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Mediation as an Alternative to Litigation

Equal Opportunity

Supreme Court Judgement

N.D.J. Narangoda and others v. B.L.V. de S. Kodituwakku and others

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Editor's note...

In our first LST Review for the New Year, we publish an article by Buvanasundari Buvanasundaram on ***Mediation as an alternative to Litigation***. In this article the writer does a comparative study of the information from a survey conducted by her in Sheffield, England and in Scotland on Mediation. She examines the role of Mediation in the process of dispute resolution in Sri Lanka. The survey, which involved the analyses of case records of Mediation Institutes, conducting of telephone interviews and postal surveys with solicitors, explores how often solicitors resort to Mediation, whether they are trained for it and their level of awareness of Mediation services carried out in their area. The study showed that there is limited awareness on Mediation amongst the solicitors of Scotland as well as insufficient funding and recognition on the part of the Scottish Government towards the services of mediators. Upon drawing a more progressive and positive comparison to the situation in Sri Lanka, the writer concludes that "without the weight of the state behind it, without government funding and patronage, mediation would remain in the shadow of litigation, to be used only by those who cannot afford the cost of a trial". She adds, "the case for making greater use of mediation in the context of neighbour disputes is not founded on financial considerations alone so much as its claim to offer a potentially more constructive way of resolving a category of disputes that has not proved amenable to conventional forms of dispute resolution".

Also published is a summary of an article written by Dinusha Panditharatne on ***Equal Opportunity*** which was published in the 1998 issue of the "Sri Lanka: State of Human Rights. Here she analyses the grounds of impairment to Equal Opportunity in the Sri Lankan context in light of Equal Opportunity provisions contained in international instruments. She further examines the present legal provisions on Equal Opportunity in Sri Lanka – where both Constitutional and statutory provisions on Equal Opportunity are discussed. Commenting on the infringement of provisions on Equal Opportunity by Executive action and policy directives, the writer observes that the effectiveness of local institutions mandated to ensuring equality of opportunity "...depend much on public awareness of their existence and functions, their accessibility and the willingness of complainants to approach them and the dynamic commitment of those responsible for their direction and everyday operation". Emphasis is also placed on the role of non-state actors, who can contribute significantly to altering cultural attitudes towards achieving Equality of Opportunity.

On a somewhat similar note, we include the judgment of a recent significant Supreme Court application under Article 126 of the Constitution (SC Application No 397/2000) filed by 46 petitioners. Namely, Assistant Superintendents of Police (ASPs), who alleged that their Fundamental Rights under Article 12(1) had been infringed by the failure to promote them to the rank of Superintendent of Police. They also challenged the appointment of 36 officers who were promoted by a Board of Interview consisting of the Inspector General of Police (IGP), the Secretary- Ministry of Defense and 3 other Senior Public Officers, for which the Public Services Commission (PSC) granted subsequent approval.

Delivering judgment on the case (decided on 11.02.2002), Fernando J. analysed each step of the selection process; the call for applications, recommendations for interviews, criteria and procedure of the marking scheme etc, and concluded that "it has been established beyond reasonable doubt that the interview and selection process was a sham – worse than any I have come across...". Thus demonstrating the strong stand of the judiciary in checking administrative injustice and ensuring transparency and accountability of the conduct of public officials, the court unanimously held in favor of the Petitioners quashing all promotions made by the PSC and directed the PSC to hold fresh interviews and to complete the grant of promotions to persons who duly applied and were interviewed, within a specified period of time. With a view to ensuring the Petitioners' rights to fair, equal and reasonable selection process, the members of the previous interview board were prohibited from being included in the new panel and the court further directed the PSC to consider whether they should be debarred from sitting on interview panels. Taking the case a step further, the court directed the Attorney General to consider whether the conduct of the members of the previous interview board constituted 'corruption' within the meaning of Section 70 of the Bribery Act (as amended) or any other offence and if so to take appropriate action and to submit a report to the Supreme Court not later than 30th April 2002.

This judgment is significant not only for the justifiable remedies granted by court, but also for the steps taken by court to ensure that the wrongdoer is made accountable for actions of the past and future.

WE TAKE THIS OPPORTUNITY TO WISH ALL OUR READERS A PEACEFUL NEW YEAR!

Mediation As an Alternative to Litigation

Buvanasundari Buvanasundaram[1]

1. Introduction

As part of the degree component leading to the MA in International Criminology at the University of Sheffield, the writer worked on placement at Mediation Sheffield (MESH). This article is based on the report submitted at the end of the period of placement. The writer's interest in the work of MESH arose from her previous experience with mediation in Sri Lanka where she sat on a committee assessing the effect of mediation on the community.

As part of her placement she analysed some of the MESH case records, conducted telephone interviews with solicitors in Sheffield and a postal survey with solicitors in Scotland. The purpose of this exercise was to address the queries of MESH whether solicitors used mediation in their offices, whether they were trained for it, and also whether solicitors were aware of the mediation service in their area.

The MESH case records gave details of the disputes, the work done by the mediators in respect of these disputes and their outcome. It provided an insight into the success rate of MESH and the problems encountered by mediators. As required the writer signed a confidentiality form.

2. Mesh Case Records

An analysis of the data showed that most of the disputes involved noise. The following sets out the types of disputes and the number of cases dealing with such dispute. Some of the cases dealt with more than one type of behaviour. In respect of outcomes it appears that most cases were withdrawn.

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The total number of cases in 1997 numbered 80. Of these disputes concerning noise numbered 42, harassment 23; anti-social behaviour 15; boundary disputes 11; untidiness 7; children 13; animals 5; abusive behaviour 8;cars 3;others 4.

The outcome of mediation of these disputes is tabulated below.

OUTCOME

Where mediation has been attempted	**Fully Resolved** (Problem resolved and agreement reached on all presenting issues)	8
	Partial (Partial agreement on the presenting issues)	4
	Improvement (No agreement reached but evidence of improved communication or better understanding between parties)	14
	Assistance (Assistance given to one party removed need for further involvement)	5
	Withdrawal (Withdrawal after joint meeting)	1
	Total	33
Where mediation has not been attempted	**No Intervention** (Problem resolved without intervention from the Mediation Service)	2
	Inappropriate A (Mediation felt to be inappropriate and parties referred elsewhere)	2
	Inappropriate B (Mediation felt to be inappropriate and no other solution available)	3
	Withdrawal (Closure following withdrawal or refusal to get involved by other parties) (Withdrawal by second party 30) (Withdrawal by first party 7)	37
	Closed A (Closure because of irreconcilable differences between parties)	1
	Closed B (Closure for some other reason) *E.g.* Death or accident of one party	3
	Total	49

The total number of cases considered in 1998 numbered 94. Of these disputes, disputes concerning noise numbered 43; harassment 10; antisocial behaviour 16; boundary disputes 19; untidiness 2; children 15; animals 9;abusive behaviour 15; cats 6; others 5;

The outcome of mediation of these disputes is tabulated below.

OUTCOME

Where mediation has been attempted	**Fully Resolved** (Problem resolved and agreement reached on all presenting issues)	6
	Partial (Partial agreement on the presenting issues)	2
	Improvement (No agreement reached but evidence of improved communication or better understanding between parties)	16
	Assistance (Assistance given to one party removed need for further involvement)	7
	Withdrawn (Withdrawal after joint meeting)	3
	Total	34
Where mediation has not been attempted	**Non Intervention** (Problem resolved without intervention from the Mediation Service)	9
	Inappropriate A (Mediation felt to be inappropriate and parties referred elsewhere)	5
	Inappropriate B (Mediation felt to be inappropriate and no other solution available)	2
	Withdrawal (Closure following a withdrawal or refusal to get involved by other parties) (Withdrawal by second party 22) (Withdrawal by first party 7)	26
	Closed A (Closure because of irreconcilable differences between parties)	3
	Closed B (Closure for some other reason) *E.g.* Death or accident of one party	11
	Total	59

It appears that most people come to MESH after they have been to the police, to the council and sometimes the solicitor. When a complaint is brought to MESH it could take about 2

weeks for the mediators to visit the first party. This is because many complaints may be received together and the party has to wait until the mediators are free to visit him. When the party contacts MESH he is already considerably distressed and a further two-week delay does not help. In one case when the party was contacted after two weeks she said she had already consulted a solicitor, as she could wait no longer.

