ensuring that, in the future, access to public resources and positions are distributed 'equitably' to the members of all communities.

Equity in the case of quotas, is satisfied if the members of the different ethnic groups have access to public resources and positions in proportion to their national population ratios.

Quotas are then a guarantee against future discrimination. Affirmative action programmes are designed to remedy past discrimination. However both function at the expense of the equality principle.

In the case of quotas classifications based on race are being used, not merely to give preferential treatment to a historically discriminated group. Rather a classification based on race is being used to prevent discrimination in the future.

Ethnic quotas are also different in nature, with regard to duration. The quotas imply programmes that will apply for a considerable period of time. The Ministry of Public Administration in its affidavit refers to the need to evolve a 'permanent and lasting solution'. And so long as quotas obtained the sanction of the ruling elite, and did not evince a hostile response from the public, it is likely that they would have – if they had not been struck down by the Court – been in force for a considerable period of time.

Further unlike programmes of affirmative action, quotas are not directed at one particular community. They are aimed at securing representation from across the ethnic spectrum. Representation in proportion to each group's national population ratio.

Affirmative action programmes are aimed at removing all barriers with regard to the disadvantaged group, and at making the theoretical concept of equality, a living reality. It endorses the proposition that all individuals should be treated on the 'basis of personal merit alone', rather than on grounds of race, ethnicity or sex. [Erstling: 115] Once the barriers are all dismantled and equality becomes a real notion, affirmative programmes have no justification. The 'laws of nature' then take over and merit becomes the sole criterion.

Quotas on the other hand take the view that the 'laws of nature' need to be tampered with. That merit as the sole criterion can only be an ideal. That in a multi ethnic society with generations of acrimony and tensions between the two principal ethnic groups, merit will never be the sole criterion. That equality may exist as an abstract theory, but in reality the picture is different. That people are inevitably drawn towards members of their own ethnic background.

The logic with regard to conventional programmes of affirmative action is clear. Where there is clear proof of past discrimination, then a programme of affirmative action, for a specified period, would be a logical and equitable course of action. This is based on the principle that unequals need to be treated unequally.

The logic with regard to ethnic quotas is less clear. The argument of quotas rests less on logic, than on history and sociology. Proponents of quotas will argue that personal merit fares well at the theoretical level. Translated into the practicalities of recruitment, promotions, university admissions and related matters, it does not perform so well. That the plural composition of a society and its history of ethnic relations are relevant factors and need to be taken into account.

Does treatment according to the national proportions of your ethnic or racial group guarantee equity or equality? Ethnic quotas are based on the assumption that treating ethnic groups according to their population distribution, should produce equality. However as the facts of the present case show, this is not always true.

The major link between quotas and affirmative action is that they both use race or ethnicity as a criterion for departing from the equality principle. Apart from this their objectives differ widely. So do their timeframes. There could however be an overlapping of motivations – as was argued by the state in this case. The state argued that one of the reasons for the introduction of quotas were perceptions of discrimination by the minority Tamils. Such a factor may also motivate a programme of affirmative action. But apart form these two links, quotas and programmes of affirmative action stand on different terrains.

This difference, between the nature of affirmative action programmes and ethnic quotas was unfortunately, not brought out in any of the three major judgements in the case. The justices tended to treat the question of quotas, in the same manner they have previously, addressed questions of affirmative action. The analogies and comparisons that were made, were made with cases that had dealt with affirmative action programmes.

Before this issue is explored further, a brief point here about judicial 'style'. Justice Fernando's judgement is a significant piece of judicial writing in terms of 'style'. And one hopes that it is an indication of an emerging trend. It is written in a style different from most judgements that come out of the court. It is remarkable for its breadth of vision. For the wide perspective in which the issues are viewed. And for a willingness to grapple with the issues – or at least most of them.

Karl Llewellyn, in his work 'The Common Law Tradition', draws a distinction between two 'styles' of judgemaking. The 'Grand Style' and the 'Formal Style'. The Grand Style to Llewellyn, is the better approach.

The Grand Style, according to Llewellyn, rejects a slavish following of precedent and is a form of judgemaking in which policy plays a large role. It is to him

> *an on-going renovation of doctrine, but touch with the past is too close, the mood is too craft conscious, the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform.* [p 34]

'Style' to Llewellyn is not a form of 'literary' style but rather

> *to the manner of doing the job, to the way of craftsmanship in office, to a functioning harmonisation of vision with tradition, of continuity with growth, of machinery and purpose, of measure with need.* [p 34]

He contrasts this with the 'Formal Style' which regards policy and 'change' as matters for the legislature not the courts and approaches matters in a formal and logical manner; where 'opinions run in deductive form with an air or expression of single-line inevitability'. [p 35]

This case, it is submitted with respect, highlights vividly, these two styles of judgemaking. Justice Fernando's judgement fitting easily into Llewellyn's notion of the Grand Style and the judgements of Justices Ranasinghe and Tambiah sliding equally easily into the notion of the Formal Style.

Justice Fernando – by his almost total rejection of Sri Lankan precedent and by his setting of the issues in a broader context – continues with his effort at 'renovation' (to use Llewellyn's terminology). Justice Fernando in several of his judgements (see for example *Wilbert Alwis v Quintus Raymond* and *Saman v Leeladasa*) has given the impression that he is bent on striking a new direction as regards the fundamental rights jurisprudence of the Court.

A Bill of Rights was introduced for the first time in the first Republican Constitution of 1972. However it was only in 1978 that a constitutional remedy was incorporated (in the Second Republican Constitution). The record of the Supreme Court in the area of fundamental rights since then has been discouraging. The court has got itself bogged down in a maze of technicalities and very few applications succeeded in the first ten years of the court. (See Coomaraswamy; de Silva; and Tiruchelvam; for impressions on how the court performed during this period.)

Recently however, there have been indications that the Court is trying to make a break with the past. Petitioner success has been more frequent and interpretations of the constitutional rights have become broader and more liberal. And one of the prime architects of this change of policy has been Justice Fernando.

However it is submitted with respect, that a major flaw in Justice Fernando's judgement is his failure to draw clearly, the obvious distinction that exists between ethnic quotas on the one hand, and programmes of affirmative action on the other. Despite approaching the issue of quotas from a wider perspective than any of the other judges, his reasoning is tainted by the blurring of this distinction. A distinction which is crucial towards obtaining a clearer perception of the case.

The only reference that Justice Fernando makes with regard to the distinction – and here too very briefly – is in the tailend of his judgement. At page 18 of his judgement His Lordship notes fleetingly that

> *the objective of affirmative action is to remedy the present effects of past discrimination, and not to perpetuate fixed quotas;*

However apart from this passing reference, there is no indication that Justice Fernando, or any of the other judges, sees a distinction between programmes of affirmative action and ethnic quotas. The Court has judged quotas against the same criteria used in assessing programmes of affirmative action.

The objectives of affirmative action and quotas both coincide and differ – at the same time. They both aim at the broad objective of equality. One seeks equality through the use of unequal treatment; the other seeks equality through what it is argues is 'equal treatment'.

But at the same time their objectives also differ. Affirmative action is aimed at curing the effects of past discrimination, and at providing redress for a period of past disability. Quotas on the other hand are aimed at guarding against future discrimination, and at ensuring that in the future disabilities do not arise.

The objective of affirmative action programmes is to deal with 'unequal' persons. One could justify giving 'unequal' persons or handicapped or socially or economically backward people, privileges. At core of programmes of affirmative action, lies the notion of unequal treatment. Equality is aimed at through unequal treatment.

One of the objectives of quotas may also be to deal with 'unequal', or economically or socially backward people. However quotas do not aim at unequal or preferential treatment. Rather they aim at 'equal treatment' or 'equitable treatment'. At entrenching more solidly the notion of equality. At producing equality through the use of quotas.

Justice Fernando in rejecting the scheme of quotas because the state failed to establish 'inequality', and because the state failed to establish a link between present disadvantage and past discrimination, has confused quotas with programmes of affirmative action. In asking the state to show proof of past discrimination, Justice Fernando, took an approach that may be justifiable in cases of affirmative action. Proof of past discrimination would be required if present privileges were to be granted. Preferential treatment would be justified on proof of past disability. However this is not an approach that can be justified in the case of quotas.

In terms of Justice Fernando's test the state was asked to produce evidence that would have conclusively established that the Tamil minority has been discriminated against in the past. That being a Tamil has meant an unequal access to public resources and jobs. And thus to argue then that race based criteria of differentiation is permissible as a result of this past discrimination. He faults the state for failing in this task – a failure which he argues is fatal.

However should this be the test? Would evidence of past discrimination logically justify quotas? The answer it is submitted is no. If quotas are supposed to act as a bulwark against future discrimination, then different criteria need to be devised to assess their validity.

Quotas are aimed not at members of a single community. Rather they are aimed at members of all communities. It would not be correct to ask for proof of discrimination with regard to one community, when what is at stake is a programme of quotas which affects all communities.

If the distinction between affirmative action and ethnic quotas had been clearly grasped – the court would not have called for proof of past discrimination, as it did. But rather asked for proof that quotas would guarantee against future discrimination – since this is their aim. If quotas are supposed to guarantee against future discrimination, then the state should logically be asked to show that this would result from the use of quotas. That the use of quotas would ensure that discrimination is brought down to marginal levels.

The Attorney General did try, at least at a theoretical level, in his oral submissions, to argue this point. The Attorney General tried arguing that if ethnic groups are represented in the public service according to their national population ratios this would mean that there is no discrimination in the service. A policy of non discrimination would mean that an ethnic group would be represented in the public service according to its national population ratios. However this submission was rejected by the Court.

Both Justice Tambiah and Ranasinghe too fail to deal with this distinction in their judgements. They both unfortunately deal with the issue using the narrower criterion of 'class'. Evident in both their judgements, is the reluctance to confront the issues. They rather choose to bypass them and to frame the issues and arguments in very narrow and formal terms.

To them both, the Customs Service represents a single class, within which it is not permissible to make further classifications based on race. Differentiation and therefore preferential treatment is permissible, but not within a single class. By implication then, ethnic quotas may be applicable to other areas of public life, though in this particular case they violated the petitioner's rights to equal treatment.

Neither Justice Ranasinghe nor Justice Tambiah, dealt with the state's argument that quotas entrench more firmly the notion of equality. They both preferred instead to resort to the notion of 'class differentiation' used previously by the Sri Lankan Supreme Court, to argue that the petitioner's rights were violated.

Justice Tambiah in his judgement refers to several authorities, especially Indian, which have considered the validity of programmes of affirmative action. He considers both quotas and affirmative action to be in the same category.

It is submitted, with respect, that the analogies made with cases of affirmative action in the three major judgements, were slightly misplaced. In none of the judgements is the distinction between programmes of affirmative action and ethnic quotas brought out with a degree of clarity.

