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illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control prevented from leading or tendering evidence material to the charge and in the interest of justice, the Appellate Court deems it appropriate having regard to the circumstances of the case, that the accused should be put on his trial again, an order of retrial wipes out from the record the earlier proceedings and exposes the person accused to another trial. In addition to this, a retrial should not be ordered when the Court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt and the like especially when the Court is of the opinion that the prosecution will be put at an advantage by allowing them to provide the gaps or what is wanting that resulted due to their own lapses."

On what Shony had to say on a comparison I find that it is not the mere irregularities that have been highlighted in this case. In this case the prosecution has deliberately refrained from leading evidence of the 2nd witness one of the most important witnesses. Further I would like to refer to the book ***"Bribery"*** by Mr. R.K.W.Goonesekera. In his book at page 93 he commented on this fact as follows;

"More than once the Supreme Court has been disturbed by the tendency of trial judges to treat the evidence of prosecution witnesses in bribery cases with the particular sanctity. In Mohamed Saleem's case the court observed that the evidence of prosecution witnesses does not carry

any presumption of truth and should not be given undue weightage. In Siriwardane Vs. The Attorney General the Chief Justice cautioned trial judges against proceeding upon an irrebuttable presumption that police officers engaged in the Bribery Commission's Department always speak the absolute truth as this would be to deny the accused the opportunity of a fair trial."

By the same token the same principles should apply and guide the judges in the assessment of the evidence of excise officers in narcotic cases. Judges must not rely on a non-existent presumption of truthfulness and regularity as regards the evidence of such trained police or excise officers.

I would also like to refer to the book entitled "The Law of Evidence" Volume 2. I quote from E.R.S.R. Coomaraswamy in The Law of Evidence volume 2 book 1 at page 395 dealing with how the police evidence in bribery cases should be considered and states as follows;

"In the great many cases, the police agents are, as a rule unreliable witnesses. It is always in their interest to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinized. Particularly where their evidence is the only corroborating evidence of the accomplice."

For these reasons we are constrained to set aside the judgment and the sentence of the learned High Court Judge and acquit and discharge the accused-appellant.

LECAMWASAM, J - I agree.

Appeal allowed.

PROF. DHARMARATNE AND OTHERS VS. INSTITUTE OF FUNDAMENTAL STUDIES AND OTHERS

SUPREME COURT
SALEEM MARSOOF, PC. J
RATNAYAKE, P. C. , J AND
IMAM, J.
SCFR APPLICATION NO. 73/2007
SC FR APPLICATION NO. 371/2009
SC FR APPLICATION NO. 413/2009
FEBRUARY 15TH, 2011

Article 126 (1) of the Constitution – Fundamental rights jurisdiction and its exercise – Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement, by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV – Application of the 'tests'

The main question for determination in all three applications is whether the Institute of Fundamental Studies (IFS) is a body which exercises executive or administrative functions within the meaning of Article 126 of the Constitution, and hence whether the impugned actions of the IFS may be subjected to judicial review in terms of Article 126 of the Constitution.

Held:

1. Our Courts have applied various tests to determine whether a particular person, Institution or other body whose action is alleged to be challenged under Article 126 of the Constitution is an emanation or agency of the State exercising executive or administrative functions.

   Where the body whose action is sought to be impugned is a corporate entity, these tests have focused, inter alia, on the nature of the functions performed by the relevant body, the question whether the State is the beneficiary of its activities, the manner

of its constitution, whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on State funds, the degree of control exercised by the State, the existence in it of sovereign characteristics or features, and whether it is otherwise an instrumentality or agency of the State. However, these tests flow in to each other.

2. Since the Board of Governors has very wide powers in terms of the provisions of the IFS Act, and it consists of the President and the Prime Minister of the Republic of Sri Lanka and other representatives of the Government, the actions of the IFS concerning the conditions of service and tenure of the senior academic staff of the IFS, constitute 'executive or administrative' action within the meaning of Article 126 of the Constitution.

3. Application of the test of deep and pervasive control, clearly demonstrate that an entity could be deemed to be an instrumentality or agency of the State even in the absence of statutory incorporations, and that even without clear provision in an incorporating statute conferring pervasive controlling power to the State.