The analysis of the data also indicates that the length of the dispute, whether it be a dispute of less than six months or a dispute for more than two years, does not affect the success or failure rate of mediation. In 1997, in disputes of less than six months duration 50% were withdrawn, and 7% were fully resolved. In the case of disputes of over two years duration 41% were withdrawn and 20% were fully resolved. In 1998 in disputes of less than six months duration 27% were withdrawn, 9% were fully resolved. In the case of disputes of over two year duration 33 % were withdrawn and 7% were fully resolved. Success or failures therefore seem to depend on the disputants themselves and the skills of the mediators, not on the length of the dispute.

There is also no substantial difference in the outcome, whether the parties hear of mediation services over the radio and step into the MESH office, or are told of mediation by their housing association or the local council to whom the dispute was initially taken. In 1997, 21 disputants came directly to MESH, of this number 28% disputes were withdrawn and 5% were fully resolved. 42 disputants came to MESH after first visiting the council, the housing association or a solicitor, of this number 57% disputes were withdrawn and 10% were fully resolved. In 1998 12 disputants came directly to MESH. Of this number, 33% disputes were withdrawn, 0% were fully resolved. 56 disputants came to MESH through other sources, of which 26% disputes were withdrawn and 4% were fully resolved.

3. Telephone Interviews

A survey among solicitors was conducted to determine their response to neighbourhood mediation. A questionnaire of 15 questions was prepared and the interviewees were asked to respond to them. It was hoped that this would determine whether solicitors were aware of community mediation. This survey was also inspired by the Lord Chancellor's Department survey conducted on Alternative Dispute Resolution.[2] Telephone interviews were conducted

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[2] Alternative Dispute Resolution, A Discussion Paper, November 1999. Lord Chancellor's Department, HMSO.

with 20 solicitors. The list of solicitors in Sheffield was obtained from the Sheffield District Incorporated Law Society. The document listed the firms of solicitors in Sheffield and under each firm listed the solicitors employed. Beside the name of each solicitor was given his/her category of work. The document refers to 29 solicitors as being involved *inter alia* in cases of neighbour disputes. Yet when contacted on the telephone some of these solicitors stated that they had not dealt with cases of neighbour disputes. Of the 20 solicitors contacted over the telephone 3 solicitors were contacted specially because of their interest in community mediation.

Of those interviewed on the telephone, three solicitors were engaged in civil litigation, four were engaged in commercial law, three in personal injury, three in family law, two in probate, one solicitor was engaged in information technology, one in housing benefits, one in conveyancing, one in criminal law and one in property litigation. Three of those interviewed were trainee solicitors and one was a para legal officer.

Training in mediation. Of those interviewed all said that training in mediation was not part of their training as a solicitor. Thirteen interviewees had no training in mediation. Two said that they had attended some training in mediation but were not qualified as mediators. Of the two one said that an in - house training on mediation was conducted by two solicitors from Leeds as part of the apprenticeship programme. Another solicitor had received some training in the U.S.A. Two solicitors said they were trained in mediation and two others said they were trained in family mediation.

Participation in mediation. Sixteen interviewees had not participated in mediation, while four had participated in mediation.

Awareness of Mesh. Eleven were unaware of the community mediation service in the area dealing with neighbour disputes, nine were aware of it. Six of the nine did not know what it was called. Two knew the name of it as MESH, while the other did not know the name but knew it was located down St James Street.

Referrals to mediation. Fourteen had never referred a potential litigation to the local mediation service, four had done so in cases of matrimonial disputes and two had done so in neighbour disputes.

Provision on mediation. Nine said their firms had no plans to provide mediation as a service in the future, two said their firms had plans to provide mediation as a service in the future,

preference was made however for family mediation as opposed to community mediation. Four said they were already doing so in family matters, two said they may do so in cases involving family one said they may do so in commercial cases, and two said that they do not know whether the firms would provide such a service.

Training lawyers as mediators. As to whether their firm would contemplate its solicitors being trained as mediators six said yes and six said no, four said may be and four said that they did not know. Most of the solicitors interviewed also commented that while firms may train their solicitors in family mediation, they would not train them in neighbourhood mediation, as it was not worth the money that would be spent on the exercise. Another solicitor commented that the firm had trained two solicitors as mediators but it is of no use as the government has failed to support the programme and has 'failed to put its money where its mouth is'. Another solicitor commented that though the firm has two trained mediators no one wants to use them.

Resolving disputes with legal connotation. As to whether mediation could successfully resolve a dispute, which has legal connotations sixteen said yes, three said may be and one said he did not know. As to whether the vocation of lawyers is threatened by mediation, eighteen said no, one said possibly and one said not to a significant extent. As to whether the mediation service provides a useful service to the community, fourteen said yes of which one said it was only a small service for mediation comes into play only in a very small area. Two said it did not provide a service, three said perhaps it did and one felt the service was not particularly beneficial.

4. Postal Survey

With the kind assistance of Mr. Ewan Malcolm, (a solicitor in Edinburgh who dealt with community mediation) solicitors in Scotland were contacted. He supplied a list of solicitors in an organisation named C.A.L.M. (Comprehensive Accredited Lawyer Mediators). 75 solicitors on that list were sent a questionnaire with a covering letter explaining the nature of the research and an SAE for return of the questionnaire. Unfortunately C.A.L.M. it turned out was involved only in family mediation not in neighbourhood mediation. C.A.L.M. is an organisation of Scottish Solicitors accredited as Family Law Mediators by the Law Society of Scotland. It appears that the confusion arose from the use of the term 'community mediation' which seemed to embrace family mediation. The term that should have been used was

'neighbourhood mediation'. That would have restricted the search to solicitors involved in matters dealt with by MESH. The confusion also arose because family mediation seems more popular than community mediation.

In an effort to contact solicitors involved in neighbourhood mediation contact was made with the Scottish Mediation Network. Its Secretary however said that the only solicitor she knew who dealt with neighbourhood mediation was Ewan Malcolm. Mediation UK was then contacted to find out if they could provide names of solicitors involved in neighbourhood mediation. The director stated that while they had a list of mediation services in the different areas, they had no names of solicitors who dealt with neighbour disputes as their emphasis was on mediation.

The questionnaire had 11 questions to which the solicitors were asked to respond. From the 75 questionnaires sent to Scotland 34 responses were received. That is a response rate of 46%. All respondents said that training in mediation was not part of their training as solicitors. They had all however been trained as mediators and had all participated in family mediation.

Whether the vocation of lawyers was threatened by mediators 31 respondents answered in the negative. One solicitor mentioned that particularly in financial matters there was need for legal expertise to properly assist parties and that lawyers are essential to make the outcome of mediation binding. Another solicitor stated that the vocation of lawyers would be threatened only if the government took funds away from the legal aid scheme and diverted it to community-based mediation. One stated 'yes and no' to the question observing that many solicitors are against mediation as they put their own interest before those of their clients.

Advantages of mediation. The respondents listed many benefits. Most said mediation was speedy and more flexible than the courts. Some said mediation can prevent parties from adopting entrenched and unreasonable positions, the solutions agreed at mediation are more likely to be respected by parties than one imposed on them. Others said mediation is non confrontational, it allows parties to make informed decisions and there is better communication and understanding between parties. It allows parties to stay in control and it diffuses the conflict. The parties can walk away from the negotiations knowing that they have reached an agreement they can live with, despite having made some compromises. Most said mediation reduces emotional and financial costs, is informal and confidential. It personalised solutions to fit individual problems and resolved problems with minimum

animosity. One respondent said mediation opens the door to direct discussion between parties as they 'cannot hide behind' solicitors.

One solicitor stated however that after five years of being a mediator, he in all honesty saw no advantages in it. Mediation worked only for a very few. It can be more disruptive and prevent early settlement. Moreover it actually adds to the cost and does not detract from it. One solicitor said mediation does not satisfy what the clients want and 'judges many important issues'. Though the solicitor did not expand on this point, what he appears to be raising is that a mediator acting improperly could pass judgement on important matters.

