

PARAMESWARY JAYATHEVAN  
v.  
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT  
FERNANDO, J.  
KULATUNGA, J.  
RAMANATHAN, J.  
P. R. P. PERERA, J. AND  
WIJETUNGA, J.  
S.C. APPLICATION NO. 192/91  
29 AND 30 JULY 1992.

*Fundamental Rights – Article 12(1) of the Constitution – Deprivation of Government Quarters and mala fide transfer by officers of a Provincial Council – Do acts or omission of a Provincial Council or its officers constitute executive or administrative action? – Attorney-General's position – Status and role in relation to a Provincial Council – Jurisdiction of the Supreme Court – Liability of the State – Enforcement of Orders of the Supreme Court against the Provincial Council and its officers.*

The petitioner was in occupation of Government Quarters as a Pharmacist. The Regional Director of Health Services, Vavuniya sought to deprive her of the facility of occupying Government Quarters and when she resisted this the Secretary, Ministry of Health and Women's Affairs of the North-East Province transferred her to the General Hospital, Batticaloa. She complained of discrimination and infringement of her fundamental rights under Article 12(1) by the transfer which she said was *mala fide*. The following questions arose for decision.

- (a) Do the acts or omissions of a Provincial Council or its officers constitute executive or administrative action?
- (b) Has the Attorney-General the right to be heard in relation to a Provincial Council?
- (c) What is the liability of the State?
- (d) If the Supreme Court has jurisdiction, how were its orders under Article 126(4) to be enforced?

**Held:**

(1) The impugned acts constitute executive or administrative action within the ambit of Article 17 of the Constitution which this Court has jurisdiction to review under Article 126.

(2) The Attorney-General has the right to be heard in the proceedings of the case in terms of Article 134(1) of the Constitution and was properly made a party under the Supreme Court rules.

(3) In respect of infringements of fundamental rights arising out of the acts of public officers or public corporation, in addition to the State which is primarily liable the offending officer is also liable, and accordingly, in appropriate cases both the State and such officer may be ordered to pay compensation. In an appropriate case the liability of the State would remain purely conceptual, and relief may be granted against the offender alone.

(4) The 13th Amendment has not eroded the judicial power of the People. The writ of the Supreme Court runs through the length and breadth of Sri Lanka. The Supreme Court has full power to enforce its orders including those made under Article 126(4).

(5) The medical administration in Vavuniya had helped the petitioner when she was in difficulty owing to the civil disturbances and permitted her to occupy quarters which no other pharmacist had been permitted to occupy. Her refusal to vacate the premises taints her conduct. She desired to enjoy a facility to which she was not entitled.

**Cases referred to:**

1. *Karunaratne v. Rupasinghe* – S.C. Application No. 71/90 S.C. Mins. of 17.6.91.
2. *Sirisena v. Perera* – S.C. Application No. 14/90 S.C. Mins. of 27.8.91.
3. *Cannossa Investment Ltd. v. E. E. B. Perera* – S.C. Application No. 12/90 S.C. Mins. of 10.10.90.

4. In *re Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1987] 1 Sri L.R. 312, 323, 327.
5. *Ratnasara Thero v. Udugampola* 2 F.R.D. 364.
6. *Perera v. The University Grants Commission*, 1 F.R.D. 103, 104.
7. *Elmore Perera v. Jayawickrema* [1985] 1 Sri L.R. 285, 358, 359.
8. *Gunaratne v. People's Bank* [1986] 1 Sri L.R. 338, 354.
9. *Roberts v. Ratnayake* [1986] 2 Sri L.R. 36.
10. *A. G. v. Liyanage* [1962] N.L.R. 313, 354, 359.

**APPLICATION** for infringement of fundamental rights.

*R. E. Thambiratnam* with *K. V. Mahendra* for petitioner.

*R. K. W. Goonasekera* with *L. C. M. Swarnadhipathy*, for 2nd, 3rd, 4th and 5th respondents.

*A. S. M. Perera*, D.S.G. for the Attorney-General.

*Cur. adv. vult.*

17th September, 1992.

**KULATUNGA, J.**

The petitioner is a Pharmacist attached to the Base Hospital, Vavuniya under the Ministry of Health and Women's Affairs of the North-East Provincial Council. Since 1989 she has been an officer of the Provincial Public Service of that Council. In her application, the petitioner complained that the 2nd respondent (the Regional Director of Health Services, Vavuniya) sought to deprive her of the facility of occupying government quarters to which she was entitled and when she resisted it, the 4th respondent (the Secretary, Ministry of Health and Women's Affairs of the North-East Province) transferred her to the General Hospital, Batticaloa; that although the said transfer order purports to be for administrative reasons, it has been made *mala fide* solely on account of her dispute with the 2nd respondent regarding her occupancy of government quarters; and that the denial of her right to occupy government quarters and the said transfer are discriminatory and violative of her rights under Article 12(1) of the Constitution. The 3rd and the 5th respondents are the District Medical Officer and the Secretary, Provincial Public Service Commission,

North-East Province, respectively. The petitioner has also named the Attorney-General as a respondent in compliance with the Supreme Court Rules.