Cases referred to:

1. *Rienzie Perera and Another Vs. University Grants Commission* – (1978 -80) 1 Sri L.R. 128
2. *Sukhdev Singh and Others Vs. Bhagatram Sarder Singh Raghuvanshi* – AIR (1975) SC 1331; 1975 SCR(3) 619
3. *Rajaratne Vs. Air Lanka Ltd., and Others* – (1987) 2 Sri L.R. 145
4. *Leo Samson Vs. Sri Lankan Airlines and Others* – (2001) 1 Srl L. R. R 94
5. *Wijeratne and Another Vs. People's Bank and Another* – (1995) 2 Sri L.R. 352
6. *Wijetunga Vs. Insurance Corporation and Another* – (1982) 1 Sri L.R. 1
7. *Trade Exchange (Ceylon) Ltd. Vs. Asian Hotels Corporation Ltd* – (1981) 1 Sri L.R. 67
8. *Jayakody Vs. Sri Lanka Insurance and Robinson Hotel Co. Ltd and Others* – (2001) 1 Sri L. R. 365
9. *Jayakody vs. Sri Lanka Insurance and Robinson Hotel Co. Ltd and others* – (2001) 1 Sri L. R. 365
10. *Wickrematunga Vs. Anuruddha Ratwatte and Others* – (1998) 1 Sri L.R. 201

11. *Ramana Dayaram Shetty Vs. International Airport Authority of India* – AIR 1979 SC 1682

12. *Organization of Protection of Human Rights and Rights of Insurance Employees and Others Vs. Public Enterprises Reform Commission and Others* – (2007) 2 Sri L.R. 316.

APPLICATION made under Article 126 of the Constitution.

Manohara de Silva, P. C. with *Pubudini Wickramaratne* for Petitioner in SC FR Application No. 73/2007

Ikram Mohamed, P. C. with *M. S. A.Wadood* for Petitioners in SC FR Nos. 371/2009 and 413/2009

Uditha Egalahewa for 9th and 12th Respondents in SC FR Nos. 371/2009 and 413/2009

P. Niles for 4th Respondent in SC FR No. 73/07

Nerin Pulle, SSC for 1st, 2nd, 3rd, 5th and 13th Respondents in SC FR No. 73/2007

Arjuna Obeysekera, SSC, for AG in SC FR Nos. 371/2009 and 413/2009

Cur.adv.vult

January 31, 2012

SALEEM MARSOOF, PC, J.

The Petitioners in these applications are scientists who have served in the Institute of Fundamental Studies (IFS) at various points of time. At the time of filing these applications, the 1st Petitioner in SC FR Application No. 73/07 was an Associate Research Professor and the 2nd Petitioner to the said application as well as the Petitioner in SC FR Application No. 371/2009 had served as Senior Research Fellows at IFS. The Petitioner in SC FR Application No. 413/2009 was a very distinguished scientist who had functioned as the Director of IFS from 6th May 1998 up to 5th May 2008. They were all

employed at the IFS on contract basis, and in their petitions filed in this Court in terms of Article 126(1) of the Constitution, they complain of violations of their respective fundamental rights guaranteed by Article 12(1) of the Constitution, through certain decisions taken by the Institute pertaining to the continuity of their contracts of service at IFS.

When the first of these applications, namely, SC FR Application No. 73/2007 was taken up for support on 28th March 2007, after hearing submissions of learned President's Counsel for the Petitioners, this Court granted leave to proceed. However, after the filing of objections and counter-affidavits, when this application was taken up for hearing on 15th September 2009, a differently constituted Bench of this Court noted *ex mero motu* that there was a "threshold question" to be decided in the case, namely whether the IFS is a body which exercises executive or administrative functions within the meaning of Article 126 of the Constitution. The Court also noted that two other applications, namely SC FR Application No. 371/2009 and SC FR Application No. 413/2009 have also been filed, in which leave to proceed had not been granted, but preliminary objection had been taken by learned Counsel for the Respondents in those cases on the basis that the said applications cannot be maintained, as the impugned actions of the IFS do not constitute "executive or administrative action" within the meaning of Article 126(1) of the Constitution. The Court directed that all these three applications should be taken up together for the purpose of determining the aforesaid threshold question and preliminary objection, which went to the jurisdiction of the court to hear and determine these cases.

Thereafter, the said threshold question and preliminary objection was taken up for argument before a differently

constituted Bench of this Court on 8th March 2010 and order was reserved, but due to the retirement of one of the members of the said Bench, order could not be pronounced. Consequent upon an order being made by the Chief Justice, the matter was taken up for argument afresh on the said threshold question before the presently constituted Bench on 15th February 2011. The parties to SC FR Application No. 371/2009 and SC FR Application No. 413/2009 on that day agreed that the preliminary objection taken up by the Respondents in those cases may be considered together with the threshold question raised by Court in SC FR Application No. 73/2009 on 15th September 2009. Learned Counsel appearing in all these cases also made extensive oral submissions on the said threshold question and preliminary objection and after considering an application made by learned Counsel appearing in SC FR Application No. 371/2009 and SC FR Application No. 413/2009, the court granted further time for the parties in all the three applications before Court in regard to the said "threshold question" and preliminary objection.