Disadvantages of Mediation. Four solicitors said they saw no disadvantage in mediation. One of whom said it was always worth trying. One stated that the disadvantage of mediation was not in mediation itself but the lack of funds. Two respondents said they saw no disadvantage if the mediation was carried out properly. The others stated there were disadvantages in mediation. Many observations were made. It was said that it is sometimes difficult to get beyond the initial discussion, one must be careful of power imbalances, which are not always apparent to a mediator and this could disrupt the process. The mediator may also fail to identify 'hidden agendas'. Mediators must be aware of risk of manipulation by one party. Also mediation may not be suitable where the dispute has 'gone too far'. Mediation is sometimes inappropriate, as in cases of domestic violence. Mediation could give an opportunity to be aggressive to the other party and of paying lip service but not really wanting to resolve issues. It requires commitment from parties to be open to negotiation. There could be pressure to mediate though one is not ready for it and pressure to reach an outcome. There is also potential for abuse of the process of mediation. Further personal confrontation can be painful. It was also stated that mediators can fudge important legal issues. There is scope for exploitation by the dominant party or of the party less emotionally disadvantaged.

These responses seem to echo the concerns of a writer on mediation who observed that despite the promise of mediation, it is important to take a hard look at what mediation really is and can really do. The process is not as benign or free of danger to social justice and individual liberty as its proponents would have us think. There is the possibility of infringing the rights of weaker parties, the potential for manipulation by mediators and the existence of subtle forms of coercion. Mediation can end up a new forum in which the predominantly

'middle-class helping professions' are invited to supervise and control the private lives of the working class.[3]

Types of dispute suitable for mediation. One solicitor said that mediation is suitable where the issues are personal and emotional rather than legal. Another stated that it is suitable where there is no major power imbalance. Two solicitors said that all types of disputes are suitable for mediation. Two stated that it is suitable in all cases where the parties are clearly able to discuss matters and have an interest in a continuing relationship or in confidentiality or cost. Another respondent observed that mediation should take place as soon as possible before the parties' positions become totally entrenched and regrettably in some instances these positions are fortified by their legal advisers who may see mediation as some form of threat.

5. Conclusion

The two types of surveys, the telephone interviews and the postal surveys highlighted the differences between the two. Most of the telephone interviewees had to be called a number of times before they found time to consider the questionnaire. Most also seemed in a hurry to have the interview over with as they were being contacted in office. Their responses were also short, some being monosyllabic answers. On the contrary the Scottish lawyers' responses were detailed and lengthy. The fact that they were responding to the questionnaire at their own time perhaps accounts for this.

The surveys conducted seem to indicate that community mediation is marginalised. The survey conducted in Sheffield confirms the concerns of MESH that among solicitors there is a limited awareness of mediation. There is also concern among mediators that there is insufficient government funding and recognition of their services.

In this respect a lesson could be learned from elsewhere, where government support has led to successful community mediation projects. In Sri Lanka mediation has a long history. '*Duk gana rala*' meaning 'one who listens to the sorrows and woes of others' were found in Sri Lanka during the ancient times of the kings.[4] In modern Sri Lanka mediation was introduced by legislation – The Mediation Boards Act No 72 of 1988. The Mediation

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[3] Merry, S.E. (1983), cited in Stewart, S. (1998), *Conflict Resolution: A Foundation Guide*, Winchester, Waterside press, p.57.

[4] Brown,S. Cervenak,C and Fairman,D, (1998), *Alternative Dispute Resolution Practitioners Guide*, Centre for Democracy and Governance, US Agency for International Development, Washington, p.6.

Commission consists of 5 persons who are usually retired judges of the Supreme Court or the Court of Appeal. They are appointed by the President. The Commission constitutes panels of mediators for each area. The Panel is constituted as follows. A notice is published calling for nominations. The Government Agent in each area then submits to the Commission the names of suitable persons. The Commission selects those it deems suitable and they will then follow a preliminary training course in mediation skills and techniques. On completion of the training, the persons conducting the course submit to the Commission, a report in respect of each of the trainees. Such report shall comment on the aptitude, knowledge and skills of such trainee to function as a mediator. Based on these reports the Commission appoints for every area a Panel of Mediators.

Any person may make an application to the Chairman of the Mediation Board for settlement by mediation of any dispute. No dispute where the value of the property/ debt/damage does not exceed Rupees 25,000/- can be instituted in a court unless mediation has first been attempted and failed. It is also possible for a civil court, with the consent of both parties, to refer a matter before it to mediation. The Board may require any person notified to be present to bring to any mediation conference witnesses or documents which may assist the disputants in arriving at a settlement, and convene as many mediation conferences as necessary to arrive at a settlement.

There are 218 Mediation Boards in Sri Lanka with 5,400 trained mediators. Since 1990 about half a million cases have been handled by mediators. The majority of cases dealt with are land disputes, minor criminal offences, debt collection, and family disputes.[5] The settlement rate is 64.2%.[6] The programme costs are covered predominantly by government funds.

For mediation to grow in the community as a successful form of dispute settlement it is important that like in Sri Lanka the government support the programme financially and that there be more public awareness both of the available mediation services and of the clear benefits mediation has over litigation. Instead of polarising parties into enemy camps, mediation encourages them to focus on the problems between them and not on each other.[7] Further admissions made during mediation are not admissible in court. This protective

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[5] *Ibid.*, p.5.

[6] *Ibid.*, p.3.

[7] Liebmann,M. (1997), 'Community and Neighbourhood Mediation: A UK Perspective' in Macfarlane, J. (ed), *Rethinking Disputes: The Mediation Alternative*, London, Cavendish, p.169 at p.178.

confidentiality means that parties in mediation can express their emotions and mediation can provide a safe place for people to vent their anger.[8]

Without the weight of the state behind it, without government funding and patronage, mediation would remain in the shadow of litigation, to be used only by those who cannot afford the cost of a trial. Mediation may have disadvantages, but it is certainly more 'user friendly' to the public. The case for making greater use of mediation in the context of neighbour disputes is not founded on financial considerations alone so much as its claim to offer a potentially more constructive way of resolving a category of disputes that has not proved amenable to conventional forms of dispute resolution. Properly targeted, mediation offers scope for significant savings to be made in respect of some of the more intractable neighbour disputes that housing and the environmental health departments are called upon to deal with.[9] Mediation demands that when conflicts occur we think harder not only about what we want and why we should have it, but also about what we need to do to resolve our disputes and why.[10] While mediation cannot be regarded as a panacea for neighbour disputes[11] it is important that the disadvantages of mediation be minimised and mediation enter the main stream of dispute resolution and at least equal if not displace court litigation.

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[8] *Ibid.*, p.179.

[9] Dignan,J. Sorsby,A and Hibbert,J, (1996), Neighbour Disputes – Comparing Cost Effectiveness of Mediation and Alternative Approaches, Centre for Criminological and Legal Research, The University of Sheffield, p.5.

[10] MacFarlane,J. (1997), 'The Mediation Alternative', in MacFarlane, J (ed) *Rethinking Disputes: The Mediation Alternative*, *op.cit.*, p.1 at p.21.

[11] Young,R. (1989) *Neighbour Dispute Mediation: Theory and Practice*, Civil Justice Quarterly, Vol 8, p.319 at p.328.

Equal Opportunity

The Law & Society Trust published an article by Dinusha Panditharatne on Equal Opportunity in, 'Sri Lanka: State of Human Rights 1998'. We publish today a summary of this article. The foot notes included in the Article is not included here.

Introduction

In Sri Lanka, as in other countries, the ability of individuals to enjoy their rights and pursue their aspirations may be impaired on the basis of their sex, ethnicity, disability, socio economic position or other such status, which may pertain to them. The impairment of individual rights and aspirations on such grounds is commonly due to discrimination but it may also be due to the inherent disadvantages of a particular status. The principle and practice of "equal opportunity" seeks to rectify or at least minimize these impairments. It aims to afford all individuals an equal chance to participate in public spheres, particularly those of education and employment, by eliminating the discrepancies, which persons may experience in their treatment by public and private actors on the grounds of their race, sex or other status. The notion of equal opportunity is premised on the belief that an individual's opportunities should not be determined by status ascriptions that are irrelevant to his or her rights, capabilities, needs and ambitions.