## **QUESTIONS OF LAW**

In this application the jurisdiction of this Court under Article 126 of the Constitution has been invoked for the first time in respect of alleged infringement of fundamental rights by officers of a Provincial Council; and His Lordship The Chief Justice, acting in terms of Article 132(3), has directed that this application be heard by a Bench of five Judges. I shall first examine the four important questions of law which had been raised for consideration by this Bench and in respect of which, the parties have, as directed by this Court, filed written submissions. The questions are as follows:

- (1) Whether this Court has jurisdiction under Article 126 on the basis that "executive or administrative action" includes the acts or omissions of a Provincial Council or its officers;
- (2) What is the position, status and role of the Attorney-General as the Chief Law Officer of the State, in relation to a Provincial Council, particularly in the context of Article 134 and the Rules requiring the Attorney-General to be made a party to applications under Article 126;
- (3) If this Court has jurisdiction, what is the liability of the State, namely the Government of Sri Lanka, in respect of infringements of fundamental rights by a Provincial Council or its officers.
- (4) If this Court has jurisdiction, how are the orders made in fundamental rights applications against the officers of a Provincial council, and the Provincial Council itself, to be enforced.

## **JURISDICTION OF THE SUPREME COURT**

Although the above questions have been formulated in wide terms, I have taken the view that having regard to the facts and the issues in this application, it would be sufficient if we express our

opinion on the said questions strictly to the extent that it is necessary for the purpose of deciding the case before us. Viewing the matter in that light, the first question is whether the impugned transfer and the deprivation of government quarters constitute "executive or administrative action" within the ambit of Article 17 of the Constitution. The authors of the Constitution, in their wisdom, have not defined this expression. However, in the area of the Central Government ("The Centre"), we are very familiar with its meaning, whether in relation to the acts of **public officers** or officers holding office under **public corporations**. Ordinarily, it means their acts done under the colour of office in the exercise or the purported exercise of governmental functions. There are numerous decisions of this Court on this point almost all of which are referred to in the recent decisions in *Karunaratne v. Rupasinghe*<sup>(1)</sup> and *Sirisena v. Perera*<sup>(2)</sup>. It has been held that complaints arising upon judicial orders are not justiciable under Article 126. See *Cannossa Investments Ltd. v. E. E. B. Perera*<sup>(3)</sup> and the decisions referred to therein.

All the Centre, Article 4(d) of the Constitution provides that the executive power of the people is exercised by the President. An elaboration of this power is to be found in Chapter VII, Articles 30-41 (President of the Republic), Chapter VIII, Articles 42-53 (The Cabinet of Ministers) and Chapter IX Articles 55-61 (The Public Service). Subject to the President's power to make certain appointments, the exercise of the power of appointment, transfer, dismissal and disciplinary control is vested in the Cabinet of Ministers. The Cabinet is empowered to delegate some of its powers to the Public Service Commission, which may in turn delegate its power to a public officer. Under Article 55(4) the Cabinet of Ministers is empowered to provide for and determine all matters relating to public officers; accordingly, the Establishments Code (1985) which has been approved by the Cabinet of Ministers makes detailed provision in respect of such matters including the transfer of public officers and the allocation of government quarters to them; and such acts constitute "executive or administrative action" reviewable under Article 126.

At the level of a Provincial Council, Article 154C provides that executive power extending to matters with respect to which a Provincial Council has the power to make statutes shall be exercised by the Governor of the Province directly or through the Board of

Ministers, or through officers subordinate to him, in accordance with Article 154F. Article 154F establishes a Board of Ministers and provides, *inter alia*, that the Governor shall, in the exercise of his functions, act in accordance with the advice of the Board of Ministers, except in so far as he is by or under the Constitution required to exercise his functions in his discretion. Under Article 154G read with List 1 of the Ninth Schedule, Health is a subject which has been devolved to Provincial Councils and under S.1:2 of appendix II to List I, it would appear that a Provincial Council is permitted to administer, control and utilise government quarters comprised in State land within the province and which are made available to such Council by the government.

Article 154Q empowers Parliament to enact further provision relating to Provincial Councils. Such provisions were made by the Provincial Councils Act No. 42 of 1987 as amended by Acts Nos. 27 of 1990 and 28 of 1990. Under S.32 of the Act, the appointment, transfer, dismissal and disciplinary control of officers of the provincial Public Service of each Province is vested in its Governor. The Governor may delegate such power to the Provincial Public Service Commission, which in turn may delegate its power to the Chief Secretary or any officer of the Provincial Public Service (see S.32 (2A)). Under S.32 (3), the Governor is empowered to provide for and determine all matters relating to officers of the Provincial Public Service: accordingly the Governor of the North-East Provincial Council has made an order dated 17.12.90 setting out the guidelines for the Provincial Public Service Commission.