Executive and administrative action

The only question that has to be considered in this order in whether the impugned actions of the Institute of Fundamental Studies (IFS) established by the Institute of Fundamental Studies, Sri Lanka, Act No. 55 of 1981. as amended by Act No. 5 of 1997, may be subjected to judicial scrutiny in terms of Article 126(1) of the Constitution. The said article provides that –

> *"The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV." (Italics added)*

It is important to observe that while the phrase 'executive or administrative action' has not been defined in the Constitution, in deciding whether in a given case, the action that is sought to be challenged under the said article constitutes 'executive or administrative action', our courts have focused attention on the particular person, institution or body whose action is sought to be impugned. It is obvious that as Sharvananda J., (as he then was) pointed out in *Rienzie Perera and Another Vs. University Grants Commission*(1) at 138 –

> "The wrongful act of an individual, unsupported by State authority, is simply a private wrong. Only if is sanctioned by the State or done under State authority does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State. In the context of fundamental rights, the 'State' includes every repository of State power"

As Mathew, J once observed in his concurring judgment in *Sukhdev Singh & Others Vs. Bhagatram Sardar Raghuvanshi*(2) at 644 –

> "A State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State."

Decisions of our courts have in the past acknowledged the reality that the State may act not only through its Ministries, Departments and officers but as Atukorale J., stressed in *Rajaratne Vs. Air Lanka Ltd and Others*(3) at 145, it 'may also act through the agency of juridical persons set up by the State by, under or in accordance with, a Statute." As Ismail J

noted in his judgment in *Leo Samson Vs. Sri Lankan Airlines and Others*[4] at 97 -

> "The expression 'executive or administrative' action has not been defined. However, the trend of our decisions has been to construe it as being equivalent to actions of the Government or of an organ or instrumentality of the Government."

Our courts have emphasized that in this context the 'State' includes every repository of State power, and as pointed out by Sharvananda J., in *Rienzie Perera and Another Vs. University Grants Commission, (supra)* at 138. the said expression embraces "exertion of State power in all its forms."

Consistent with this approach, our courts have applied various tests to determine whether a particular person, institution or other body whose action is alleged to be challenged under Article 126 of the Constitution, is an emanation or agency of the State exercising executive or administrative functions. Where the body whose action is sought to be impugned as a corporate entity these tests have focussed, among other things on the nature of the functions performed by the relevant body, the question whether the state is the beneficiary of its activities, the manner of is constitution, whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on state funds, the degree of control exercised by the State, the existence in it of sovereign characteristics or features, and whether it is otherwise an instrumentality or agency of the State. However, as will be seen, these tests flow into each other.

The Application of the 'tests'

One of the important tests adopted in the past decisions of this Court is whether the body whose actions are sought to be challenged under Article 126 of the Constitution performs functions of a public (or governmental) nature, or to which the functions of a Government department have been transferred. Applying this test, in *Wijeratne and Another Vs. People's Bank and Another*[5], this Court concluded that the actions of the People's Bank did not constitute administrative and executive action, as it performed functions entirely of a commercial nature, notwithstanding the fact that one of the purposes of the said Bank was to develop the co-operative movement, and despite its incorporation by a special Act of Parliament which provided for the members of its Board of Directors to be appointed by the Minister, and for a major contribution to be made towards the initial expenses for its establishment, from the Consolidated Fund.

Learned President's Counsel who appeared for the Petitioners in these cases have submitted that an examination of the provisions of the Institute of Fundamental Studies, Sri Lanka, Act No. 55 of 1981, as amended by Act No. 5 of 1997 (IFS Act), which is the statute by which the Institute of Fundamental Studies (IPS) was incorporated, will reveal that IFS performs functions of public importance and or of governmental nature, and that its functions would benefit the State or the Government, as well as the nation at large. In fact, learned President's Counsel for the Petitioners went to the extent of suggesting that the IFS is similar to the National Aeronautics and Spact Administration (NASA), which is a well known agency of the United States Government engaged

in specialized fundamental studies. Learned Counsel who represented the Respondents in these cases have stressed the difficulties associated with deciding whether a particular function is of a public or governmental nature or not, and have also submitted that it is clear from the jurisprudence of our courts that none of the tests adopted by them can be conclusive by themselves.