Defining Equal Opportunity

By way of analogy, Equal opportunity aims to provide a level playing field, to which all players have fair access and can compete on fair terms. However Equal opportunity should not be equated with non-discrimination. The principle of non-discrimination is a general maxim of procedural equality of all individuals. It calls for the equal treatment of all persons by the law or by public or private actors in potentially any sphere of life. In contrast, non-discrimination as an arm of equal opportunity law and practice targets the elimination of discrimination specifically where it inhibits opportunities and particularly those of employment and educâtion. Rather than requiring procedural or 'formal' equality in the way in which persons are treated, equal opportunity calls for a more substantive equality, which

frequently requires the active intervention of the State or private actors through enabling measures and affirmative action.

Equal opportunity provisions in international instruments and grounds of impairement

International instruments provide a starting point for defining both spheres of equal opportunity and the proscribed grounds of impairment to equal opportunity in those spheres. Although several International Conventions include non-discrimination clauses (See Convention on the Elimination of All Forms of Discrimination Against Women, General Assembly resolution 2263 (XXII) of 7th November 1967, Articles 12 and 13; International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly resolution 2106 A (XX) of 21 December 1965, Articles 5(e)(iii)-(iv) and (vi) and 5f and the Declaration on the Rights of Disabled Persons, General Assembly resolution 3447 (XXX) of 9th December 1975, Article 9) specific terminology of 'equal opportunity' has only been used in international instruments relating to employment and education.

The ILO Convention (No.111) Concerning Discrimination in Respect of Employment and Occupation, which was adopted on 25 June 1958 by the General Conference of the International Labour Organisation at its 42nd session, requires state parties "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof (Article 2). Sri Lanka is yet to ratify this treaty. Article I of the convention describes 'discrimination' for the purpose of the Convention as:

[a]ny distinction, exclusion or preference made on the basis of race, colour, sex, religion political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), which was ratified by Sri Lanka on 11th June 1980, states that:

[t]he States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:....Equal opportunity

for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

International provisions target socially, politically, economically and culturally institutionalized grounds of impairment to equal opportunity, such as sex, race, social origin, political opinion and economic condition or birth. The derth of Sri Lankan case law challenging these grounds of impairment (exemplified by the lack of a single case of sex discrimination decided by the Supreme Court) may be responsible for the common local conception that equal opportunity involves the absence of undue discrimination on the grounds of any status, trait or characteristic.

The Sri Lankan Context

The terminology of 'equal opportunity' has yet to infuse local human rights discourse, but relevant concerns and issues have long dominated human rights and political agendas in Sri Lanka.

The ongoing civil conflict may be viewed in part as a manifestation of the perception that equal opportunity has been denied to segments of the Sri Lankan population on the grounds of language and ethnicity. The introduction of the Official Languages Act (No. 33 of 1956) and the policy of 'standardization' until 1978 (under which admission to universities was determined according to the proportions of school leavers educated in each language medium) were notable policies, which fuelled such perception.

Sri Lankan Women

Sri Lankan women face several problematic aspects in respect to equality of opportunity. These include the harassment of women in employment, education and public space; and continued social disapproval and imposition of gender- stereotyped limitations on women accessing and advancing in certain fields. Direct and indirect barriers to women entering employment are evident in the high unemployment rates of women, which for over 20 years have at least doubled the rate of men. Sexual harassment of women has been conspicuously absent from local discourse on equal opportunity. Yet this is a prime example of the institutionally disadvantageous conditions women experience, which are often sanctioned by the management and administration, and which discourage or impede women's advancement

in and contribution to public spheres. Related concerns include the use of marital status and maternity to impair women's equality of opportunity; employers frequently ask female applicants and employees about these statuses when considering appointments and promotions.

Plantation Sector

In respect to Sri Lanka's plantation sector Tamils, barriers to equality of opportunity on the ground of national extraction or citizenship have been addressed to some extent but their access to education and employment remain a matter of concern. Further, the disparities between male and female employment and educational indicators among estate Tamils are particularly pronounced.

Political opinion

A highly partisan culture of political favoritism and partiality suggests that impairments to equal opportunity on the ground of political opinion (including trade union association), particularly in the sphere of employment, are frequent.

Socio economic status

Perhaps the most systematic impediment to Equal Opportunity in Sri Lanka occur on the ground of socio-economic status, whereupon anyone or more of the factors of poverty, rural habitation or non-English speaking status serve to restrict opportunities in the sphere of education and employment. Discrimination on the basis of caste is also a form of impairment to equality of opportunity on the ground of socio-economic status. Discrimination on the ground of caste appears most pervasive as a form of social discrimination. However it also remains ingrained in certain spheres of occupation and employment, most notably, with regard to ordination to religious priesthood.

Disability

As with the other segments of the population, equal opportunity in training and employment commensurate with individual ability, must be provided to Sri Lanka's ever increasing number of disabled persons in order to ensure their ongoing contribution to the social, economic and public life of the country. Further, the provision of equal access to public buildings and spaces which inevitably requires special facilities as enabling measures, is vital to their continued participation and sense of belonging in public and community activities.

Age

A cultural reverence for age and seniority in Sri Lanka appears to have checked the increase in discrimination on the ground of (older) age, which is noticeable in many Western countries. Nevertheless, even a cursory glance at employment advertisements in local papers reveals that it is common to specify an upper age limit for a particular job, frequently as low as forty-five years of age for a managerial position. Of course the same cultural reverence may be indicative of discrimination on the ground of youth, particularly in respect to promotions, where merit and seniority within an organization may be over-ridden by preference to an older candidate.

Sexual orientation

The criminalistaion of homosexual activity under colonial rule (Until 1995, sec. 365A of the Penal Code rendered illegal acts of "gross indecency" between male persons in public or in private. The Penal Code (Amendment) Act No. 22 of 1995, replaced this section with the criminalisation of acts of gross indecency in public or private between persons) and the corresponding change in attitude towards sexual behaviour means that those who practice homosexual and bisexual behaviour may suffer intolerance or harassment in their educational institutions and workplace.

The present legal provisions for equal opportunity in Sri Lanka

Constitutional provisions

The 1978 constitution does not explicitly protect 'equality of opportunity' in any sphere as a fundamental right. However **Article 12 in chapter III**, which provides for the 'right to equality', contains four distinct aspects. The first is Article 12(1), which provided for equality before the law and equal protection of the law. This article enshrines the general principle of equal justice, stipulating equal subjugation of all persons to the law and guaranteeing equal application of laws of the State and the rights contained therein to all persons similarly situated. And further, equal rights of access and action before the Courts. Article 12(1) thereby implicitly incorporates the underlying basis of equal opportunity but does not specifically provide for it by any reference to its spheres and grounds of operation.

Article 12(2) specifies the institutionalized grounds on which discrimination against any citizen is prohibited, including race, religion, caste, sex, political opinion, place of birth "or any of such grounds". However Article 12(2) exempts discrimination against a non-Sri Lankan citizen or stateless person – an exclusion that does not feature in the other provisions of Article 12. There are two exceptions to this Article, both dealing with language.

Article 12(3) prohibits discrimination in the form of "any disability, liability, restriction or condition" with regard to "access to shops, public restaurants, hotels, places of public entertainment and places of public worship" of a person's own religion. The proscribed grounds include all those mentioned in Article 12(2) except those of political opinion and place of birth.

Article 12(4) includes limited provision for affirmative action and enabling measures by the State. It permits (but does not require) "special" provisions being made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

Perhaps the most serious limitation of article 12 (and indeed of the Chapter on Fundamental Rights as a whole) is that, it is only enforceable against State respondents. This is a severe restriction on the protection of equal opportunity, given the ever expanding influence of the private sector in employment and lately, in education.

Statutory Provisions

Statutory provisions are generally enforceable against non-State respondents and thereby offer remedies to a considerably wider segment of the population whose rights and opportunities have been impaired. Statutory provisions relevant to securing equal opportunity relate primarily to sexual harassment, disability and women.

1. Sexual Harassment under the Penal Code

Section 345 of the Penal Code was amended in 1995 (which in archaic terminology, made it illegal to 'outrage the modesty' of a woman) and replaced with the criminal prohibition of sexual harassment of another person by assault or use of criminal force, and sexual annoyance or harassment by the use of words or action. Sexual harassment is defined as "[u]n welcome sexual advances by words or action used by a person in authority, in a working place or any other place…". There is therefore, no prohibition on sexual harassment or annoyance by a person who is deemed not to be in a position of authority.