Justice Fernando for instance cites *Bakke* and other cases to argue that in those cases evidence of historical discrimination was clearly established. In the present case, he says, it was not established and therefore strikes it down.

Justice Fernando as we saw above required the state to produce evidence that the Tamils had been discriminated against in the past. For the state to have shown that the Tamil minority underwent a past period of disability. It is an obligation that the state would not have discharged even if it could. It is extremely unlikely, given political sensitivity of the issue, that the state would have confessed that it had been the 'cause' and the 'source' of past discrimination against the Tamils and then produce evidence to substantiate this claim.

The state argued that quotas were introduced because of 'perceptions' of discrimination on the part of the Tamil minority. However if it is possible to establish that the Tamil minority has been discriminated against, then the logical course of action would be a programme of affirmative action for the Tamils. They should be afforded privileges for a period of historical discrimination. If there is proof of past disadvantage, then the solution would be a temporary period of privilege.

In Sri Lanka however charges of discrimination emanate from both the major communities. Both the Sinhalese and Tamils argue that they underwent a period of disadvantage and disability. Hence programmes of affirmative action are likely to fuel ethnic passions even further. It may then be possible to justify ethnic quotas as a compromise of sorts. A middle path, between programmes of affirmative action for the Sinhalese or the Tamils. The discrimination argument is being advocated by both minority and majority. And quotas are in a sense being

offered as a remedy to both or all ethnic groups. However the argument that it was a 'compromise' of sorts was not one that was made by the state.

Quotas and other Options

Another approach to the question of quotas, would have been for the Court to have considered it and assessed it against other possible solutions to the ethnic problem.

It is the argument of this paper that the better approach to the issue, would have been for the Court to have assessed quotas against other possible mechanisms that the state could have used to resolve the ethnic problem.

For the Court, not to have called for positive evidence of past discrimination against the Tamils. Nor to have asked for evidence to establish a link between present position and past disadvantage. But rather for the court to have asked the state to justify quotas as being a 'reasonable' mechanism to adopt in the current context. That given the country's ethnic history and present state of ethnic relations, the use of quotas based on ethnicity was justified. That it is, if not the best, at least a mechanism worth exploring, in an endeavour to resolve Sri Lanka's ethnic problem.

In this case the Supreme Court resorts to a constitutional doctrine – the doctrine of equality before the law and equal opportunity – to strike down quotas. The doctrine by itself, is unimpeachable and has gained wide acceptance. The doctrine was used though in a manner not consistent with the way in which the doctrine has been used previously. By equating ethnic quotas with affirmative action, the court has lain itself open to attack.

Why the Court resorts to constitutional doctrine to resolve these issues is because of the wider acceptability of such doctrines. An approach based on constitutional doctrines would attract less hostility and criticism than one based on 'political considerations'.

However a more frank, realistic and better approach would have been for the Court to have assessed the question of quotas against other political alternatives available to the political elite. To have openly conceded that the question requires them to undertake a 'quasi–political' inquiry.

This approach would have required the Court to have asked the political elite to have justified the imposition of quotas in a different manner. That the departure from the merit principle is justified for different reasons. The state would have been required to show that despite conflict with the equality provisions of the constitution, the exercise is valid in the context of Sri Lanka's state of ethnic relations and further that such departure from the equality principle is permitted by the Constitution. (Article 15 (7) of the Constitution permits restrictions with regard to Article 12 'for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society'.)

This approach would have required the Court to have dispensed with the affirmative action analogies and the authority of those cases. It would have meant that the Court would have had to argue that quotas are in a category of their own. That they are *sui generis* and need to be assessed against different criteria.

Justice Fernando's approach is laudable for its breadth of vision and its willingness to grapple with the issues. However its breadth stills falls short of what is required to cope adequately with the issues in the cases.

If the wider approach was taken, then the state would have had to argue that quotas are not the ideal, but that in the present context, it could contain the elements of a solution to Sri Lanka's ethnic problem. That quotas may produce marginal inequality, as in the present case, but that overall it is an option that should be explored given Sri Lanka's recent ethnic history.

Under this approach then the state would have had to argue that the merit principle is departed from, but only because the larger interests of society requires it. That each member in society has an interest in seeing the elimination of the ethnic problem and that quotas are an effort towards this end.

There is of course an obvious criticism against the use of this approach. That is, that it would require the judges to get involved in politics. That if this is the approach courts take, it would necessarily involve them in political controversies. They would be called upon to adjudicate on political questions. And that judiciaries are often ill equipped and under skilled to evaluate political issues and make the assessment that is called for.

However in the area of public law and especially if possessed of a fundamental rights jurisdiction, some degree of overlap with political issues is inevitable. When asked to decide issues relating to public law, the court is inevitably drawn into the political sphere. The court cannot abdicate its 'political role' in a democratic society. And this role sometimes calls for pronouncements on sensitive issues of public policy.

There is also another reason why this approach is advocated. Lockhard and Murphy argue that the effectiveness of judicial decisions lies in the court's ability to persuade the citizens by 'reason'. That courts too share state power like hosts of other public officials, but that their claim to participate in the governance of a nation is based on 'reason'. [p 4]

If this be true, then the Court's ability to persuade the 'Sri Lankan people' would be enhanced by adopting a more frank and realistic approach. The effectiveness of the judicial decision would be increased by an approach grounded in the social realities of the day. Rather than an approach grounded solely in constitutional doctrine, incomprehensible to the bulk of society.

Additionally, this approach is possibly the only way by which the introduction of quotas could be justified. If the objective of quotas is to guard against future discrimination then there is no way the state could show that this would occur. That the introduction of quotas would ensure a policy of non-discriminatory recruitment and promotions in the future.

The approach advocated in this paper then calls for the court to evaluate ethnic quotas against other possible options the state may have had. That given the history of tension and violence, the use of quotas was justifiable. However this argument was not made by the state. Rather the state was bent on arguing, futilely, that quotas entrench, even more firmly, the notion of equality.

What has been attempted in this section is to show that the Court's analogy with affirmative action is misplaced. That quotas and affirmative action are different and need to be looked at and assessed against different principles.

Youth Quotas

It is interesting to note that Justice Fernando's reasoning may also be applied to the 'youth quotas' that now form part of Sri Lanka's electoral laws. Among the findings of the Presidential Commission on Youth was that youth had no access to political power, that they were not involved in the decision making processes and they were under represented in the legislature. One of the Commission's recommendations was that special quotas be reserved for those people who were classified as 'youth' in certain spheres of public life.

Acting on this recommendation the legislature introduced an amendment (Act No 25 of 1990) to the Local Authorities Elections Ordinance which regulates local elections in Sri Lanka. In terms of this amendment, at least 40 per cent of the total number of candidates nominated by a political party should be 'youth'. All those over 18 and under 35 fall into the category of 'youth' (section 89). Local elections held in the May of 1991 were conducted in accordance with this amendment.

Justice Fernando's reasoning, it appears, may be applied to these quotas to argue that they too violate Article 12 of the constitution. The arguments that Justice Fernando used to strike down ethnic quotas are equally applicable to the special privileges granted to youth in the terms of the amended local elections law.

To Justice Fernando, the essential prerequisite for any form of preferential treatment is conclusive evidence of past discrimination. In the absence of such past discrimination, no special privileges could be granted. His Lordship argues that 'apart from proved "inequality"', Article 12 would not permit say, 'a quota of 60 per cent being stipulated for women, in any sphere'. [p 17]

In the absence of 'the necessary proof' [p 19 of Justice Fernando] indicating past discrimination against the youth of this country, the youth quotas it could be argued are prima facie unconstitutional. This is unless the recommendations of the Youth Commission are accepted as evidence of this 'fact'.

However the courts of Sri Lanka lack the power to declare legislation as being unconstitutional. It is only 'executive and administrative action' that may be struck down as being unconstitutional. The law conferring special quotas on youth will thus continue in force till it is repealed by the legislature.

Nevertheless it is possible to envisage a scenario where administrative action taken as a result of this law is sought to be questioned in court. For example if a nomination paper containing less than the required 40 per cent of youth is rejected, could the political party question this action as being unconstitutional?

Symbolism and Ethnic Quotas

Apart from its merits and constitutionality, the introduction of quotas based on ethnicity represents a significant political step for the current regime. Divorced from its legal validity and its consistency with the equality provisions of the constitution, it depicts a landmark decision for the government of Ranasinghe Premadasa.

This wider political significance lies in its symbolic value. Whatever its ultimate impact, had it been allowed to continue unopposed, the measure has for the regime tremendous symbolic consequences. This lies in it being seen as a genuine effort, being made by the regime, to solve the ethnic problem. Whether it ultimately succeeded in acting as bulwark against discrimination or not, it has lent at the present juncture, a greater credibility to the current political regime – at least in the sphere of ethnic relations. The standing of the regime (including its international standing) has been enhanced by the perception that here is a bona fide effort to help solve Sri Lanka's ethnic conflict.

Its adoption – irrespective of its merits – is designed to show civil society that the ruling regime is making a serious effort at resolving the ethnic problem. This symbolism has now been challenged by the Supreme Court.

However it may be possible to argue that the value of this symbolism has been enhanced by the decision of the Supreme Court. Here is a bona fide effort on the part of the state to solve the ethnic problem; and here is an stubborn court acting as an obstacle. A bungling judiciary has got in the way of a progressive political elite.

Fundamental Rights and Non State Organisations

Apart from the issue relating to quotas the case is also important for the approach it takes to fundamental rights violations by non state persons. We will look briefly at this issue. [See also LST Review: 16 August 1990]

The traditional view of fundamental rights taken by the Supreme Court has been to argue that fundamental rights are available only against the state. That they are not available against non state persons. This view has arisen primarily because of the provisions of Articles 17 and 126 of the Constitution. Article 17 and 126 provide constitutional methods of redress where an infringement of a fundamental right has occurred through 'executive or administrative action'.

In *Goonewardene v Perera* for example Justice Soza implied that the 'protections with regard to fundamental rights is against contravention of these rights by executive or administrative action of the state and its organs'. (p 437)

In *Ramupillai v Festus Perera*, Justice Fernando argues differently and sets forth a view which he has argued previously, both within and outside court.

Justice Fernando has strongly supported the view that the fundamental rights provisions set down in the constitution apply against all persons – state and non state. It is only the remedy contained in article 126 that

is available against executive and administrative action. Dealing specifically with Article 12, Justice Fernando argues that the constitution prohibits discrimination by all persons and institutions, not just state ones.

He had set out a similar view in an earlier case. In *Saman v Leeladasa* Justice Fernando made out a strong case for a wider approach to fundamental rights in our constitution. He said the constitutional guarantees in relation to fundamental rights are available not only against state action but also where the violations are by private individuals. He cited as authority the earlier case of *Gunaratne v People's Bank* which had reached a similar conclusion. [See LST Review: 16 August 1990]

He reasoned that where the infringement is caused by 'executive or administrative action', then the remedy is by way of an application under Article 126 of the constitution. However if the violation is not one by executive or administrative action, then a common law or statutory remedy would be available. So even in the absence of the specific constitutional remedy contained in Article 126, a common law remedy would be available.