However, it will be useful to consider the provisions of the IFS Act, and in fact it would be appropriate to begin with an examination of the provisions of the said Act that deal with the objectives and powers of the IFS. Section 2(2) of the IFS Act, which along with sections 3 and 4 constitute Part I of the Act, provides that the IFS shall be "a body corporate with perpetual succession and a common seal and may sue and be sued in such name." Section 3 of the said Act provides that "the aims and objectives of the Institute shall be to create an interest in and provide facilities for fundamental and advanced studies and in particular to –

(a) initiate, promote and conduct research and original investigation into fundamental studies in general with particular emphasis on mathematics, physical and chemical sciences, life sciences, social sciences and philosophy, taken in the broadest sense;

(b) arrange lectures, meetings, seminars and symposia in pursuance of its research work and for the diffusion of scientific knowledge;

(c) invite scientists, in Sri Lanka and from abroad, actively engaged in creative work to deliver lectures and participate in its research activities;

(d) establish and maintain liaison with scientific workers and scientific institutions in other countries and promote international co-operation in matters relating to the aims and objects of the Institute, while taking care to protect and promote the national interest; and

(e) do such other acts and things as may be necessary to promote the aims and objects of the Institute."

Section 44 of the Act does not elaborate or further the definition of 'fundamental and advanced studies', and simply states that 'fundamental' and 'advanced' studies "include experimental investigations". While the website of the Ministry of Technology and Research, within whose purview the Institute of Fundamental Studies falls, in terms of the assignment of subjects and functions to Ministers made under Article 44(1)(a) of the Constitution, reproduces some salient provisions of the IFS Act, the website of the IFS at the web address http://www.ifs.ac.lk/ sheds more light on its primary objective, which is to engage in basic research that would result in useful applications for national development and social welfare. These websites, which are very much in the public domain, contain useful information regarding the on-going research projects and activities of IFS which are intended to facilitate, for instance, finding new energy sources through bio-fuel, geothermal and solar energy, unveiling the hidden potential in our flora, serving the nation with biological research, the provision of assistance for the disabled with artificial intelligence, finding solutions for environmental problems through scientific research and making science simple and attractive to everyone.

The Institute is vested by Section 4 of the IFS Act with such powers and rights as may be necessary to achieve its

aims and objects, and in particular it may, amongst other things, establish a research fund for the promotion of fundamental and advanced studies, institute research Professorships, Associate Research Professorships and Research Fellowships, establish a research fund for the promotion of fundamental and advanced studies, and award prizes and medals, for fundamental and advanced studies.

It is not easy to identify any of the aforesaid functions and powers as necessarily public or governmental functions. Learned President's Counsel for the Respondents have contended that it is obvious from Section 3 and 4 of the IFS Act that the IFS in intended to catalyse and create an environment conductive to the highest level of scientific activity in Sri Lanka, and they have specifically refered to certain observations contained in the Cabinet Memorandum by which the approval of the Cabinet of Ministers was sought by the relevant Minister for the incorporation of the IFS. However, as submitted by learned Counsel for the Respondents, these provisions of the IFS Act do not reveal expressly, or suggest impliedly, that the IFS was created for achievement of 'State policy' or for fulfilling the mandate of any Ministry or Institution.

In my view, the mere fact that in the United States of America, the National Science Foundation (NSF), which is an agency that supports fundamental research and education in science and engineering in areas other than those covered by the mandates of the National Institute of Health (NIH) and the National Aeronautics and Space administration (NASA), which respectively cater to fundamental research and study in the fields of medicine and aeronautics, has been established by the US Government as its agency, does not necessarily mean that similar activity should be categorized

as governmental in other jurisdictions, and in particular, in Sri Lanka. Of course, as pointed out by Learned President's Counsel for the Petitioners, from the Sri Lankan perspective, fundamental and advanced studies further some of the directive principles of State Policy enshrined in Article 27 of the Constitution and could be of great importance for national development, environmental protection and promoting the welfare of the People. In particular, such studies, if undertaken by the State or a governmental agency, could further infra-structure development, augment energy resources including nuclear, solar, agriculture, fisheries, industries, transportation, telecommunication, housing and health, and assist in the combat of natural disasters in the context of global warming and climatic change. However, in my considered opinion, it is difficult to conclude from a mere analysis of Sections 3 and 4 of the IFS Act or from information contained in the IFS website alone, that IFS was intended to be an instrumentality or agency of the State established to create an interest in and provide facilities for fundamental and advanced studies, or its actions were capable of being classified as 'executive or administrative' action, within the meaning of Article 126 of the Constitution.

This is more so because the public or governmental character of any activity will differ from nation to nation and from time to time. As Atukorale J., observed in *Rajaratne Vs. Air Lanka Ltd (supra)* at 145 –

> *"The demands and obligations of the modern welfare State have 'resulted' in an alarming increase in the magnitude and range of governmental activity. For the purpose of ensuring and achieving the rapid development of the whole country by means of public economic activity*

the government is called upon to embark on a multitude of commercial and industrial undertakings. In fact a stage has now been reached when it has become difficult to distinguish between governmental and non-governmental functions. This distinction is now virtually non-existent."