2. Statutory provisions on disabled persons

The protection of the rights of persons with disabilities Act (act. No. 28 of 1996) makes some provision for the equal opportunity of disabled persons. The Act provides for the establishment of a "National Council for persons with disabilities," whose several intended functions are enumerated in Article 13 of the Act. Section 23(1) of the act prohibits discrimination against persons on the ground of disability "in recruitment for any employment or office or admission to any educational institution." Further Sec 23(2) aims at affording similar protection for disabled persons as Article 12(3) of the Constitution provides for other specified statuses.

3.Effect of labour laws on women in employment

Several enabling measures for employed women, such as maternity benefits and other special conditions, exist in a variety of legislation and sub-legislation in Sri Lanka. (See for example, *The Shop and Office Employees (regulation of Employment and Remuneration)* Act, No. 19 of 1954 (as amended), and *The Maternity Benefits Ordinance* (1939)). However a number of substantial defects are apparent in the statutory provisions for equality of opportunity for women in employment. Firstly **differential minimum wages** for men and women remain in force in certain trades such as for workers in the cinnamon trade. Secondly certain statutory provisions **legitimize the stereotypical assumption of women's roles**. Thus under the *Employment of Women, Young Persons and Children Act.* No. 47 of 1956 (as amended) *and* section 10 *of the Shop and Office Employees (Regulation of Employment and Remuneration) Act* women are prevented from working at certain times. Then also under the *Shop and Office Employees (Regulation of employment and remuneration) Act,* 'white collar' women are entitled to 84 days of maternity leave with full pay for their first two children (and 42 days for subsequent children) exclusive of other leave holidays. In contrast, the *Maternity Benefits Ordinance* entitles women in labour-intensive (such as factory) employment to 84 days of maternity leave with full pay inclusive of holidays. This distinction is tantamount to **discrimination on the ground of socio-economic status**. It is also relevant to mention here that there are no statutory provisions prohibiting discrimination against women in employment, which leaves women employed in the private sector (who cannot lodge a fundamental rights petition) without any remedy in the event of infringement of their right to non- discrimination and equality of opportunity.

4. Statutory prohibition of caste-based discrimination

There is also a statutory prohibition on caste- based discrimination. *The Prevention of Social Disabilities Act No 21 of 1957, as amended by No. 18 of 1971* makes it illegal to impose "social disabilities' on a person by reason of his or her caste, and also punishable by imprisonment up to three years with or without a fine up to Rs. 3,000 if found to have done so. The Act does not seek to prevent caste-based discrimination in the private or social spheres (despite its terminology). Rather, social disabilities as defined under the Act directly impact on spheres of equal opportunity and constitute prevention or obstruction of a person from, inter alia, admittance to any educational institution; engagement in any lawful employment and activity; entering or being present in any place to which the public have access, other than a place of religious worship; entering or service at a shop, market, fair, hotel, rest house, eating house or restaurant; and being carried as a passenger in any public vehicle or vessel. The exclusion of places of religious worship is significant because religious activity is the prime public domain in which caste-based discrimination prevails.

Executive action and policy

University admissions and matters relating to admission and promotion in public service are two of the relevant areas under this topic. The issues of equality of opportunity, which arise in respect to the district quota system, are multi-faceted. To date, the focus has been on its discriminatory impact on Jaffna Tamils, yet its role in redressing institutionalized discrimination and disadvantage on other grounds – namely economic condition, social origin and birth – also needs close attention.

As for employment it is relevant to mention the Public Administration Circular No. 15/90 and 15/90(i) of 1990 which stipulated that recruitment of ethnic groups to public employment must correspond to the proportions of those groups in the total Sri Lankan population. Previously ethnic quotas applied also to promotions within the public service and public corporations. However this was challenged in the case of *Ramupillai v. Festus Perera (1991) 1SLR 11* which held that although appointments to public employment could be made in accordance with ethnic quotas, the application of a quota system to promotions constituted an unwarranted interference with the principle of merit.

Voluntary measures and policy directives

Voluntary measures, which have been effective in other jurisdictions, are those undertaken by non-state actors, whose role should not be underestimated in gradually altering cultural attitudes towards, and expectations of, equal opportunity. The 'Human Resources' departments of large private sector institutions in Sri Lanka, for example, could draw up and institute their own 'codes of conduct' to set standards by which both management and employees treat fellow workers, implement informal mechanisms to impart these standards in the work force and resolve concerns relating to their adherence.

Local Institutions for protecting equal opportunity

The Human Rights Commission, Official Languages Commission, the Ombudsman are institutions which have mandates relevant to ensuring equality of opportunity. The National Council for Persons with Disabilities and the National Committee on Women are two other bodies with similar functions. How effective these bodies are in ensuring equality of opportunity depend much on public awareness of their existence and functions, their accessibility and the willingness of complainants to approach them, and the dynamic commitment of those responsible for their direction and everyday operation.

Supreme Court of the Democratic socialist Republic of Sri Lanka
Colombo 12.

In the matter of an Application under Article 126 of the Constitution

1. N.D.J. Narangoda,
   Assistant Superintendent of Police
   Avissawella.

2. M.G.W. Muthubanda,
   39 D, Summit Flats, Colombo 5.

3. S. A. Priyaratne,
   101/ 1, 1-2, Senior Police officers Quarters,
   Kew Road, Colombo 2.

4. N.K.D. Kudahetty,
   Training Commander,
   PSD Training Camp, Kumbuka.

5. M.D.A. Wijesingne,
   14/10, 2nd Lane,
   Prathibimbarama Road, Dehiwala.

6. A.A. Gunatilleka,
   139/1, Pagoda Road, Nugegoda.

7. S.N.S. Perera,
   9, Vihara Lane, Wellawatte.

8. P.T. Nimal Sirinatha,
   8C, Sapugaskanda, Makola.

9. M.M.A.I. Manamperi,
   Galkanda Road, Nattaranpotha,
   Kundasale.

10. W.M.S. Weerasinghe,
    Police Reserve Headquarters,
    Colombo 1.

11. B.K.S.P.K. Maturata,
    4/1, 1st Lane, Dehiwela Road,
    Boralesgamuwa.

12. S.A.D.S. Gunawardena,
    101/21, A Block, Officers Quarters,
    Kew Road, Colombo 2.

13. K. Arasaratnam,
    Police Office,
    Horana.

14. T.M.N. Hameed,
    213, Bandaranaike Mawatha,
    Hunupitiya, Wattala.

15. D.B. Epa,
    BP 1/1, Manning Town Housing Scheme
    Elvitigala Mawatha, Colombo 8.

16. R.A. Seneviratne,
    Police Office, Vavuniya.

17. A.M.S. Abeysinghe,
    101/1, 3/1, Police Quarters,
    Kew Road, Colombo 2.

SC Application
No 397/2000

Petitioners

- vs -

1. B.L.V. De S. Kodituvakku,
   Inspector-General of Police,
   Police Headquarters, Colombo 1.

2. Victor Perera,
   D.I.G. (Personnel),
   Police Head Quarters, Colombo 1.

3. Nihal Dharmadasa,
   Senior Superintendent of Police,
   Manpower and Deployment,
   Director Personnel,
   Police Headquarters, Colombo 1.

4. R.K. Chandananda De Silva,
   Secretary,
   Ministry of Defence,
   15/5, Baladaksha Mawatha, Colombo 3.

5. K. Vignarajah,
   Chairman,
   Public Service Commission.

6. M.M. Mansoor,
   Member,
   Public Service Commission.

7. P. Sangiah,
   Member,
   Public Service Commission.

8. Dr (Mrs) N. Samarasekera,
   Member,
   Public Service Commission.

9. W.M.A. Wijekoon,
   Member,
   Public Service Commission.

10. G. Wickremaratne,
    Member,
    Public Service Commission.

11. Col. V.S. Kudaligama,
    Member,
    Public Service Commission.

12. Mrs.L. Gunawardena,
    Secretary,
    Public Service Commission.

all of 61, Janadhipathi Mawatha, Colombo 1.