Justice Fernando argued that Article 126 does not define an ingredient of an infringement of a fundamental right; it merely ousts the jurisdiction of all other courts and tribunals (except the Supreme Court) in respect of one category of infringements, those by executive or administrative action. Whether there has been an infringement or not must be determined independently of whether such infringement was by executive or administrative action.

Justice Fernando has sought to justify these views *ex cathedra* several times. His justifications have been based on two further grounds. These relate to the language of the Chapter on Fundamental Rights contained in the constitution.

For example Article 12(3) says that no person shall, on grounds of race, sex, religion etc., be denied access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion. By implication this article guarantees rights against all those persons who may be responsible for access to these institutions, whether state or non state.

A further justification is the absence of the word 'state' in the rights guaranteed under the constitution. There is no provision that the state is bound to provide the rights contained in the constitution. He has drawn a distinction with the constitutions of the United States of America and India, whose chapters on fundamental rights impose on the state the fundamental duty of ensuring those rights to its citizens. No corresponding provision exists in the Sri Lankan constitution, and hence it is clear that Parliament intended those rights to be applicable against all the world, and not just the state.

The recent constitutions of Nepal and Czechoslovakia also take a similar approach.

This broader approach to the question of violations by non state persons is part of a broader approach to human rights that has been taken by the Supreme Court in recent years. There are indications that the Supreme Court is beginning to shed some of the intricate technicalities it wove in this area in the late seventies and early eighties.

An further illustration is Justice Kulatunge's dissenting judgement in the recent case of *Somawathie v Weerasinghe*. Here a majority of the Court had refused standing to an aggrieved person's wife to maintain a fundamental rights application. This was based on a narrow construction of the relevant constitutional provisions. Justice Kulatunge taking a wider approach, issued a strong and convincing dissent. A dissent more consistent with approaches taking place in other jurisdictions.

The argument taken here is that judges are often influenced by the changing environment around them. Judicial decision making seldom, if ever, takes place in a vacuum, detached from the changing social and political reality. Judges are seldom called upon to decide cases isolated from the social events of their times. Judges – despite what they often say – are not passive participators in the historical process. They are influenced by changing circumstances and their judgements are often a response to the changing social reality. Judicial decision making is frequently a response to the re-alignment of forces and the emergence of new forces in the societies in which they live.

After a disappointing record in the late seventies and early eighties, there are now signs of a new human rights jurisprudence emerging from the Court. The lack of petitioner success during this period was due to a large extent to the maze of technicality the Court wove around this area of the law. There are indications now, that this labyrinth is being disentangled.

The new and more liberal Supreme Court Rules (with regard to applications under Article 126 of the constitution), at draft stage and still to come into force, are a further indication of this trend.

This wider approach to human rights has been influenced by two factors, among several others. The court seems to have now recovered from the humiliation the Jayewardene regime subjected it to. (See Tiruchelvam) Further, it appears that the court is at last responding to the vast accumulation of state power that has occurred over the past 10 years and especially during the Jayewardene regime. The more liberal approach is in a sense, an attempt at restoring the balance.

Tiruchelvam, in an analysis of the Sri Lankan judiciary writes that

> *constitutional adjudication in the past decade is conclusive that (judicial) expectations are not matched by the performance of the court. Our aspirations must accordingly be modest ....* [p 63]

Trends in the recent jurisprudence of the court, however slight, seem to indicate that we could perhaps hope to be more optimistic, in the coming decade.

Politics and Judicial decision making

The political implications of judicial decision making have been significantly underplayed in Sri Lankan legal discourse. Our legal culture has continued to endorse values which have seen law as an autonomous and distinct discipline. The politics of the Sri Lankan judges and judiciaries has seldom been considered a subject worthy of critical discourse.

This culture has been bred by a system of legal education which has reinforced this perception of the law. Students travel through law school learning almost nothing of the connections between law and other areas of social life. They learn instead that 'law' is an autonomous and self regulating discipline, divorced from other areas of social life.

Blackshield's comments, written in another jurisdiction, seem appropriate to the Sri Lankan context. Blackshield notes that although he has had difficulty in convincing lawyers of the 'widespread pervasive reality of judicial legislation', he has never had a similar difficulty with non-lawyers. [p 172] In the Sri Lankan case too, the perceptions of law promoted by the legal community, differ from those endorsed by the larger public community.

Recent constitutional and other jurisprudence has highlighted the 'political' role of the court. A role that any Supreme Court in any real democracy must play. It is also a role the court needs to recognize and articulate. Hanks makes the very apt comment. Hanks notes that constitutional adjudication

> *cannot escape its political dimension: that dimension should be frankly recognized, so that the political values which underpin the adjudication can be articulated and their relative merits debated. To deny the existence of those values, to assert that constitutional decisions are dictated by the text of the Constitution ... is to shield those values from scrutiny and criticism which is crucial to the legitimacy of the adjudicatory process.* [p 154]

Baxi expresses a similar opinion in his book 'The Indian Supreme Court and Politics'. That a nexus exists between the socio-political environment and judicial decision making is apparent if one looks at the workings of the South Asian judiciaries in the last few years. Sri Lanka seems to be no exception.

The Supreme Court of Sri Lanka – like most of appellate courts in the Commonwealth and outside – has always been called upon to decide political questions. In the Court's history spanning over 150 years, issues have come up which have contained varying degrees of politicisation.

In 1929, the colonial Supreme Court was called upon to decide whether a Buddhist school girl who had converted to Christianity, should be allowed to remain in the custody of her missionary boarding school. In *Gooneratnayaka v Clayton* the parents of a seventeen year old girl sought the custody of their daughter in a habeas corpus application. The girl had been placed by Gooneratnayaka – the petitioner – in the custody of the first respondent Clayton, for her education. Clayton was the principal of Clodagh Mount Boarding School, Matale – a Christian missionary school. The girl had changed her religion and did not wish to go back to her parents. The wishes of the child were given effect to and the writ refused.

In the *Bracegirdle Case*, the Court refused to uphold an order of deportation issued by the then Governor of Ceylon – Sir Edward Stubbs – on Australian trade unionist Bracegirdle. Marxist Bracegirdle had antagonised the colonial regime by his activities on the tea estates. As Amarasinghe notes the case 'precipitated the transfer of power from the British in a most remarkable way'.

And recently in *Bandaranaike v Weeraratne*, the Court of Appeal was called upon to decide whether the warrant setting up a Special Presidential Commission of Inquiry was ultra vires the enabling legislation. Here the court held with the petitioner – leader of the opposition Sirima Bandaranaike – that the Commission had no jurisdiction to inquire into abuse of power during the period she was Prime Minister. The enabling legislation did not contemplate a retroactive inquiry. The legal challenge however ultimately proved futile when Parliament, despite the court ruling, imposed civic disabilities on Ms Bandaranaike for seven years.

The political content of judicial decision making has become more transparent after the adoption of the Second Republican Constitution. The constitution provided a Bill of Rights and for the first time provided an explicit constitutional remedy to seek redress in cases of violation of those rights. The decisions of the Supreme Court have thus begun progressively to have significant political ramifications – especially in area of fundamental rights.

Whether the Supreme Court becomes more politicized in the future would depend on how the court deals with issues that come before it. If the court is able to show that it has the capacity to address its mind to the several complexities and the social consequences of the issues that surface before the court, then it is likely to increasingly attract matters of high public interest. Recent jurisprudence from the court seems to indicate that there is an increase in the maturity and depth with which the court has handled these issues.

Ethnic Criteria: Good or Evil

Does the present state of ethnic relations justify the use of ethnic quotas? Should they be used as part of an effort to resolve the ethnic problem? Despite its flaws and defects is it justified given Sri Lanka's current state of ethnic conflict. Will quotas act as a bulwark against discrimination? Will minority rights be better ensured, if recruitments to and promotions within, the public service and the academia are regulated on the basis of one's ethnic background? Do the tensions present in our society give rise to the view that quotas may be able to absorb some of them?

These and other questions would need to be considered if a Court in the future was to adopt the wider 'political' approach advocated in this paper.

Do quotas perpetuate racial and ethnic differences and heighten the notion of different communities? Who will in fact benefit from the quotas – the privileged within each community or the disadvantaged? Who will suffer as a result of the quotas?

If quotas are acceptable to the minorities, would that justify their introduction? On the other hand, can it be acceptable, if people do not know how it works? Further, has there been acceptance, given the paucity of public debate on the issue?

Will members of each ethnic background seek to exploit quotas? Will there be a search for loopholes, as there is, it is often argued, with regard to the scheme of university admissions in Sri Lanka?

Ethnic quotas were introduced in an effort to help solve Sri Lanka's ethnic problem. But the fundamental question remains, will it?

The view taken in this paper is that quotas based on ethnicity or race should **not** be used in relation to recruitment and promotions within the public service and the academia. A series of criteria based on one's racial or ethnic background is not an appropriate mechanism for use in public life, especially given Sri Lanka's past ethnic history and current ethnic conflict.

This view is taken for several reasons. Principal among them is the uncertainty of the exercise. There is no guarantee that the system of quotas, as presently conceived, would ensure a non-discriminatory policy in public life. That it would in practice, entrench more firmly the principle of equality in our society.

There are also further uncertainties. According to the circular issued by the Ministry of Public Administration, the quota was to be applied not just at the national level, but also at the provincial and district levels. Recruitments and promotions at national, provincial and district level were to be on the national, provincial and district ethnic ratios. The application of the system of quotas at these different levels leaves open the possibility that an imbalance in favour of one or more communities could result, when the country is considered as a whole. If the quotas are applied at these different levels, then the country taken as a whole may reflect an imbalance. It is an area which obviously requires more exhaustive research before such a significant step is be taken.

Uncertainty with regard to who will in fact benefit within each community, is an additional reason for opposing the introduction of quotas. The large possibility of exploiting quotas also militates against their adoption.

This view is also taken on the more fundamental ground that they would accentuate racial and ethnic differences. That quotas based on ethnicity possess the potential to draw more starkly, the splits based on race and ethnicity already prevalent in our society. That it has the capacity to illuminate and highlight racial differences when our approaches should be in the opposite direction - towards the forging of a Sri Lankan identity. As Reynolds notes

> *If a remedy discriminates, it is not moving us in a direction that will eliminate discrimination.* [p 115]

This view taken here is that pursuit of the ideal of a 'raceless society', is more worthy an objective than the pursuit of ethnic egalitarianism, through the use of criteria based on race.