It is necessary, in my view, to look at the other tests adopted by this Court in determining whether it should exercise jurisdiction under Article 126 in a given case. It may be useful in this connection to refer to the following observation of Sharvananda J (as he then was) in *Wijetunga Vs. Insurance Corporation and Another*(6) at 6 to 7:-

"For determining the, integral relationship between the State and the Corporation, we have to examine the provisions of the statute by which the Corporation has been established. If the statute in terms answers this question, there is no need for further inquiries, but in the absence of such statutory declaration or provision, the intention of Parliament is to be gathered from the provisions of the statute constituting the Corporation. These provisions have to be judged in the light of the following:-

(a) First the incorporation of the Body though not determinative is of some significance as an indication by Parliament of its intention to create a legal entity with a personality of its own, distinct from the State.

(b) Secondly the degree of control exercised by the Minister on the functioning of the corporation is a very relevant factor. A complete dependence on him marks it as really a Governmental body, while comparative freedom to pursue its administration is an element negativing the intention to constitute it a government agency.

(c) Third is the degree of dependence of the Corporation on the Government for its financial needs."

The mere fact that the institution or body whose action is challenged under Article 126 has been incorporated by statute, or otherwise enjoys a personality distinct from that of the State, is not necessarily conclusive in this regard. Thus, although in *Trade Exchange (Ceylon) Ltd. Vs. Asian Hotels Corporation Ltd.*[7], this Court had held that the action of a public commercial company. incorporated under the Companies Ordinance, was not amenable to the writ *of certiorari* and other writs despite most of its capital being contributed by the State, since such a company was a juristic person whose personality was distinct from those of its shareholders, in decisions such as *Rajaratne Vs. Air Lanka Ltd (supra) and Jayakody Vs. Sri Lanka Insurance*[8] *and Robinson Hotel Co. Ltd, and Others*[9], this Court was prepared to hold that the actions of a company could amount to executive or administrative action in terms of Article 126 of the Constitution by reason of the high degree of control that was exercised over the company by the State.

It is therefore necessary to consider the other provisions of the IFS Act that shed light in regard to the question as to whether the IFS came within the ambit of State control, in particular, Sections 5 to 11 of the IFS Act which constitute Part II of the Act entitled The Authorities of the Institute'. According to Section 5 of the IFS Act, the authorities of the Institute are the Board of Governors and the Research Council. Section 6(1) provides that the Institute shall be administered by a Board of Governors consisting of the President of Sri Lanka, who is the Chairman, the Prime Minister, the Leader of the Opposition, the Director of the Institute, the Chairman

of the University Grants Commission, the Adviser to the President on Scientific Affairs, two members elected from the Research Council and four persons appointed by the President from among persons who in his opinion are specially qualified in relation to the work of the Institute.

Learned Counsel for the Respondents have contended that the Board of Governors is intended to enjoy a high degree of independence. which fact is highlighted by the provision which makes the Leader of the Opposition a member of the Board of Governors by virtue of office. On the other hand, learned President's Counsel for the Petitioners have stressed that apart from the President of Sri Lanka, the Prime Minister, and the Advisor to the President on Scientific Affairs, who are also ex officio members of the Board of Governors, the Director of the Institute, and four other members of the Board are appointed by the President, and this brings the number of government representatives in the Board to at least seven out of a total of twelve Board members. Furthermore, while Section 6(2) to 6(5) of the IFS Act contain provisions regulating the filling of vacancies that could arise in the Board of Governors, it is significant to note that Section 6(6) of the Act expressly provides that "a member appointed by the President under this section may be removed by him at any time without reasons assigned and such removal shall not be questioned in any court."

Although I am inclined to the view that these provisions manifest a legislative intent to make the Board of Governors subservient to the executive arm of Government, whether that would give the Government dominance over the affairs of the IFS would depend on the other provisions of the IFS Act, particularly those that relate to the function and role

of the Board of Governors and the Research Council, and the manner in which the IFS has in reality functioned. In this connection, it is significant to note that Section 9 of the IFS Act provides that, subject to the other provisions of the Act and the rules of the Institute, the powers and duties of the Institute shall be vested in the Board of Governors, and that these include the power to hold, control and administer the property and funds of the Institute, and to regulate and determine all matters concerning the Institute in accordance with the IFS Act and the rules of the Institute. For the purposes of this case, it is pertinent to note that as provided in Section 9(d) of the IFS Act, the power is specifically vested in the Board of Governors, after consideration of the recommendations of the Research Council, to institute, abolish or suspend Research Professorships, Associate Research Professorships, Fellowships, and to determine the qualifications required for appointments to such posts and to determine the emoluments payable to the holders thereof.