13. K.A. Ariyapala.

14. S.M. Suraweera.

15. G.E.V. Nihal Jayasekera.

16. K. Udayapala.

17. Ajith K. Fonseka.

18. M.J. Mohamed Rishard.

19. Ajith Wickramasekera.

20. R.W.M.C. Ranawana.

21. Mohamed R. Latiff.

22. K. Sridaran.

23. A.G.J. Wickremasinghe.

24. G.A.A. Ananda Galgamuwa.

25. K.R.W.W.S.B.G. Wijesinghe.

26. U.S.R. Nandana Wijeratne.

27. John C. Proctor.

28. Nihal Kalansuriya.

29. Moharned Hyder Anver.

30. Oscar Antony de Silva.

31. A.R.W.B.W.R.A.B. Tibbotuwawa.

32. M. Thuraisingham.

33. W.P. Thilakawansa Werawardena.

34. A. Charles Wijesuriya.

35. D. Ratnapala.

36. K.H. Jayaweera.

37. Nevil Gray.

38. Gamini Dissanayake.

39. G..Gamini Silva.

40. P.D.K. Rodrigo.

41. B.R.S.K. Udapamunuwa.

42. B.M..Dole.

43. B.V. Ranaweera.

44. G.D.A. Kumara Senaratne.

45. W.S.M. Gunasekera.

46. M.J. Karunaratne.

47. S. Ajith Wegodapola.

48. Nihal Karunaratne.

All c/o of the Inspector-
General of Police, Sri Lanka
Police Headquarters, Colombo 1.

49. The Attorney General,
Attorney General's Department,
Colombo 12.

50. R.A.A.Ranaweera,
Secretary,
Ministry of Cultural and Religious Affairs,
8th Floor, "Sethsiripaya", Battaramulla.

51. S.M.J. Senaratne,
Secretary,
Ministry of Posts, Telecommunications and Media,
West Tower, World Trade Centre,
Colombo 1.

52. Romesh Jayasinghe
Additional Secretary to the
Ministry of Foreign Affairs,
Republic Building, Colombo 1.

Respondents

BEFORE Fernando, J.
Gunasekara, J. and
Yapa, J.

COUNSEL F. Musthapha, PC, with Sanjeewa Jayawardene for the Petitioners in SC 397, 398, 703 and 704 of 2000;
D.S. Wijesinghe, PC, with J.C, Weliamuna for the Petitioners in SC 400 of 2000;
Palitha Fernando, DSG, for the 25th Respondents;
Manohara de Silva for the 25th Respondent;
U. Abdul Najeem for the 44th Respondent.

ARGUED ON 15th and 28th November 2001.

DECIDED ON 11th February 2002.

FERNANDO, J.

These five applications (SC Nos 397, 398, 400, 703 and 704 of 2000) were taken up for hearing together. Counsel agreed that the decision in SC 397/2000 would apply to the other four cases as well.

There are 17 Petitioners in SC 397/2000, and 29 Petitioners in the other four cases. They are Assistant Superintendents of Police ("ASP's"), who complain that their fundamental rights under Article 12(1) had been infringed by the failure to promote them to the rank of Superintendent. In Sc 397/2000 they have named as Respondents 36 officers who were promoted, and all those promotions are challenged in these five applications, except that of the 48th Respondent. Although in their petition the Petitioners challenged his appointment, alleging that he was not eligible and had neither applied nor been interviewed, at the leave stage itself they stated that they were not pursuing that challenge because he had been promoted in pursuance of a distinct Cabinet decision of 19.4.2000. I express no opinion as to whether that promotion was legal or proper in terms of the applicable scheme of promotion.

The 32nd Respondent (Candidate No 55) died before leave was granted, without any attempt at substitution, and natural justice requires that his promotion remain unaffected by this order.

The officers who were invited to apply were ASP's who had five years confirmed service as ASP's, and an "unblemished record of service" for five years prior to December 1999. However, the modified scheme of recruitment and promotion approved by the Cabinet on 5.8.98 stipulated eight years service. The question whether some successful candidates were disqualified on this score was not pursued at the hearing, and I express no opinion on that matter.

185 ASP's were called for interview, and 178 were interviewed, on 13th, 15th, 17th and 19th March and 7th May 2000. The Board of Interview ("the Board") consisted of the 1st Respondent (the Inspector-General of Police), the .4th Respondent (the Secretary, Ministry of Defence), and the 50th, 51st and 52nd Respondents (senior public officers). Upon the Board's recommendation, communicated by the 4th Respondent by his letter-dated 12.5.2000 (not produced), the Public Service Commission ("PSC") by letter-dated 16.5.2000 granted approval for the promotion of 35 officers. The 5th Respondent is the Chairman, and the 6th, 8th, 9th, 10th and 11th Respondents are the members, of the PSC. The 1st Respondent announced these promotions by a circular dated 18.5.2000 both the 17th and the 18th were public holidays). The 4th Respondent averred in his affidavit that another eight officers (not named) had not been recommended, although they had scored more marks than the last of the 35 promotees, because of pending fundamental rights applications, and disciplinary and criminal proceedings against them. The PSC when granting approval stated that a further communication would follow in regard to another ten officers (not named). In November and December 2000, six others were promoted. This judgment will apply to all ASP's promoted (or recommended for promotion) in pursuance of the aforesaid interviews.

After judgment was reserved, I called for the correspondence between the 1st Respondent, the 4th Respondent and, the PSC pertaining to the promotions, and the PSC minutes. One of the documents produced was the 4th Respondent's letter dated 12.5.2000 to the PSC, in which he recommended 45 officers, including the eight who had scored more than the last promotee. That letter made no reference to pending inquiries: his affidavit in this Court was therefore not truthful. By letter dated 15.5.2000 the PSC asked whether there were pending inquiries, and then only was it disclosed, by letter dated 15.5.2000 received by the PSC on 16.5.2000, that there were pending inquiries against ten of the officers already recommended.

It appears that without any discussion at a meeting Chairman and three members of the PSC approved the 35 promotions by circulation of papers the same day.

The Petitioners contended that the decisions of the Board and the PSC were arbitrary, capricious, unreasonable and discriminatory.

The shortcomings in the interview and selection process are more serious than those disclosed in SC Applications Nos 272-275/2001 (SCM 19.11.2001), which involved the promotion of Chief Inspectors to the rank of ASP.

The Petitioners challenged the authenticity of the interview mark sheet, the selection criteria adopted by the Board, the procedure followed in verifying service records, and the allocation of marks. They averred that they were interviewed for three to four minutes each and asked various questions, some of which were strictly unrelated to their police work.

INTERVIEW MARK SHEETS

It was submitted on behalf of the members of the Board that they did not maintain individual mark sheets, and that they made a joint assessment of each candidate. If systematically and honestly done after meaningful discussion, that procedure is not objectionable. However, the document produced by the 4th Respondent as being the interview mark sheet is a computer printout, and not a mark sheet contemporaneously maintained by them - although that was the document, which this Court called for. We were told that this was not available. (By a strange coincidence, in SC Applications 272-275/2001, too, the original mark sheet was not available.)

Only the last sheet (the eleventh) of that computer print-cut is signed. Though all five members have signed three of them have not dated it. The 1st Respondent had dated his signature as "12.5.2000". The date under the 4th Respondent's signature is unclear. One possible explanation that might have been suggested for the lack of a hand-written record is that the marks, as soon as they had been agreed, were entered directly on the computer: but the members of the Board made no such claim. Indeed, if that was the case, there is no reason why a computer print-out was not obtained on 7.5.2000, and signed at once; only a very few candidates were interviewed on 7.5.2000. Besides, the computer entries include the

ranking of the candidates, which would have been done only after the conclusion of all the interviews. Here too, time members of the Board might have claimed - but did not - that this was done automatically, and contemporaneously, by the computer program used. If that was what happened, it would have been signed the same day.

There is another matter. Against the name of Candidate No 68 (and his alone), there are three asterisks ("***"). There was no explanation for this. However, above the marks allocated to him, there is an unauthenticated entry; "Killed in action". Posthumously promoted. The asterisks and that entry, quite obviously, were not made at the time of interview, but later. When? is the question.