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WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL'S DEPARTMENT IN THE CASE OF RAMUPILLAI V FESTUS PERERA

1. It is respectfully submitted that p4 is consistent with with the principle enshrined in Article 12 (1) of the Constitution and that it does not attract any classification even though the petitioner sought to challenge it on the basis that it cannot be properly classified in order to exclude it from the operation of the said Article.

2. The respondents sought to justify the said circular p4 on the basis of the averments that are contained in the affidavit of the 2nd respondent. In this affidavit the 2nd respondent deals with the following matters:

2.1 the events of the recent past, where large scale acts of violence and sabotage threatened national security.

2.2 the fact that whilst immediate measures were taken to meet these manifestations of discontent, a permanent and lasting solution involved (a) the identification and (b) the removal, of the root causes for the situation.

2.3 (a) identification of causes:

the perception amongst the minority communities and other disadvantaged groups amongst the majority community, that unequal opportunity for recruitment to, and appointment within, the public service, were identified as being one of the causes for the sabotage and violence that has threatened the national security of the country.

(b) removal of the causes:

the formulation of a national policy with this objective in view.

3. It is respectfully submitted that if selections to any post or appointment are made without discrimination past or present, it would most probably reflect the ethnic ratio at the respective national, provincial and district levels.

4. Accordingly, the Cabinet of Ministers were of the opinion that a scheme based on an equal distribution of ethnicity in the public service, would convince those dissatisfied with the present schemes of appointment that such recruitment and appointments are made without discrimination.

5. It is further submitted that circular p4 reflects a decision that was taken by the Cabinet Ministers in a given situation and contain a criteria based on ascertainable facts. This decision in the context of perceptions of inequality based, among other criteria, on ethnicity, and that fact has not been controverted in these proceedings.

6. It is further submitted that in the given background of events the Cabinet of Ministers formulated a policy designed on the above stated premise to assuage such fears and perceptions.

7. It is accordingly submitted that the apportionment of the recruitment and appointments on a basis which is arbitrary but is based on the relevant ethnic ratio at the national, provincial and district level would engender the acceptance of the recruitment or appointment as being free of discrimination.

8. In the circumstances, the decision by the Cabinet of Ministers in this regard is in furtherance and not in derogation of Article 12 (1), in that it ensures equality on a logical and determinable basis in recruitment to, and appointments within public service.

9. It is submitted that the application of the circular p4, at the point of selection or appointment.

9.1 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.

9.2 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.

9.2.1 it is submitted that this principle reflects settled law on the question as stated in **AG vs Palihawadana.**

10. It is further submitted 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.

11. It is submitted that in the premises afore-stated, the circular p4 became necessary only because of a perception that appointments to the public service had hitherto been made on a discriminatory basis on the grounds of ethnicity and to satisfy those who held such perceptions that:

a) no such discrimination would take place hereafter, and

b) if in fact such discrimination had taken place either in making appointments or in the process of education leading to the acquisition of qualifications necessary for selection, and such discrimination was based on ethnicity, then they would be unequals, whom the principle in the **AG vs Palihawadana** case would require to be treated unequally in order to provide equality in the process of selection.

12. It is respectfully submitted that p4 provides for a committee to monitor its implementation (paragraph 8). This committee will review and evaluate the functioning of this scheme after it has operated for one year and submit its recommendations thereon to the Government. It is respectfully submitted that this clause is important for the reason that it demonstrates that p4 is not intended to be a permanent scheme and is liable to be varied or even rescinded as the situation improves.

13. It is respectfully submitted that having regard to the circumstances under which this scheme was introduced and the objective that it seeks to achieve viz. restoration of peace, order and good government, it is clear from the contents of the said circular that it is only a temporary measure to achieve the said objective.

14. It is further submitted that:

14.1 if the circular p4 operates to the detriment of any particular individual, the appropriate remedy would be to amend the circular to provide for relief in respect of such individual cases.

14.2 It is submitted that the circular does provide for the resolving of certain type of problems and as such it could if necessary be suitably amended to meet a particular situation.

15. It is respectfully submitted that the quota of employment in **Makhanal vs. State of Jammu** case is not based on any ethnic or other ratio. Furthermore this case also involved an implementation of communal policy. It is submitted that p4 as set out above is not based on any communal policy. This case therefore has no application to the facts of the present case.

16. It is submitted that in any event, the petitioner does not enjoy a right to appointment to any particular grade or post within the public service and as such that he cannot claim an infringement of any fundamental right by the denial of appointment to any particular post of grade in the public service.

PROTECTIVE DISCRIMINATION IN INDIA

by Dr Devanesan Nesiah

Background to the Mandal Commission Report

The origins of the Indian caste system are shrouded in pre-history. While the practise of caste varies in detail from place to place and time to time, the tradition has continued virtually unbroken for at least three millennia. The system derived its legitimacy not only from established social practice but also from Hindu mythology and scriptures, notably Manu Smriti (Circa 1st Century AD), an authoritative codification of the caste laws then accepted in much of North India. Galanter (1984, 8) defines caste as:

> "An endogamous group having a common name and claiming a common origin, membership in which is hereditary, linked to one or more traditional occupations, imposing on its members certain obligations and restrictions on matters of social intercourse, and having a more or less determined position in a hierarchical scale of rank."

Nehru (1961, 247-8) has observed that the structure of the traditional Indian society "was based on three concepts: the autonomous village community, caste, and the joint family system. In all these three it is the group that counts; the individual has a secondary place." Louis Dumont (1970) has developed his thesis that the Indian social structure is basically "Homo-Hierarchuus", not :Homo-Equalis". Henry Maine (1977) has drawn a distinction between societies based on status and those based on contract and argued that the Indian population is typical of the former. Few will dispute the observation of Galanter (1984, 7) that Indian society, even today, is "compartmental" in its composition, though many Indian scholars attribute this fact no less to British "divide et impera" policy as to values intrinsic to Indian civilisation and to Hinduism as re-interpreted by several 20th Century reformers.

Castes are traditionally grouped in the four Varnas with the outcastes (referred to by Gandhi as Harijans, i.e. People of God, and in the Constitution as Scheduled Castes) forming a fifth category. Tribals (referred to in the Constitution as Scheduled Tribes) and non-Hindus are, at least nominally, outside the caste hierarchy which has no scriptural legitimacy outside Hinduism. The castes comprising the first three Varnas, viz. Brahmins, Kshastriyas and Vaishyas, totalling 17.6% of the population in India are regarded as "High Castes". The castes comprising the fourth Varna, viz. Shudras are, in some regions, subdivided into "forward" and "backward" castes. The backward castes (totalling 43.7% of the population) together with some backward non-Hindu ethnic

minority groups (totalling 8.4% of the population) comprise the "Other Backward Classes" referred to in the Constitution. The Scheduled Castes form 15.1% and the Scheduled Tribes 7.5% of the population. Thus, all backward classes together constitute 74.7% of the population of India (Mandal, 1980, Part I, 56).

The history of reservations in India dates back to the scheme of quota reservations for Muslims introduced in British India in 1909. The British introduced reservations for Outcastes and Tribals in 1919. The Raja of Mysore and the Government of Madras introduced comprehensive caste-based schemes of quotas in those States in 1921. The creation of Pakistan in 1947 and the adoption by India of a secular Constitution undermined the case for reservations for Muslims, but certain reservations for Scheduled Castes (listed in terms of Art. 341:1) and Scheduled Tribes (listed in terms of Art. 342:1) were mandated in the Constitution, and other reservations for these categories and for "Other Backward Classes" were expressly provided for.

The reservations mandated were for places for Scheduled Caste and Scheduled Tribe members to be elected to the Lok Sabha (in terms of Art. 330) and to the State Legislative Assemblies (in terms of Art. 332); these are time-bound (in terms of Art. 334). The Constitution also provides for "reservation of appointments or posts in favour of any backward class of citizen which, in the opinion of the State, is not adequately represented within the service of the State (Art. 16:4) and permits "special provision for the advancement of any socially and educationally backward class of persons or for the Scheduled Castes and Scheduled Tribes" (Art. 15:4). The directive principle of State policy in this field is that "the State should protect with special care the educational and economic interests of the weaker sections of the people, and of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation" (Art. 46).

Apart from the mandatory reservations on the Legislative Assemblies, the Union Government had prescribed reservations up to 15% and 7 1/2% respectively for qualified candidates of Scheduled Castes and Scheduled Tribes in the public services and in State-supported training and educational institutions. Many (but not all) State Governments, local bodies and educational institutions have additional reservations for various other categories, including "Other Backward Classes" and, in a few cases, women. Reservations for women could be justified under Art. 15:3, which permits "special provision for women and children", or women could be regarded as a `backward class'.

Another category of reservations is for "sons of the soil", i.e. based on domicile in a particular region. These come under Art. 15:3 which permits, in regard to "employment or appointment to an office under the government, or any local or other authority within a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment". There is no ceiling on these reservations, but the Supreme Court has placed a ceiling of 50 per cent on the total of the reservations for other categories (Balaji, 1963 and Devadasan, 1964).

The declared rationale for imposing this limit is that the quotas must not be so numerous as to unduly restrict the opportunities of those for whom there are no reservations. This rule seeks to reconcile the clauses legitimising reverse discrimination and group quotas with those upholding non-discrimination and equal opportunity as between individuals. It is pertinent that Art. 15:1, which stipulates "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them", is followed by Art. 15:3 and 15:4 which provide for reverse discrimination; and Art. 15:1, which declares that "There shall be equality of opportunity for all citizens on matters relating to employment or appointment to any office under the State, and Art. 15:2, which affirms that "No citizen shall on ground 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", are followed by Art. 16:3 and Art. 16:4 which expressly provide for reservations for certain groups. This suggests that those who framed the Constitution considered these clauses to be extensions of the preceding clauses, which these are complementary with and not contradictory to. This position is endorsed by the Supreme Court which has held that in protecting and strengthening the weakest components of society, Art. 15:4 and 16:4 promote the fundamental rights of the society as a whole (Balaji, 1963).

Unlike quotas prescribed by the Constitution or by the Union government for Scheduled Castes and Scheduled Tribes, reservation for "Other Backward Classes" has been at the discretion of State governments. Art. 340 provides for the appointment of a Commission to investigate the conditions of "socially and educationally

backward classes" and to recommend steps to be taken for their advancement. The first Backward Classes Commission, headed by Kaka Kalelker (1955), and the second, headed by B.P. Mandal (1980), had their reports presented to Parliament, but their recommendations have not been implemented. Among the recommendations of the Kalelker Commission were the use of the caste criteria in the identification of backward classes, for which 70 per cent of places in technical and professional institutions were to be reserved, and the identification of women as a backward class. There were divisions among the members of the Commission in respect of several of the recommendations and the Chairman, in a covering letter forwarding the recommendations, repudiated one of the main recommendations to which he had given assent in the report, viz. the use of the caste criteria in identifying "Other Backward Classes". For these reasons and also because the "Other Backward Classes" category identified was unduly large, the Union Government did not implement the recommendations but left it to State governments to adopt such of the recommendations as they thought fit. Many States, particularly in South India, have long had reservations for "Other Backward Classes" and the Union Government has made no attempt to interfere with the diverse policies followed by various State governments.