The other internal body of the IFS is the Research Council, which consists of two persons appointed by the President from among persons who have gained eminence in the field of science, all Research Professors, Associate Research Professors, and Senior Research Fellows of the Institute, three members elected by the Research Fellows of the Institute from among their number, and five representatives of Universities in Sri Lanka who are appointed by the Board of Governors from among persons nominated by the University Grants Commission, who have excelled in fundamental research. In terms of Section 10(1) of the IFS Act, the Director of IFS also functions as the Chairman of the Council. Learned Counsel for the Respondents have relied on these

provisions to argue that the Research Council is by its constitution, intended to be independent from executive or ministerial control, and is a check on the dominance of the Board of Governors in regard to the conduct of its affairs.

They have also relied on Section 11 (1) of the Act, which provides that "the Council shall have control and general direction of instruction, education, research and examination in the Institute". However, it is necessary to note that this provision is expressly made subject to the other provisions of the IFS Act and the rules of the Institute, and it is manifest that on the whole, the functions of the Council, other than the power to elect two of its members to the Board of Governors, are mainly recommendatory or advisory. This becomes abundantly clear from the provisions of Part IV of the IFS Act (Sections 19 to 24) which contain elaborate provisions for the appointment and disciplinary control of Research and other staff of the Institute.

In terms of section 19 of the Act, the first director of IFS was appointed directly by the President, and subsequent vacancies in said post were filled by the Board of Governors after taking into consideration the recommendations of the Research Council. The appointment of Research Professors and Associate Research Professor has to be made by the Board of Governors, after considering the recommendations of the Research Council, while Research Fellows are appointed by the Director of the IFS in consultation with the Research Professor or the Head of the Project concerned. The Board of Governors is also empowered by Section 20 to make rules defining the privileges of the Director of IFS and other research staff.

It is noteworthy that, while Section 21 of the IFS Act empowers the Board of Governors to appoint to IFS such other officers and servants as the Board may deem necessary, section 22 of the Act vests on the Board of Governors the power to dismiss and exercise disciplinary control over the staff including the research staff of the Institute and fix the wages or salary or other remuneration of such staff and determine the terms and conditions of service of such staff. It is expressly provided in the proviso to Section 22, that no member of the research staff may be dismissed except by a majority of two-thirds of the votes of the members of the Board at a meeting on the ground of gross dereliction of duty or for moral turpitude or for other good and sufficient cause to be recorded in writing. It is also noteworthy that in terms of Section 24(1) of the Act, any officer in public service may, at the request of the Board of Governors and with the consent of that officer and the Secretary to the Ministry of the Minister in charge of Public Administration, be temporarily appointed to the staff of the Institute for such period as may be determined by the Board, or with like consent be permanently appointed to such staff. These provisions of the IFS Act clearly show that the dominant organ of the IFS insofar as the appointment, conditions of service, disciplinary control and termination of service of the staff of IFS is concerned, is the Board of Governors, but whether the IFS is in reality an agency of the State whose actions constitute 'executive or administrative' action, would depend on the degree of control exercised by the Government in regard to its affairs.

In this context, it will be useful to consider to what extent the State enjoys financial control over the IFS. Our attention has been drawn by learned Counsel to the provisions of Part V of the IFS Act (Sections 25 to 31) which contain elaborate

provisions relating to the IFS Provident Fund, and Part VI of the Act (Sections 32 to 36), which is headed 'Finance' and deals with the finances of the Institute. It is significant that in terms of to Section 33 of the Act, the Institute is entitled to receive grants from any source, whether in Sri Lanka or abroad, and to negotiate directly for such grants with any individual, institution or body of persons whether incorporate or not, for the purpose of carrying out its aims and objects.

Learned President's Counsel for the Petitioners have specifically invited our attention to section 32 of the IFS Act, which provides that the "Government *may* donate to the Institute annually a grant adequate for the purpose of carrying out the aims and objects of the Institute", and Section 34 (2) (a) of the Act, which provides that all such sums of money as may be voted from time to time by Parliament for the use of the Institute shall be paid into the Fund of the IFS. However, these provisions are merely facilitative, and although it would appear from page 18 of the Government publication entitled *'Budget Estimates 2009'* that budgetary provision had been made for the President of Sri Lanka to contribute a sum of Rs. 7,227,000 to the IFS in 2007, and further sums of approximately Rs. 13,950,000 and Rs. 20,000,000 to be so contributed, respectively in the years 2008 and 2009, neither the Petitioners in these cases nor the Respondents have provided to this Court any statements of accounts or other evidence to show whether in reality any funds had been donated to the IFS by the Government or voted by Parliament, and if so, whether they were so overwhelming so as to demonstrate effective financial control by the Government.