Among the documents produced after the hearing was the 1st Respondent's request dated 28.4.2000 to the 4th Respondent for a posthumous promotion for Candidate No 68 who was killed in action on 7.4.2000. The 4th Respondent appears to have conveyed that request to the PSC only much later. The PSC by letter dated 10.8.2001 granted that promotion. That officer had scored enough marks to be ranked 27th, but his name was not among those recommended for promotion by the Board, or promoted by the PSC in May 2000. I find it difficult to believe that the members of the Board in May 2000 anticipated the PSC's August 2001 decision.

I think it probable that the computer printout was not a contemporaneous record, but one subsequently made from another (probably hand-written) document which has not been produced. There is neither a certificate nor evidence that the computer printout is a correct copy of such original (or that the members of the Board satisfied themselves on that score before signing). There is considerable doubt as to whether that document correctly records the marks given at the interview without subsequent adjustments.

CRITERIA AND PROCEDURE

In his first affidavit dated 7.11.2000, the 4th Respondent explained the criteria and procedure as follows;

> The Board of Interview, with the concurrence of the Public Service Commission, applied the following marking scheme:

seniority	-	30 marks
service record	-	30 marks
conceptual skills	-	10 marks
analytical skills	-	10 marks
human relations skills	-	10 marks
communication skills	-	10 marks

The candidates' seniority and service records were verified by perusing personal files, records, reports and certificates submitted by the relevant authorities and the candidates, in order to obtain, among other details, the total period of service in the said rank, special increments (10 marks), commendations and rewards of Rs. 5,000 and above (10 marks) and good entries (10 marks).

The Board assessed their conceptual skills, analytical skills, human relations skills, and communication skills by questioning candidates on real and hypothetical situations in different languages and by paying special attention to the manner and the confidence with which they faced the interview and replied the numerous questions posed to them.

Each candidate was awarded marks upon the overall agreement of the members of the Board.

In a later affidavit dated 18.4.2001 filed in SC 398/2000 the 4th Respondent added;

All members of the Interview Board were furnished with personal details of the candidates in the form of computer printouts, an Inquiry File containing disciplinary/criminal/court action pending against candidates, an assessment of the service record of each candidate, and personal data submitted by candidates in the prescribed form.

Several questions arise in regard to the criteria and the procedure.

While the criteria and the weightage given are unobjectionable, it is a serious defect that the criteria did not include many important qualities needed for the post - such as leadership ability, management skills, initiative, independence and the ability to resist improper influence.

The decision of the Board to sub-divide "service record" to include marks for 'rewards' and 'good entries' was patently unreasonable. The Petitioners produced the Departmental Order relating to the Police Reward Fund, which provided for the payment of rewards to officers of and below the rank of Chief Inspector. It was not disputed that ASP's are not entitled to rewards. It was also conceded that there is no practice of making 'good entries' in respect of ASP's. That the Head of the Police Force was unaware of this, and failed to enlighten his colleagues on the Board, raises serious doubts as to his competence. Assuming, however, that all the members of the Board made a *bona fide* mistake at the outset in making that sub-division, there is no explanation for their failure to correct it when the interviews commenced - for it would then have become apparent that marks could not be allocated under those two heads. Indeed, the computer printouts containing the candidates' personal details did not record rewards and good entries. Nevertheless, if the mark sheet is to be believed, the Board purported to allocate marks under those two heads as well. That is beyond dispute, because several candidates were given high marks (between 16 and 21, out of 30) even though they had no special increments or commendations.

Further, since an "unblemished record of service" for five years was a *sine qua non,* the Board was obliged to make provision - by deducting marks, or otherwise - for "blemishes". As pointed out later in this judgment, the Board failed to do so.

I hold that the sub-division of the "service record", and the allocation of marks for "service record", were gravely flawed.

Turning to the procedure followed, although the 4th Respondent asserted that an assessment of the service record of each candidate was available to the Board, when this Court called for the documents, the 'assessments' tendered did not include those in respect of candidates Nos 1 to 36, and 137 to 185. Ten of the original 35 promotees were among Candidates Moe 1 to 36. The available assessments were a scanty recital of a few aspects of the service details (which should anyway have been available in the computer printouts referred to below), and were in no sense an *evaluation* of the merits or the quality of service. Besides, those assessments were not signed or authenticated in any way. I doubt their reliability. Thus Candidate No 55 had not been recommended for promotion by his two immediate superiors, and had pending disciplinary inquiries - facts which his 'assessment' did not disclose. Candidate No 91 had been on no-pay leave, but this his 'assessment' did not reveal - although one of the matters which the 4th Respondent had directed the 1st Respondent to provide in

advance was "periods of no-pay leave/no service period in the present rank".

As for the computer printouts, it is doubtful whether the computer records, were regularly and systematically maintained. Thus, in regard to "disciplinary inquiries", most records were negative, as indicated by 'N'. In the case of many candidates, "N" had been altered in ink to "Y" without any authentication. It may be that these alterations were correct and proper, but the fact that they were made shortly after the printouts were obtained for the interviews proves that the computer records had not been properly updated. Further, in regard to successful Candidates Nos 47 and 55, although the computer printout showed 'N', there was evidence that there were, pending disciplinary inquiries against them.

There were inconsistencies between the "assessments" and the computer printouts. Thus successful Candidate No 91 had been on no-pay leave for one year and seven months, and had that period been deducted it would have been apparent that he did not have the required minimum of five years confirmed service as an ASP. Had that deduction been made, it would have been clear that he was not eligible, even to be called for the interview. The computer printout disclosed this period of no-pay leave; the "assessment" did not. The Petitioners pleaded that that candidate was ineligible. In reply, the 4th Respondent claimed that 'this fact was not reported to the Interview Board' -thereby confessing that the Board had failed to peruse the computer printouts. Furthermore, Counsel for that candidate pointed out that the candidate himself had disclosed this fact in his application form. That confirms that even if the "personal data submitted by candidates in the prescribed form" was available to the Board (as the 4th Respondent claims), that too was not checked.

I must mention that the other four members of the Board did not file affidavits to answer or explain the allegations made by the Petitioner. In SC 398/2000, on 3.11.2000 the 1st Respondent's instructing Attorneys informed this Court that he was undergoing medical treatment in India and that his affidavit would be filed on his return - but that 'was not done. The explanation given by the 4th Respondent is most unsatisfactory. It was humanly impossible, in the time available, for the Board to have verified details from all the numerous sources listed by the 4th Respondent, namely:

(a) personal files,
(b) records, reports and certificates submitted by the relevant authorities and the candidates,

(c) personal data submitted by candidates in the prescribed forms,

(d) computer print-outs,

(e) inquiry file, and

(f) assessments of service.

What is more, it appears that what was available was only one set of all these documents - which five members could not have referred at the same time.

Any meaningful interview for such a large number of candidates should have been preceded by the preparation of detailed interview schedules, listing out all relevant details, for the use of every member of the Board. That was not done.

ALLOCATION OF MARKS

The interview mark sheet shows that the first candidate scored 78 marks, and the 45th candidate (not counting Candidate No 68) scored 50 marks. A large number of candidates scored 49 marks, and were not recommended.

'Seniority': The learned Deputy Solicitor-General submitted that marks for seniority were allocated at the rate of three marks for each year of service as ASP's. In that respect, the mark sheet reveals several discrepancies. Thus Candidates Nos 12, 129, 136 and 137 were allocated only 12 marks each: if so, they had only four years service, and were ineligible, and even if they had been called for interview by mistake, the Board should not have wasted any time in attempting to assess them.

'Service Record': Among the top 45 candidates, there were over 20 candidates who had been allocated between 16 and 21 marks - although there was no evidence that they had any special increments or commendations. There were at least another 15 candidates, also without special increments or commendations, who had been allocated between 4 and 13 marks; the latter had an aggregate of 49 marks, and thus missed selection by just one mark. I find it impossible to understand how the Board differentiated between these two groups, and how the differential was so substantial. Thus successful Candidate No.44 (with eight years service) got 21 marks, while unsuccessful Candidates Nos 1 and 3 (with over ten years service) got only four and seven marks, respectively. There is some doubt as to the former's

eligibility as he had been on overseas leave since July 1995, but that apart since he was abroad for all but seven months of the five-year period relevant to quality of service, it is surprising that he earned the highest number of marks from among all the candidates for "service record". Candidates Nos 1 and 3 missed the cut-off mark by three marks and one mark, respectively.