The second Backward Classes Commission has again recommended the use of caste criteria, pointing out that both Art. 15:4 and Art. 340 specifically refer to "socially and educationally backward classes" and not to economic classes (Mandal, 1980, Part I, 4)). If implemented, the Mandal Commission recommendations would mark the first major development in Indian Government policy in this field in the four decades following the enaction of the Constitution on November 26, 1949, and the incorporation of Art. 15:4 through a Constitutional Amendment on June 2, 1951. The 10 yearly amendments to Art. 334, each extending by a decade the scheme of reservations for Scheduled Castes and Scheduled Tribes in the Union and State Legislative Assemblies have merely served to avoid drastic changes. Even amending the schedules to the Constitution listing Scheduled Castes and Scheduled Tribes has proved to be politically most difficult. It was inevitable that the announcement that the Mandal Commission recommendations would be implemented would lead to a crisis. That the crisis contributed to the fall of the V.P. Singh government, the installation of a shaky minority government which had not yet taken a clear stand on this issue, and that the agitation continued through many months is not surprising. The crisis is yet to be resolved.

The Mandal Commission Report: Implementation Prospects

Several major Indian political parties and leaders have, for many years, been ambivalent on the issue of extending "Protective Discrimination" to Other Backward Classes. The Mandal Commission Report found broad acceptance, in principle, within the major political parties, so long as there was no imminent prospect of its implementation. Despite the inclusion in the 1990 election manifesto of the National Front of a promise to implement the recommendations, it does not appear to have been a decisive issue at the polls. The National Front won enough seats to be called upon to form the Government, but there was no crisis till a series of announcements in quick succession made it clear that the new administration did intend to carry out this promise. There was a declaration by Mr. V.P. Singh in the Lok Sabha, on August 7, 1990, of his commitment on this issue, followed by an affirmation of his commitment, on August 15, contained in the first Independence Day message of the new Government delivered from the Red Fort, Delhi, and, on September 16, confirmation of the commitment to implement the Mandal Commission recommendations at a public meeting at Marina Beach, Madras. There had been controversy on many occasions earlier in respect of programmes for Other Backward Classes, but those programmes concerned particular regions and the respective State Governments. This was the first time a major, nationwide programme for Other Backward Classes was announced by the Union Government, and it quickly became a critical national issue.

Despite its shaky position in the Lok Sabha, the National Front Government vigorously promoted this controversial programme. It was clear that not only was the Government firmly committed to this policy but that it also considered it to be politically opportune. This must be viewed in the context of the gradual decline of the political dominance of the upper castes over the last three decades, and the shift, beginning in the last years of Indira Gandhi, of some of the support of the ethnic, caste and tribal minorities away from Congress (I) to other parties at both national and regional levels. At the time of Independence, all the Chief Ministers were Congressmen and all but two were Brahmins. Till the appointment of Charan Singh as Prime Minister, all the national governments were Congress governments and the Prime Ministers of India were all Brahmins;

so were many of the most influential of the national political leaders. But changes had already taken place at the regional level and many State governments had non-Congress governments, some of them headed by regional political parties, and the large majority of the Chief Ministers were non-Brahmins. But at the national level the Congress had continued to have the political alliance of much of South India, of the Muslims, of the lower castes, and of the tribes. This situation changed significantly in the late 70s and through the 80s. The proposed implementation, by the V.P. Singh government, of the Mandal Commission recommendations, seemed likely to consolidate the political gains made by the National Front at the expense of the Congress.

While the caste composition of the political leadership has been changing, there is little indication of any collapse of the caste system. The Mandal Commission found that two-thirds of those who responded to the questionnaire believed that there had been no material changes in the Indian caste structure since Independence, and more than three-quarters were of the opinion that no concrete steps had been taken to eliminate caste discrimination. Nearly three-quarters approved the use of caste criteria to identify Backward Classes. Many of those who responded were legislators. Although those who responded may not have been a representative sample of the population of India, their views give some indication of the thinking of at least a section of the social and political leadership.

The Mandal Commission found that the Other Backward Classes, who constitute 52 per cent of the population, held only 4.69 per cent of Class I jobs and 12.55 per cent of all jobs (mostly at the lower level) in the public sector. Even these jobs were held mostly by persons from the upper rungs of the Other Backward Classes. The position in respect of Scheduled Castes and Scheduled Tribes was much worse, but they enjoyed a measure of constitutional protection, including mandatory reservation of seats in the Union and State Legislative Assemblies and of places in the public sector and in educational, professional and training institutions. In the case of Other Backward Classes, the reservations were not prescribed either by the Constitution or by the Union Government but were at the discretion of the respective State Governments.

There is no comprehensive list of Other Backward Classes recognized by the Constitution or by the Union Government; nor is there a centrally prescribed list of benefits to which these "classes" are entitled. The "protection" they receive is, therefore, very patchy, ranging from benefits comparable to those enjoyed by Scheduled Castes and Scheduled Tribes (in some South Indian States) to virtually no benefits (in some North Indian States). The Mandal Commission recommended adoption of a national list of other Backward Classes and mandating reservations for them on an All-India basis as in the case of Scheduled Castes and Scheduled Tribes, in public service employment and in scientific, technical and commercial institutions run by the State.

It is pertinent to note that the Mandal Commission did not make recommendations regarding reservations for Other Backward Classes in all academic institutions on the ground that educational reform was not within the terms of reference of the Commission. However, they did recommend that, in accordance with Art 15 (4), "seats should be reserved for Other Backward Classes in all scientific, technical and professional institutions run by the Central as well as State Governments... as in the Government, i.e. 27 per cent" (Chapter XIII Para 13.18).

The Mandal Commission has gone on to make several recommendations, e.g. relating to special educational facilities designed for the upgrading of certain institutions serving Other Backward Classes, a special programme for coaching, upgrading skills and helping entrepreneurs from this category, welfare programmes and land reform etc. but the most controversial recommendation relates to quotas, and is summarized by the Mandal Commission as follows:

> "Reservation for S.Cs and S.Ts is in proportion to their population, i.e. 22.5 per cent, but as there is a legal obligation to keep reservations under Articles 15(4) and 16(4) of the Constitution below 50 per cent, the Commission recommends a reservation of 27 per cent for O.B.Cs. The reservations should apply to all Government services as well as technical and professional institutions, both in the Centre and the States" (Chapter XIV).

In his speech in Parliament on 7 August 1990, the then Prime Minister, Mr. V.P. Singh, conceded the legitimacy of the demand for more aggressive intervention in this field and stated that this was not undertaken in the "first phase" for tactical reasons. He went on to point out that the criteria of "social and educational backwardness" addressed by the Mandal Commission and adopted by the Government in listing Other Backward Classes, relate

to all religious groups, not just Hindus. In this respect there is a clear departure from the criteria used in the definition of Scheduled Castes which, by definition, are exclusively Hindu. Mr. Singh went further and announced the reservations of 30 per cent of places for women in Panchayats and reservations for them in Zila Parishads and Municipalities as well. He also announced several other decisions to protect minorities, e.g. "Selection Boards will, in future, include one representative of Scheduled Castes/Scheduled Tribes and one representative of all Other Backward Classes".

Unlike in the case of Scheduled Castes and Scheduled Tribes, it is likely that Other Backward Classes will fully use up most of their reservation quotas. In the case of Scheduled Castes and Scheduled Tribes, reservations are roughly in proportion to their population ratios; in the case of Other Backward Classes, the recommended reservations are approximately one-half (27% as against 52%) of their proportion in the population of the country. Moreover, in the case of Scheduled Castes and Scheduled Tribes, the question of adjustment on account of those of these categories who get in on "merit" competition is largely an academic issue since it is the rule rather than the exception for the totals of these categories who qualify for selection to fall short of the allotted quotas.

In the case of Other Backward Classes, partly because they are much more numerous and partly because they are less "backward" than the Scheduled Castes and Scheduled Tribes, the number who qualify for any particular intake is likely to be frequently in excess of the number of reserved places. The Mandal Commission recommendation is that those of Other Backward Classes who get in on "merit" should be counted against the 27% reservation quota and that, as in the case of Scheduled Castes and Scheduled Tribes, the reservations should apply in the case of promotions as well as fresh intake.

What would be the impact on the administration of the implementation of the Mandal Commission recommendations? The most significant changes would be in recruitment to and promotion within the public services. The numbers involved are of the order of 40,000 jobs per annum reserved for Other Backward Classes under the Central Government and in Central Government services, and another 60,000 per annum for Other Backward Classes in Stage Government services, local bodies, etc. (Shivanandan, 1990, 8). Of the latter, since some States and other institutions already have reservations for Other Backward Classes the number of new reservations may be of the order of 40,000 jobs per annum.

The total number of jobs at stake on account of the Mandal Commission recommendations is therefore in the region of 40,000 per annum under the Centre and an equal number under the State Governments, local bodies and other institutions, i.e. a total of 80,000 jobs per annum. Given that about 16 million enter the workforce in India each year (Shivanandan, 1990, 8) the reservations affect less than half percent of the increment to the workforce. Even given the high prestige of public service employment in India, the scale and intensity of the political protests against the adoption and implementation of the Mandal Commission recommendations appears to be disproportionately high.

Closely related to the composition of the intake is the quality of the administration. The impact of reservations for Other Backward Classes on the quality of the administration is not easy to assess. Even assuming that merit is frequently not the main criterion in recruitment, it may be reasonable to assume that the introduction of a new non-merit criterion will tend to reduce the quality of the intake, particularly in the case of recruitment based on examination performances. But it is also reasonable to assume that the prevailing mode of recruitment has an inbuilt, systematic bias in favour of the higher castes and against the lower castes. Introducing quotas could therefore possibly result in increased efficiency, especially in the long run.

Another factor is that a more balanced public service may be more responsive to and serve better those categories of the population who are presently under-represented in the public services. Thus the net impact of the reservations for Other Backward Classes on the efficiency of the public services could be positive or negative. Gill (1990, p.7) has noted that in fact the Southern States which have a long history of reservations for Other Backward Classes tend to be better administered than the Northern States, many of whom have few or no reservations for Other Backward Classes. Achieving a more balanced public service may indeed have advantages which outweigh the disadvantages of introducing more quotas.

In this connection it is interesting to note that, broadly, the intensity of the agitation against the adoption and implementation of the Mandal Commission recommendations have been more in the States which have currently few or no reservations for Other Backward Classes than in those which have extensive reservations. One reason may be that the change may be drastic in the former and marginal in the latter. Another may be that in the latter of the population has got accustomed to large numbers of Other Backward Classes in the public services and that these reservations and the consequences which follow from them may have gained a degree of acceptance even among the higher castes.