The IFS Act contains a few provisions that provide IFS with special favours which are generally granted only to

Government departments and agencies. Thus, for instance, Section 35 of the said Act provides for the exemption of the IFS from the payment of rates imposed by any local authority, and also makes provision for the Minister under whose purview the IFS falls, in consultation with the Minister in charge of the subject of Finance, to exempt the Institute from the payment of any customs duty for goods imported by the Institute for the achievement of its aims and objects. These are special favours granted to the institution by the State, which in the words of Amerasinghe J., in *Wickrematunga Vs. Anuruddha Ratwatte and Others*(10), at 224 show "contact as well as symbiotic relationship" with the State. these features also signify the role of the IFS as a venture with some national importance. This aspect is also highlighted by Section 36 of the Act, which seek to subject the audit of accounts of the IFS to Article 154 of the Constitution conferring to the Auditor General the power to scrutinise and audit its accounts and impose surcharges and imposing on him the duty to report to Parliament about its affairs on an annual basis.

It is interesting to note that Section 37, which appears in Part VI of the IFS Act entitled 'General', provides that the IFS is "open to all persons of either sex, of whatever race, creed or nationality and no test of religious belief or profession shall be adopted or imposed in order to entitle any person to be admitted as a Director, Professor, Member or Research Fellow of the Institute or to hold any appointment therein or to hold, enjoy or exercise any advantage or privilege therein." Similarly, Sections 38 and 39 are intended to protect the officers of the Institute or to hold any appointment therein or to hold, enjoy or exercise any advantage or privilege therein. "Similarly, Section 38 and 39 are intended to protect the

officers of the Institute from legal proceedings and execution of writ for any act which is done in good faith or on the direction of the Board, and Section 38(3) specifically entitles any officer so sued to be reimbursed by IFS for any expenses incurred in such litigation. It is also of some significance to note that Section 40 of the IFS Act provides that all officers and servants of the Institute shall be deemed to be public servants within the meaning and for the purposes of the Penal Code, and Section 41 further provides that the IFS shall be deemed to be a "scheduled institution" within the meaning of the Bribery Act. These provisions lend credence to the submission of the learned President's Counsel for the Petitioners that the Institute was intended to be a vibrant research arm of the State playing a major role in national development and progress. These are significant pointers which appear to endow the IFS with what was described by Atukorale J., *in Rajaratne Vs. Air Lanka Ltd. and Others (supra)* at 146 as "sovereign characteristics and features", the existence of which in the corporate body was regarded as "strongly indicative of it being an organ or agency or instrumentality of the government".

On this analysis of the provisions of the IFS Act and material contained in the official websites of the IFS as well as that of the Ministry of Technology and Research, it is manifest that at least in regard to the appointment, conditions of service and disciplinary control of the Director, Associate Directors, Deputy Directors, Research Professors Associate Research Professor and Research Fellows of the Institute, and other staff, it is the Board of Governors that is vested with and enjoys power, and that the role of the Research Council is nothing but recommendatory or advisory. Since, as already noted, the Board of Governors has in terms of the

Act, very wide powers, and it consists of the President of Sri Lanka and the Prime Minister, and other representatives of the Government, there can be little doubt that, as submitted by learned President's Counsel for the Petitioners, the actions of IFS concerning the conditions of service and tenure of the senior academic staff of the Institute, constitute 'executive or administrative' action within the meaning of Article 126 of the Constitution.

Learned Counsel for the Respondents have contended that the omission from the IFS Act of any express provision to empower the Minister to make general or special directions to the Board of Governors of IFS, manifests a legislative intent to keep the IFS free from government control. However, it is my considered view that the absence of such express provision in the IFS Act will not necessarily be conclusive, where the provisions of the relevant Act are structured so as to give the State dominance over the Institute, or it is possible to conclude from the evidence that an express provision for Ministerial control would be rendered redundant by reason of the deep and pervasive control which is in reality enjoyed by the Government over its affairs.

Deep and Pervasive Control

In my view, in determining whether the actions of any person, institution or other body constitutes 'executive or administrative' action within the meaning of Article 126 of the Constitution, a mere analysis of the provisions of the incorporating statute or other relevant legislation may not always suffice, and may sometimes be misleading. In fact, in certain circumstances, a person or body may exercise executive or administrative power even in the absence of any enabling legislation. In *Rajaratne vs. Air Lanka Ltd., (supra)* at

140, this Court quoted the following words of Bhagwati J. in *Ramana Dayaram Shetty Vs. International Airport Authority of India* (11).

> *"We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created."*

Applying the test to the Air Lanka Ltd., which was the company whose actions were sought to be impugned under Article 126 of the Constitution, this Court concluded at 148 to 149 that –

> *In reality Ari Lanka is a company formed by the government, owned by the government and controlled by the government. The juristic veil of corporate personality donned by the company for certain purpose cannot, for the purposes of the application and enforcement of fundamental rights enshrined in Part III of the Constitution, be permitted to conceal the reality behind it which is the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of all the above factors and features would, in my view, render Air Lanka an agent or organ of the government.*

Further elaborating the test, in *Wijeratne Vs. The People's Bank (supra)* at 12. Sharvananda J. (as he then was) observed that –

> "When a corporation is wholly controlled not only in its policy making but also in the execution of its functions it would be an instrumentality or agency of the State.