There were others, such as Candidates Nos 7, 12, and 25, who did have special increments or commendations, but were allocated only 9, 10 and 12 marks, respectively. Each of them had an aggregate of 49, and missed selection by one mark.

There was no satisfactory explanation as to these huge discrepancies.

When interviewing 179 candidates, a few mistakes are both unavoidable and perhaps excusable. But here the mistakes, if indeed they were no more than mistakes, were legion. Five members of the Board, if they had each perused the relevant documents, could not all have made the identical "mistakes" which I have referred to above. The allocation of marks for "service record" appeared to be no better than a "lucky dip".

"Other skills": I have now to turn to the other four criteria (collectively referred to as "capacity"). The Petitioners stressed the shortness of the interviews. The 4th Respondent contented himself with a bare denial, saying nothing about the length of each interview or the total time spent. The 25th Respondent stated that he had been interviewed for "almost 15 minutes". If each interview lasted 15 minutes, the Board would have required 45 hours to interview the candidates. The Board does not claim to have spent so much time on the interviews. Besides, even 15 minutes was inadequate for the Board to have done properly - what it claims to have done. Verifying the records of each candidate, asking him numerous questions to judge his skills in four different areas, and discussing and reaching agreement (for each candidate separately) as to the allocation of marks for "service records" and four other criteria, would have required much more than 15 minutes.

There is another disturbing feature. By and large the candidates who came among the top 45 had all had been given 24 marks or more (out of 40) for "capacity", while the unsuccessful candidates got 15 or less. Candidates who were given high marks for "service record" despite the lack of special increments and commendations invariably received high marks for "capacity" as well; and those who were given low marks for "service record" consistently

also received low marks for "capacity". That suggests a deliberate manipulation of the marking system. Further, the ranking of the 45 candidates who scored the highest marks, coincided with their seniority - that is to say, not one of those officers scored more than any of his seniors or less than any of his juniors. Many of the candidates were of equal seniority. Thus there were about 20 officers with eight years service, each entitled to 24 marks for, seniority. That none of these candidates scored more than his senior or less than his junior is highly improbable.

I have no hesitation in concluding that the allocation of marks was worse than a 'lucky dip', at which everyone has an equal chance, depending only on his luck. This, however, was a deliberate manipulation, and not chance. 45 officers were selected in advance for promotion, for good reason or bad, and at the interviews the allocation of marks was manipulated to give more for the favoured few, and less for the others, without disturbing their seniority *inter se*. The result was that among the 60 most senior candidates, the 31 senior officers overlooked scored 47, 48 or 49 marks each. The only exception was Candidate No 22 who scored 35 marks - but that was because he was wrongly given only 12 marks (and not 24) for seniority.

I must hasten to add that there is no evidence of shortcomings or manipulation in regard to about one-third of the promotees.

The failure to produce the original mark sheet(s) gives rise to the inference that it would have disclosed alterations and additions indicative of manipulation.

PENDING DISCIPLINARY INQUIRIES

The 4th Respondent's position that candidates who had scored sufficient marks to warrant promotion were not recommended for promotion if there were pending disciplinary or legal proceedings against them is contradicted by his letter dated 12.5.2000. The Petitioners alleged that some officers were not only recommended but even promoted despite such proceedings. Among the examples cited were successful Candidates Nos 47 and 55.

A rigid rule that public officers against whom disciplinary or legal proceedings are pending must be denied appointments and promotions, may sometimes cause injustice - as, for instance, if the proceedings are based on frivolous allegations. At the same time, if an

appointing authority were to make an appointment or grant a promotion, despite such proceedings, a serious injustice and anomaly would result if the officer was later found guilty.

Such injustices and anomalies can be avoided in several ways. The appointing authority may make an appointment or promotion subject to the result of the proceedings, or may expressly reserve (if he lawfully could) the right to revoke the appointment or promotion in the event of the charges being later proved. Another reasonable alternative would be for the appointing authority to make the appointment or promotion but to make it operative only upon the favourable conclusion of such proceedings.

The practice followed by the PSC in this case of permitting officers to apply for promotions despite pending proceedings, and of withholding promotions until such proceedings are concluded, is reasonable and proper. However, in this case there is a further consideration, namely that only those with an "unblemished record" were eligible. Accordingly, not only were pending proceedings of some relevance, though perhaps slight, but adverse findings in concluded proceedings could not be ignored simply because no punishment was imposed. Any evaluation of the "service record" of a candidate could not have ignored such "blemishes", at least for the reason that a candidate against whom there was no adverse finding was entitled to some preference as against another whose record was blemished by a finding of guilt, even though not visited with "punishment" as defined in the Establishments Code.

It is in that context that the cases of Candidates Nos 47 and 55 have to be considered. It was the 4th Respondent, who had no personal knowledge of the facts and circumstances, who ventured explanations. In regard to Candidate No 47 the Petitioners' allegation was that he had been severely warned by the previous I.G.P on 3.7.98 and that an inquiry was pending in respect of the misuse of an official vehicle. The 4th Respondent said that a report had been submitted to the 1st Respondent, who "having carefully considered all available material has decided not to initiate any further action". He did not say when that decision had been taken - before the recommendation, before the promotion, or after the promotion. In regard to Candidate No 55 the 4th Respondent stated that on 30.3.2000 the 1st Respondent had communicated a disciplinary order, a 'warning', which, he said, was not a "punishment" under the Establishments Code. The report, the disciplinary order, and other relevant documents were not produced. The 1st Respondent who would have had personal knowledge of the circumstances did not try to explain.

The 12th Respondent, the Secretary to the PSC, tendered an affidavit pleading unawareness of the Petitioners' allegations, and that presumably extended to the PSC as well.

I hold that in this respect too the Board failed properly to assess the "service record" of the candidates.

ORDER

At the conclusion of the oral argument on 28.11.2001 all Counsel moved for two weeks time to explore the possibility of a settlement on the basis of leaving the impugned promotions undisturbed and promoting the Petitioners. Having regard to the serious flaws in the interview and selection process, we informed Counsel that this Court could not approve such a settlement, and that we would reserve the right of other unsuccessful candidates thereupon to complain that such settlement was in violation of their rights. Thereafter, a motion was filed by the State Attorney On 20.12.2001 asking f or a further two weeks time to settle this matter in view of the change of administration. Finally, on 11.1.2002 we were informed that no settlement had been reached.

It has been established beyond reasonable doubt that the interview and selection process was a sham - worse than any I have come across. There has been a grave denial of the Petitioners' rights to a fair, equal and reasonable selection process.

I hold that the Petitioners' fundamental rights under Article 12(1) have been infringed by the 1st, 4th, 50th, 51st and 52nd Respondents, and award each of the 46 Petitioners (in this and in the four other cases) a sum of Rs 10,000 as compensation and costs, payable on or before 30.4.2002. The aggregate sum of Rs 460,000 will be paid as follows Rs 100,000 personally by the 1st and 4th Respondents in equal shares, Rs 60,000 personally by the 50th, 51st, and 52nd Respondents in equal shares, and the remaining Rs 300,000 by the State.

All promotions made by the PSC in pursuance of the interviews held in March and May 2000 are quashed (other than the 32nd Respondent's).

The Public Service Commission is directed to hold, or to cause to be held, fresh interviews for promotion to the rank of Superintendent of Police for the persons who duly applied and

were interviewed in March and May 2000; the interview and selection process shall be completed and promotions made on or before 31.5.2002. The Board of Interview will determine which candidates are eligible to be called for interview. The Board of Interview shall not include the 1st, 4th, 50th, 51st and 52nd Respondents, and the PSC will consider whether they should be debarred from sitting on interview panels.

The Attorney-General is directed to consider whether the conduct of the 1st. 4th, 50th, 51st and 52nd Respondents constitutes "corruption" within the meaning of section 70 of the Bribery Act as amended, or any other offence, and if so to take appropriate consequential action; and to submit a report to this Court not later than 30.4.2002.

The Registrar is directed to return to the Attorney General all personal files and records pertaining to the candidates.

JUDGE OF THE SUPREME COURT

GUNASEKERA, J:

I agree.

JUDGE OF THE SUPREME COURT

YAPA, J:

I agree.

JUDGE OF THE SUPREME COURT

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