Pushing through the Mandal Commission recommendations and implementing them effectively will require a strong administration and a stable government under a charismatic leader committed to the welfare of the Other Backward Classes. It does not appear that these conditions will be satisfied in the near future. Less than a year ago, despite its shaky position in the Lok Sabha, it looked as if the government of that time had infused life into the Mandal Commission reforms which had been dormant for a decade. In the current political context, the prospects of early implementation of these recommendations seem to be receding. While caste issues may continue to be raised at all levels, it appears that at least over the next few months the Hindu–Muslim and other religious conflicts rather than the problems of Other Backward Classes may hold the centre of the political stage. There may have to be significant political developments before the Mandal Commission reforms can be resurrected.

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WARDS COVE V ATONIO:

THE DECLINE OF AFFIRMATIVE ACTION?

By Asita Obeyesekere

As the bicentennial of the Bill of Rights of the U.S. Constitution approaches, it is perhaps useful to reflect on the principles of this document, and the difficulties the government and the Courts have had in applying those principles in society. The Bill of Rights exists primarily to guarantee the individual rights of U.S. citizens. Defining the exact nature of these rights however has been, and remains, problematic for the Courts.

Protection of individual (and group) rights has been especially controversial in the area of civil rights. In particular, the use of affirmative action and racial hiring quotas as a redress for historical discrimination and as a protective measure against latent societal discrimination has become a contentious issue. Opponents of affirmative action argue that such policies deviate from the principle of merit and individual rights, and are therefore incompatible with the ideal of a non discriminatory society. Supporters argue that given the past historical disadvantage suffered by certain groups, some form of compensentory practice is justified and necessary in ensuring equality of opportunity.

The role of the Supreme Court has become a large part of this debate. In the 1960s and 1970s, the Court was inclined to promote affirmative action goals. In the 1980s and 1990s, however, with the accession of a conservative majority, the Court has been less supportive of such programmes. Indeed there are clear indications that the Court is against the usage of protective measures such as affirmative action on the grounds that they are incompatible with the equality principles of the Constitution. Many recent decisions in the area of civil rights seem to indicate that the Court views anti discrimination efforts at having gone too far and consequently resulted in a disregard for other legitimate considerations.

A recent decision of the Supreme Court - Wards Cove v Atonio (109 S.Ct 2115, 1989) - is illustrative of the new trends and attitudes sweeping the Court. This paper will examine this decision in light of the Court's new conceptions and approaches regarding the protection of civil rights.

Wards Cove narrowed the scope of one of the most important civil rights precedents of the 1970's, the construction of the concept of disparate impact by the Court in Griggs v. Duke Power Co. (91 S.Ct. 849 1971)[1] The Wards Cove decision was immediately decried by mainstream civil rights activists as a further indication of the Court's abandonment of its former commitment to the protection of minorities and other disadvantaged groups; others however viewed the action as a much needed reversal of the misguided judicial activism of Griggs. In any event, whether one supports or disapproves of the Court's reasoning in Wards Cove, it is indicative of a whole new conception and judicial philosophy regarding civil rights.

Griggs v. Duke Power Company and the Construction of "Disparate Impact"

In order to fully understand the implications of the Wards Cove decision, it is first necessary to consider the case which led to the concept of disparate impact, Griggs v. Duke Power Company. In Griggs, black employees at the Duke Power Company brought suit against their employer stating its employment practices violated Title VII of the Civil Rights Act of 1964. Specifically they challenged hiring and promotion criteria requiring a high school diploma and the passing of a standardized general intelligence test on the grounds that neither qualification had any relation to the jobs sought, and served to disqualify a disproportionate number of black applicants.

In determining the facts of the case the District Court found that before the enactment of the Civil Rights Act of 1964 the Duke Power Company had racially discriminated in its hiring practices. Of its five operating divisions - labor, coal handling, operations, maintenance, and laboratory and test - blacks were only employed in the lowest paying labor department. In 1955, the company instituted a requirement of a high school diploma

for new applicants assigned to any department other than labor. (Employees already operating in those departments were exempt from the qualification however, and continued to obtain promotions based on their performance). After the company stopped its policy of racial discrimination in 1965, a high school diploma and the attainment of a satisfactory score on two professionally designed aptitude tests was required of new employees seeking work in any of the non labor departments. The company later allowed incumbent employees lacking a high school diploma to transfer to one of the higher departments from labor if they passed two general tests–the Wonderlic Personnel Test and the Bennet Mechanical Comprehension Test. While neither test was intended to measure the applicants ability towards a particular job, the required scores were generally equivalent to the norm for high school graduates.

The most relevant areas of Title VII on which the Courts based their decisions were:

Section 703[2]
(a)–employer cannot in hiring/firing "discriminate with regard to race, color, religion, sex or national origin."

(2)–cannot "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race, color, religion, sex or national origin."

(d)–"it shall be an unlawful employment practice for any employer, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining, including on the job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to or employment in, any program established to provide apprenticeship or other training."

(h)–". . .nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or *used* (emphasis added) to discriminate because of race, color, religion, sex or national origin. .. ."

(j)"Nothing contained in this Title shall be interpreted to require any employer, employment agency . . .to grant preferential treatment to any individual or any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage or persons of any race, color.. . . [in comparison with the] total number or percentage of persons of such race, color. . . in any community , state, section or other area. . .. "

The District Court and the Court of Appeals, in reaching their decisions, saw the thrust of Title VII directed against practices *intended* to discriminate against particular parties. Both Courts essentially viewed Section 703 (h) as sanctioning professionally developed tests absent discriminatory intent. The District Court found that while the Duke Power Company had discriminated in the past, they no longer did so. The tests were not pretextually used to discriminate on the basis of race, and were therefore not violative of Title VII. The Court of Appeals also held that as there was no purpose of discriminatory intent in the hiring requirements, and as the criteria had been applied equally to all parties, the company had not violated Title VII. The company's adoption of training and incentive programs to help black applicants meet the requirements for transfer lent added weight to their testimony that the hiring practices were non discriminatory in intent.

In reversing the Court of Appeals decision, the Supreme Court gave a reading of Title VII which led to the concept of disparate impact. The Court ruled that while Title VII did not intend to guarantee a job for every victim of past discrimination (as explicitly stated in Section 703 [j]) Congress did intend the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible qualification."[3] It saw Title VII as proscribing:

> not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[4]

In arriving at the business necessity justification, the Court relied on Section 703 (h), where professional tests are allowable unless "designed intended *or used* (emphasis added) to discriminate because of race." The Court, in interpreting this clause in particular, concluded that any employment or testing criteria with a disparate impact on blacks must be justified by a business necessity standard. Otherwise, intent aside, they are merely built in "headwinds against minorities."

Similarly the Court interpreted Section 703 (2) as a further justification of the business necessity criteria. In the event that a test has no relation to the sought after job, it can be construed as a practice which denies individuals of employment opportunities unfairly. Given that blacks lower scoring on many standardized tests is attributable to the inferior education they had long received in segregated schools, such testing, provided that it had no specific and identifiable job relevance, would be an unnecessary barrier to employment and unintentionally discriminate on the basis of race. Thus although there was no discriminatory intent in the company's hiring or testing procedures, as the evidence revealed no correlation between testing and job performance, the requirement was contrary to the intent of Title VII. Finally, in perhaps the most significant portion of its decision, the Court ruled that in a disparate impact situation, it is the employer who bears the "burden of showing that any given requirement must have a manifest relationship to the employment in question."[5]

To support its interpretation of Title VII the Supreme Court relied both on the Equal Employment Opportunity Commission's (EEOC) interpretation of Section 703 (h) as well as the legislative history and debates surrounding the passage of the act. Yet it is by no means certain that the Supreme Court's interpretation of the statute is correct. Professor Richerd Epstein of the University of Chicago has argued persuasively that Congress had never intended Title VII to be constructed as having a job necessity requirement, and had the sponsors of the bill brought up such an interpretation, it would have resulted in a resounding defeat.[6] Yet whatever the correct interpretation may be, it is the Supreme Court's ruling in Griggs and its disparate impact formulation which has provided the impetus for much of the civil rights legislation of the past two decades.

Defence of Griggs

For many civil rights activists, the Griggs decision was merely another much needed bolster against both overt and latent societal discrimination. Prior to the Griggs decision, there had been many laws which while claiming to be neutral, were nonetheless pretexts designed to disqualify an inordinate number of minorities. For example in Guinn v. United States, (638 U.S. 347 1915) the Supreme Court struck down an Oklahoma voting rights law requiring the ability to read and write any section of the Oklahoma constitution.[7] Although this clause alleged neutrality, it contained however a provision exempting those entitled to vote on January 1, 1866 or any time prior as well as their lineal descendents from this requirement. This clause, while ostensibly being applied to all parties, effectively disqualified large numbers of blacks from voting. The Court quite correctly identified this as pretextual discrimination. The Griggs decision, its supporters claim, went one step further. By mandating that employment criteria, whether intentionally or not, cannot operate as an unnecessary hinderance to minorities, it set a higher safeguard standard for minority rights protection.

Implications of Griggs

A significant consequence of the Griggs decision was its creation of a distinction between cases of disparate impact and disparate treatment in employment discrimination suits. As stated earlier, with disparate impact claims employment practices which substantially affect one group more than another, regardless of discriminatory intent, are proscribed unless justified by business necessity. In disparate treatment situations however, the intent of the employer plays a significant role. Claims under disparate treatment must show that an "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin through a showing of discriminatory intent."[8] As intent is a critical factor in disparate treatment, the burden of proof is with the party bringing the suit.

In addition, disparate treatment cases would invariably involve individual parties, while disparate impact cases would press the claims for a larger number of people. The effects of disparate impact claims are therefore more substantial and far reaching. Moreover, disparate treatment claims, when brought by a single party may put that individual in a position for possible ostracism from employers at a later date. By contrast, with disparate impact suits, which can be brought by outside parties, it is more difficult to single out and identify individuals for

retaliation by employers. For civil rights activists, these factors make disparate impact claims a much more useful and successful tool in their suits.