> On the other hand, where the Direction to carry out governmental policies, are otherwise free from the fetters of governmental control in the discharge of their functions, the corporation cannot be treated as instrumentality or agency of the State. It is not possible to formulate an all inclusive or exhaustive test to determine whether a particular corporation is acting as an instrumentality or agency of the government for its action to be labeled executive or administrative action. Mere finding of some control would not be determinative of the question. The existence of deep and pervasive State control may afford an indication that a corporation is a State agency."

The test of deep and pervasive control has also been adopted in three other leading cases to determine whether an institution or body whose actions have been challenged under Article 126 is an instrumentality or agency of the State. In the first of these cases, namely, *Wickrematunga Vs. Anuruddha Ratwatte and Others (supra)*, this Court was called upon to decide whether the action of the Ceylon Petroleum Corporation constituted 'executive or administrative' action. After analysing in great detail the provisions of the relevant incorporating statute, the Ceylon Petroleum Corporation Act, No. 28 of 1961, as subsequently amended, this Court concluded that there was "deep and pervasive State control, indicating that the Corporation is a state agency or instrumentality."

However, in *Leo Samson v Sri Lankan Airlines and Others, (Supra)*, when this Court had a fresh look at Air Lanka Ltd., this Court concluded on an application of the 'deep and pervasive' test that the impugned actions of the company, consequent upon the entry into a Shareholders Agreement entered into in March, 1998 between the Government of

Sri Lanka and the Emirates, an international airline incorporated in the United Arab Emirates, did not amount to 'executive or administrative' action. This was because it found that although Emirates acquired only 40 per centum of the shares of the company and the power to appoint only 3 of its 7 Directors, it still had deep and pervasive control over the affair of the company, which was renamed "Sri Lankan Airlines Ltd.", through its power to appoint its Managing Director who managed its business, and in fact, controlled its affairs. Court accordingly concluded at page 104 of its judgment that "it is clear upon a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement referred to above, that the state has lost the 'deep and pervasive' control exercised by it over the Company earlier."

In *Jayakody Vs. Sri Lanka Insurance and Robinson Hotel Co. Ltd., and Others, (supra)*, this Court distinguished the decision in Leo Samson, and observed at 379 of the judgment that the petitioner in the latter case had been dismissed by the Chief Executive Officer of Sri Lankan Airlines Ltd., and hence the "dismissal was not by Emirates or its officers or employees" but by the local company, as "the act of the Chief Executive Officer of the Company was the act of the Company." However, the former case did not involve Air Lanka Ltd., or the Sri Lankan Airlines, but related to the Sri Lanka Insurance Corporation Ltd. (SLIC) which was a private limited liability company and the successor to the Insurance Corporation of Sri Lanka (ICSL), which was a public Corporation. All the shares of SLIC were held by the Secretary to the Treasury, for and on behalf of the State, and its Chairman and Directors were appointed appointed by the State.

In 1980, SLIC entered into a Joint Venture Agreement with Robinson Hotels GMBH &Co. KG, a company incorporated in Germany, for the purpose of establishing a "holiday club" type hotel at Bentota. The Joint Venture Agreement provided for the incorporation of two private limited liability companies in Sri Lanka, namely, the Sri Lanka Insurance and Robinson Hotel Co. Ltd., and the Robinson Club Bentota Ltd., the first of which was intended to build, own, furnish and equip the hotel, and the second was incorporated specifically to operate the business of the hotel. The Joint Venture Agreement provided that in respect of both companies, ICSL would have 80 per centum of the issued share capital, and out of a total of five Directors, the ICSL would be entitled to nominate (with the approval of the relevant Minister) the majority of the Board of Directors. The Joint Venture Agreement further provided that the Sri Lanka Insurance and Robinson Hotel Co. Ltd., would by a lease agreement, lease the hotel to Robinson Club Bentota Ltd., for a period of twenty years, and the former would by a Management Agreement entrust the management of the hotel to Robinson. It would appear that the proposed Management Agreement, though drafted, was never signed, but the management of the hotel was in fact run by Robinson Club Bentota Ltd., as envisaged in the Joint Venture Agreement. The petitioner, who was admittedly an employee of Robinson Club Bentota Ltd., invoked the jurisdiction of this Court after he was suspended from service by a letter signed by the Chief Accountant and General Manager of the said company in alleged violation of his fundamental right to equality, and a preliminary objection was taken that the application should be dismissed in *limine,* as the impugned act did not constitute 'executive or administrative action".