Job Necessity Standards under Griggs

One of the frequent criticisms made against the Griggs decision is that in mandating a positive correlation of job necessity, the Court has placed an unmanageable burden of proof on the employer. In particular, employers consider the EEOC guidelines, (to be treated with "deference" under Griggs), as excessively stringent both in defending against an initial charge of disparate impact and with regard to proving a job necessity correlation in employment criteria.[9]

The current EEOC guidelines define disparate impact as generally occurring when a selection rate for any group is less than 80% of the group with the highest rate. However, smaller and greater differences in selection rate may or may not constitute adverse impact where they are significant in both statistical and practical terms. The consequence of these standards is that Courts have often seemed confused by, or applying arbitrarily, the EEOC guidelines in this area. For instance, in Stewart v. Hannon although the pass rate for blacks in a written examination was 70% of that of whites and hispanics, the presiding Court did not find a case of adverse impact. By contrast, in Firefighters Institute for Racial Equality v. City of St. Louis, a District Court made an adverse impact finding on a portion of an exam despite the fact that 97.8% of white and 87.7% of black applicants had passed.[10]

For a test to be held as sufficiently job related, the EEOC has mandated three criteria: content validation, criterion validation, and construct validation. Criterion validity relates test scores to the ability to perform a particular task; content validity "requires a test examine a representative sample of knowledge or skills acknowledged to be required for a job;" and "construct validity requires that a test designed to measure a trait predicts behavior deducible from a theory of the trait."[11] While the EEOC has defined these "validity" standards, a coherent practical application by the Courts has not been forthcoming.

The difficulty for the Courts in applying these criteria in a uniform and consistent manner is evinced by a number of cases. In Albermarle Paper Co. v. Moody (422 U.S. 405 1975) black employees challenged the job relatedness of Albermarle's employment testing procedures. Prior to the trial, Albermarle had engaged an industrial psychology "expert" to evaluate the job relatedness of the testing procedure. On the basis of the expert study, the District Court found that employers had made a valid job necessity finding. The Court of Appeals and the Supreme Court however, in a detailed critique of the findings in comparison to the EEOC guidelines, reversed the decision.

In Washington v. Davis the Supreme Court upheld a District Court decision that a Washington D.C. written Police Department examination (Test 21) with adverse impact on minorities was sufficiently job related. The District Court based its finding on the fact that a positive relationship existed between test performance and the performance in the police training program. The test was held to be "directly related to a determination of whether the applicant possesses sufficient skill requisite to the demands of the curriculum a recruit must master at the police academy."

The Court of Appeals reversed the decision on the grounds that while the relationship between Test 21 and training school performance even if established, "did not satisfy what it deemed to be the crucial requirement of a direct relationship between performance of Test 21 and performance on the policeman's job." After the Appeal Court decision, the federal parties requested remand to the District Court "for the purpose of further inquiry into whether the training program test scores, which were found to correlate with Test 21 scores are themselves an appropriate measure of the trainee's mastership of the material taught in the course and whether the training program itself is sufficiently related to the actual performance of the police officers task." The Supreme Court denied the request and upheld the District Court decision, stating: "This conclusion of the District Judge that training program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion of evidence placed before the District judge....Nor is the conclusion foreclosed by either Griggs or Albermarle Paper Co. v. Moody: and it seems to us the much more sensible construction of the job relatedness requirement."[12]

The Washington case, although ultimately decided against the respondents, well illustrates both the difficulty in devising and defending a test against charges of disparate impact. The difference between the District and Appeals Courts as to whether the training program or the ultimate performance of the policeman's job should be the standard of job relatedness is essentially an arbitrary and debateable one. The remand request of the petitioners, which sought a job relationship requirement in regard to the training program test scores and mastership of course material, as well as training program relationship to performance as policeman, underscores the constraints that a test designer would be under. Defending any test from such rigorous standards would be expensive and wasteful. Indeed many critics charge that the ease in which the Griggs standards allow testing procedures to be challenged has resulted in a flood of discrimination suits. There is certainly some justification for this view. Of the 70,000 complaints the EEOC receives annually, approximately 15 - 20% involve charges of test discrimination.

What Stewart v. Hannon, Firefighters Institute, Albermarle and Washington illustrate is how convoluted interpretation of job relatedness can become. The ad hoc application of the guidelines in cases such as these creates a further confusion in the Courts. As no hard and fast legal standards have effectively been established[13], the interpretations as to what constitutes job necessity or a prima facie case of adverse impact may vary according to the particular court or judge adjudicating. Thus unsuccessful litigants may be more likely to file appeal on the assumption that a different court will have a different standard in this area.

There is another issue to consider in adverse impact suits: the problematical nature of using statistics in establishing a prima facie case of disparate impact. Often parties will differ as to the nature of the relevent labor pool used for comparative purposes. As one academic argues, "in the employment area it is more difficult to construct the statistical norm for a particular employer."[14] To do so one must consider not only such areas as the appropriate geographic area of the labor market (which was disputed in Wards Cove by all concerned parties), the skill and ability requirements for the job or promotion and the relative distribution of these skills among various groups (also disputed in Wards Cove), but also areas as the attractiveness of job for different racial groups, the determination of alternative jobs and consideration of their attractiveness, and others all of which would effect the relevant labor pool.[15] Although in practical terms this may be excessive, it is indicative of how subjective and complicated a statistical basis of disparate impact can become.

Employers constraints under Griggs

Perhaps the most serious allegation against Griggs is that by crippling employers' ability to defend their legitimate business practices, it has created a situation where employers are forced to resort to racial hiring quotas. The possibility of discrimination suits in general involve a potential high cost for employers. While this risk can result "in nothing more than a punctilious compliance with the law" it may "also lead the businessman concerned with wealth maximization to ensure himself against the cost."[16] This anticipatory insurance would consist of the use of racial quotas and "hiring without regard to merit, some of those on behalf of whom claims are likely to be asserted." The resulting decrease in productivity would be made up in freedom from lawsuits. The final result for employers may be precisely what Congress has proscribed in Title VII: "preferential treatment to any group because of the race, color, religion, sex or national origin of such individual on account of an imbalance which may exist with respect to the total number or percentage of persons of any race color. . . .employed by any employer." Given the difficulties in rebutting charges of disparate impact discrimination, employers, rather than undergo the expensive and time consuming process of defending themselves against such suits, may seek just such a remedy.

Ironically, one of the other standards that had prior to Griggs been considered an objective form of insurance against job discrimination suits was precisely standardized testing. The use of "objective standardized tests or a formalized criteria in the selection...minimizes the risk of prosecution and reduces the cost of defending because the employer can easily point to the performance under these objective criteria . . .as his basis for rejection of the individual who charges discrimination based on race."[17] Griggs, by forcing the employer to prove a job necessity requirement has effectively eliminated this option.

Wards Cove Packing Company v. Atonio

Given the difficulties the Griggs standards had presented to enforcement of disparate impact, the more conservative majority of the Rhenquist Court had in recent years attempted to cut back and narrow some of

what it considered its excesses (i.e. as seen in Washington and later in Watson). The Wards Cove decision was in effect a culmination of this process. Although this case was decided on the "particular facts", the Court majority used the opportunity to make a number of classifications and revisions on the theory of disparate impact.

In delivering the opinion of the Court, Justice White drew attention to the prohibitions against discrimination given in section 2000e-2(a) of Title VII of the Civil Rights Act of 1964 and the construction of disparate impact under Griggs where facially neutral employment practices could violate Title VII without relation to the employers discriminatory intent. He then delivered an opinion reinterpreting the standards of Title VII constructed by Griggs.

The Wards Cove case involved charges of discrimination by employees with regard to the hiring practices of the Wards Cove canning companies. The canneries, which are located in Alaska, operate salmon runs in the summer months. Before the season begins, workers arrive to prepare the canneries for operation. Once operation commences, cannery workers arrive and remain at the cannery until the end of the season. Due to the intensity of the work, cannery workers are boarded in company owned mess halls located at the plant.

Jobs at the plant are divided into two types: the relatively "unskilled" cannery jobs and the more "skilled" and higher paying non cannery jobs. The non cannery jobs are filled primarily by whites hired through company offices in the off season, while the cannery jobs are manned by Alaskan natives, Filipinos, and other non-whites. Respondents, a number of nonwhite cannery workers employed by the Wards Cove Packing Company, filed action on the basis of Title VII disparate impact and disparate treatment violations. The respondents claimed that the "petitioners' hiring and promotion practices- e.g. a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting within- were responsible for the racial stratification of the work force, and had denied them and other nonwhites employment as non-cannery workers on the basis of race."[18]

The District Court rejected all the respondents' disparate treatment claims and dismissed the disparate impact claims as it related to subjective hiring criteria, "on the grounds that those criteria were not subject to attack under a disparate impact theory." The charges of disparate impact against the petitioners objective hiring criteria were dismissed for lack of proof. The Court of Appeals however held that subjective hiring criteria could be challenged by disparate impact analysis, and that respondents had made out a prima facie case with regard to both skilled and unskilled cannery positions. It then remanded the case to the District Court "instructing the District Court that it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity."[19] Subsequent to the Appeals Court decision, petitioners sought review by the Supreme Court.In reversing the Court of Appeals decision, the Supreme Court, further narrowed some aspects of the more open ended areas of the Griggs decision (such as the use of statistics in proving a prima facie case), while also making wholesale reversals of some of the major precedents established by Griggs.

Rejecting the respondents claims of having established a prima facie case of disparate impact, the Supreme Court held that while statistics alone can make out a prima facie case, the analysis applied by the Court of Appeals "misapprehends our precedents and the purposes of Title VII." The Court of Appeals "relied solely on respondents' statistics showing a high percentage of non white workers in the cannery jobs and a low percentage of such workers in the noncannery positions." The proper comparison should have been "between the racial composition of the *qualified persons in the labor market* and the persons holding at issue jobs..."[20] The Court went on to state that the cannery work force as a whole did not reflect the available work force for the at issue jobs (which included accountants, managers, boat captains, electricians and doctors). In pointing out the inconsisitent logic of the Appeal Court the Court cited the respondents own statistics:

> Respondents own statistics concerning the noncannery work force at one of the canneries at issue here indicate that approximately 17% of the new hires for medical jobs, and 15% of the new hires for officer worker positions, were nonwhite. If it were the case that less than 15 - 17% of the applicants for these jobs were nonwhite and that nonwhites made up a lower percentage of the relevant qualified labor market, it is hard to see how respondents, without more, would have made out a prima facie case of disparate impact. Yet, under the Court of Appeals theory, simply because nonwhites comprise 52%

> of the cannery workers at the cannery in question, respondents would be successful in establishing a prima facie case of racial discrimination under Title VII.[21]

Thus, "if the absence of minorities holding . . .skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a disparate impact on nonwhites."[22]

In addition, the Court of Appeals statistical comparison was also flawed with regard to the unskilled noncannery positions (where the cannery and noncannery workers "may have somewhat fungible skills)." Stated the Court: "Racial imbalance in one segment of an employers' work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions. . . " A correct methodology for the Court of Appeals would have been a comparison of the nonwhite applicants for the unskilled noncannery positions with the percentage selected. Then, had there been no disproportionate selection rate, and no barriers to employment, the practices are not likely to have had a disparate impact. As Justice White stated:

> [The Court of Appeals view that cannery workers are the] "potential work force for unskilled noncannery positions is at once both too broad and too narrow... Too broad because the vast majority of these cannery workers did not seek jobs in unskilled noncannery positions; there is no showing that many of them would have done so even if none of the arguably "deterring practices existed. . . Conversely if respondents propose to use the cannery workers for comparison purposes because they represented the qualified labor population generally the group is too narrow because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers."[23]

Although the Court found that respondents had not made out a prima facie case of adverse impact, it nevertheless went on to address other aspects of disparate impact litigation. The Court reinforced a principle reached in an earlier revision of Griggs, Watson v. Fort Worth Bank and Trust, by mandating that in disparate impact cases, "as a general matter, a plaintiff must demonstrate that it is the application of a *specific or particular employment practice* (emphasis added) that has created the disparate impact under attack." Therefore in the Wards Cove case, for the respondents to prove a prima facie case, they would not only have to show that "minorities were under-represented in the at issue jobs in a manner acceptable under the standards (given earlier)", they would have to correlate this to the particular hiring practices, "specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[24] While acknowledging that this places a burden on employees, the Court was of the view of that liberal civil discovery rules would greatly facilitate this task.

The most notable aspect of the Wards Cove decision was however the Court's reversal of the burden of proof from employer to employee, and the concommitant changes in the standards for establishing a business necessity justification. The Court, initially following Griggs, held that once the respondent establishes a prima facie case of adverse impact, the burden of proof shifts to petitioner to provide a business justification for the practices. Yet it then departed from Griggs by holding that, while in this phase the onus of proving a business necessity justification is with the employer, the *"burden of persuasion however, remains with the disparate impact plaintiff."*(emphasis added). Although the Court majority claimed to be following Griggs in arriving at their decision, they implicitly acknowleged the tenuous nature of their new interpretation. Justice White, in putting forward this new formulation, stated: "We acknowledge that some of our earlier decisions can be read as suggesting otherwise, but to the extent that those cases speak of any employers burden of proof with respect to a legitimate business justification defence, they should have been understood to mean an employers production-- but not persuasion-- burden."[25] Yet as the dissent of Justice Stevens pointed out, such a construction from Griggs is hardly possible.

The Court then proceeded to further revise Griggs' standard of business necessity. Evaluation of business justification, the Court reasoned, consists of two phases: "first a consideration of the justifications an employer offers for his use of (employment) practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact." Regarding the former standard, the Court argued that "a mere

insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." Nonetheless it held that "at the same time, though, there is no requirement that the challenged practice be "essential or indispensable to the employers business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above."[26]

Regarding the use of alternative practices with less racial impact, the Court argues that a petitioners refusal to adopt *viable* practices would discredit their testimony that the hiring practices are non-discriminatory in intent. However "alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners legitimate employment goals." Cost and other factors would be legitimate employer considerations in these cases. Finally as a further restriction on the use of alternative remedies, the opinion added that "courts are generally less competent than employers to restructure business practices; consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit."[27]

Results of the Wards Cove Decision

The Wards Cove decision marked a wholesale departure of the standards and precedents of Griggs. It signifies a reversal in the priorities of the Court from protection of employee rights to a greater consideration of employer business constraints. Clearly the Court felt that Griggs and subsequent decisions had, in an attempt to eradicate discrimination in the workplace, greatly undermined and disregarded legitimate business and employer considerations. Wards Cove was an attempt to redress this disparity and reach a more equitable balance. While it may well be that Griggs and had created an excessive burden on employers in defending against disparate impact charges, the Court in its zealousness to narrow the scope of Griggs, may have gone too far in the other direction.

By reversing the burden of proof from employer to employee, the majority sought to bring disparate impact suits in line with disparate treatment suits. Although this may allow employers greater leeway in defending their practices, as stated earlier it greatly hinders the ability of employees in proving adverse impact (despite the Court's claims of liberal access to employer records being used by employees). In general, the resources available to employers is greater than that of employees. The Court's earlier decision to place the burden of proof on employers in Griggs would no doubt have been influenced by this consideration.

Moreover one must consider the totality of the decision. Not only did the Court reverse the burden of proof, it required employees to identify the particular hiring practices leading to adverse impact, and limited the use of statistics in establishing a prima facie case. In addition, the Court's statement that practices need not be "indispensible" to a business to be considered legitimate is a radical departure from Griggs, where the employer justicfication was "weighty" and EEOC guidelines were to be treated with "deference." Finally by qualifying the use of alternative remedial measures as it did, the Court effectively curtailed the use of such practices. Although the exact nature of these standards remain ambiguous at this stage, the overall opinion sends a very definite message regarding the Court's position on employment practices. Taken together, these factors suggest a new deference toward employer discretion in these areas.

With the Wards Cove decision, the Court signifies return to a standard of disparate impact where facially neutral criteria may not operate to exclude a particular group only when used pretextually. In this way it is a return to the standards of Guinn. Although discriminatory intent was irrelevent in the construction of Griggs, the Court in Wards Cove implicitly reverts to an intent standard. The thrust of the Court's decision is against "insubstantial (business) justification" allowing discrimination "to be practiced through the use of spurious, *seemingly* (emphasis added) neutral employment practices." By watering down the business necessity justification it moves away from the higher Griggs standards. Indeed, had the original Griggs case been decided under the Wards Cove job relatedness criteria, it is questionable whether the hiring practices would have been found unrelated to business necessity, and indeed whether the concept of disparate impact would have evolved at all.

In any event, one of the immediate consequences of Wards Cove will be even greater confusion in the lower courts concerning the standards of disparate impact. While the Court had attempted to set down formal guidelines in Griggs, as Albermarle and Washington demonstrates, a standard interpretation did not prevail. Now, with the wholesale reformulation set by Wards Cove, the standard of business necessity justification of the

employer, the establishment of prima facie cases, the applicability of EEOC standards, the employees burden of proof will all be subject to a new interpretation by the lower Courts. Until the Supreme Court establishes in subsequent decisions clearer guidelines in these areas, the decisions of the lower courts are likely to be varying and confused.

CONCLUSION

To a great extent, how one views the Wards Cove or Griggs decisions depends on ones view on the extent of racial discrimination pervasive in society. For the heads of most major civil rights organizations, those who wish to curtail such decisions as Griggs underestimate the level of discrimination pervasive in US society and the white hostility to black progress.[28] Moreover, they argue that given the effects of past discrimination there must be an active government role to provide genuine equality of opportunity. For them, the Griggs job necessity defense and its employer burden of proof, despite their costs, are justified in countering effects of present and past discrimination and in bringing about a more egalitarian society.

Critics of Griggs however choose to focus on other factors. They view the Griggs decision as having led to a devaluation of the merit principle and education, a lowering of the quality of the employees, and worst of all, reverse discrimination through hiring quotas against a particular section of the work force. In this sense Griggs and Wards Cove are part of the larger debate over the use of affirmative action as a redress for historical and latent societal discrimination. Although one can argue that Griggs and Wards Cove are not actually affirmative action policies, in the context of the present day debate, with its focus on historical disadvantages and racial hiring quotas, the distinction is tenuous. By and large, supporters of the Griggs standards are likely to be those who favor an active government role through affirmative action programs, while opponents are likely to be hostile to such interventionist policies. The Court which ruled in Griggs in the 1970 decision and the Court which ruled in the Wards Cove decision can be broadly seen as reflecting these two attitudes.

The benefits and detriments of affirmative action programs have been repeated ad infinitum elsewhere and are in any case outside the scope of this paper. It is clear though that the tendency in the Supreme Court (which began during the Reagan administration and is going strong today) is away from affirmative action and other programs of this nature. The antipathy for such compensatory programs is also evident in U.S. society as a whole. When race or gender is seen as one factor among many in selection criteria, society is somewhat willing to accept it. However, when affirmative action is seen as mandating specific and rigid "quotas" (as it was in Wards Cove) the hostility is compounded. If the current economic recession continues with the subsequent heightened competition for diminishing employment opportunities, this antagonism is likely to become even greater.

Given the increased societal sensitivities to affirmative action and the widespread perception that government is favoring minorities unfairly, the likelihood of Wards Cove being overturned in Congress is limited. Indeed, the Democratic sponsored Bill being debated presently (which seeks to return the burden of proof to employer) is likely to be vetoed, and the possibility of a successful Congressional override is slim.[29] Meanwhile, attempts by Republican leaders to use the issue politically has effectively curtailed any chances of a compromise solution. On the opposite side, Democratic party leaders, in an effort to satisfy two of their most important constituents, minorities and white blue collar workers, have been trying to separate the quota issue from their bill, going so far as to include a specific prohibition against quotas in hiring and promotion.[30]

As the legislation stalls in Congress, new studies reveal that American society still has a way to go in eradicating discrimination. Despite some gains in employment and college admissions since the 1970's the problems of minorities continue: the average earnings of black and white workers still remain far apart; the minority urban underclass continue to be plagued by drugs and violence; and in the area perhaps most relevant to Wards Cove, employment discrimination, a recent Urban Institute study reveals that "in 1 out of 5 attempts to get an entry level job, a white applicant advanced further in the hiring process than a black applicant who was equally qualified."[31] Given these statistics, the fact that many Americans view minorities as no longer deserving of special consideration is for many civil rights activists a disturbing phenomenon.

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1.Although this case was decided after the retirement of Chief Justice Earl Warren and his replacement by Chief Justice warren Burger, the Court was still dominated by the liberal faction of the Warren Court. Thus Griggs follows more closely the ideology and precedents of the Warren Court.

2. Griggs v. Duke Power Co., 91 S.Ct. 849 (1971) p.851

3.Griggs, p. 853.

4.Griggs, p. 853.

5.Griggs, p. 854

6.Richerd Epstein, unpublished paper on the Wards Cove decision.

7.Theodore Eisenberg, Civil Rights Legislation, The Michie Company, 1987, p. 631.

8.Robin Silverman, 1983 Annual Survey of American Law, p.958.

9.Richerd Epstein, previous citation.

10.Eisenberg, p.718

11.Eisenberg, p. 722.

12.Eisenberg, p.723

13.Eisenberg, p.687 – 688.

14.Fiss, A Theory of Fair Employment Laws, University of Chicago Law Review, See Eisenberg, p.688

15.Fiss, (See Eisenberg, p.688)

16.Eisenberg, p.718

17. Fiss (See Eisenberg, p.688)

18.Wards Cove, p. 208

19.Wards Cove, p.208.

20.Wards Cove, p.210

21.Wards Cove, p.211

22.Wards Cove, p.211

23.Wards Cove, p.212

24.Wards Cove, p. 213

25.Wards Cove, p.215

26.Wards Cove, p.216

27.Wards Cove, p.217

28."Quota Quagmire" Time May 27 1991, p.22

29.Time, p.23

30.Republican could easily counter that this prohibition will merely compound the problem. By placing the burden of proof on employers, they implicitly force hiring quotas as insurance against discrimination. Yet by including the prohibition, they allow other disgruntled employees to sue on the grounds that these hiring were quota based. Either way the employer is involved in tedious and expensive litigation.

31.Time, p.24