By his order dated 10.10.90, the Governor of the North-East Provincial Council has delegated his powers of appointment etc. over officers of the Provincial Public Service to the Provincial Public Service Commission, whilst retaining to himself such powers in respect of certain posts; and the Commission by its order dated 14.10.90 has delegated its powers to the officers indicated therein. Under the said delegation, the powers of transfer and disciplinary control over the petitioner are vested in the 4th respondent. The 2nd respondent is the Regional Head in Vavuniya having administrative authority over the petitioner, including the power to allocate government quarters to her. In its determination on the Bills for the

enactment of the 13th Amendment and the Provincial Councils Act, this Court held that such powers have been conferred by way of "devolution" or "delegation" of "Central Government powers" within the framework of the Unitary State postulated by Article 2 of the Constitution. Having examined Article 154C and the relevant provisions, the majority of the Court said –

" . . . There can be no gainsaying the fact that the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him."

In *re Thirteenth Amendment to the Constitution and the Provincial Councils Bill*<sup>(4)</sup>. I have, therefore, no doubt that the impugned acts constitute "executive or administrative action" within the ambit of Article 17 of the Constitution, which this Court has jurisdiction to review under Article 126.

## **THE POSITION, STATUS AND THE ROLE OF THE ATTORNEY-GENERAL**

It follows from my above finding that the Attorney-General has the right to be heard in these proceedings in terms of Article 134 (1) of the Constitution and has been properly made a party under the Supreme Court Rules. It would be unnecessary, for the purposes of this application, to decide the other issues involved in the second question set out above.

## **LIABILITY OF THE STATE**

In respect of infringements of fundamental rights arising out of the acts of public officers or public corporations, it has been held (in the light of Articles 4(d) and 126(4) of the Constitution) that in addition to the State (which is primarily liable) the offending officer is also liable; and accordingly, in appropriate cases both the State and such officer may be ordered to pay compensation. *Karunaratne v. Rupasinghe (supra)* and *Sirisena v. Perera (supra)*. In an appropriate case, the liability of the State would remain purely conceptual, and relief may be granted against the offender alone. *Ratnasara Thero v.*

*Udugampola*<sup>(5)</sup>; *Perera v. The University Grants Commission*<sup>(6)</sup>. In the instant case the relief, if any, need not go beyond the 2nd and the 4th respondents; hence the liability of the State, if any, remains purely conceptual. The third question before us impliedly raises another issue namely, whether a Provincial Council itself may incur a liability analogous to that of the State on account of an infringement of fundamental rights. That issue also does not arise for decision in this case. I would, however, conclude my opinion on this question with the observation that under the 13th Amendment, the Republic of Sri Lanka alone is sovereign and Provincial Councils have been established for the purpose of devolving some of the powers exercised by the Centre and they are no more than components of the Republic, created for that purpose. The status of a Provincial Council is, therefore, not analogous to that of the State in fundamental rights cases. However, the question whether *relief* may be granted against the Provincial Council alone on account of an infringement of fundamental rights by "executive or administrative action" within its area can arise for decision in an appropriate case in which event, this Court will express its opinion thereon.

#### **ENFORCEMENT OF THE ORDERS OF THE SUPREME COURT UNDER ARTICLE 126 (4)**

In the determination of this Court on the 13th Amendment and the Provincial Councils Bill this Court said –

"The Bills do not effect any change in the structure of the Courts of judicial power of the People. The Supreme Court and the Court of Appeal continue to exercise unimpaired the several jurisdictions vested in them by the Constitution. There is one Supreme Court and one Court of Appeal for the whole Island . . ." (P.323)

I myself subscribe to the view that the 13th Amendment has not eroded the judicial power of the People and hold that the writ of this Court still runs through the length and breadth of Sri Lanka and that this Court has the full power to enforce its orders, including those made under Article 126(4).

## CONSIDERATION OF THE DISPUTE ON THE MERITS

### Occupation of Medical Quarters by the petitioner

The petitioner is one of the six pharmacists attached to the Base Hospital, Vavuniya. Unlike in the case of medical officers, pharmacists are not entitled to scheduled quarters (i.e. those assigned to a particular post or grade within a Department; see S.1 of Chapter XIX of the Establishments Code). The petitioner states that in Vavuniya there are six such quarters assigned for the use of medical officers ("medical quarters") but the respondents state that there are only five such quarters, a discrepancy which is not important because the petitioner is, in any event, not entitled to such quarters. However, the medical administration in Vavuniya had helped the petitioner when she was in difficulty due to the civil disturbances there and permitted her to occupy such quarters, which fact ultimately led to the present dispute. No other pharmacist has been permitted to occupy scheduled or other government quarters.

In 1989 the petitioner had rented out a private house in Vavuniya and was living there, when the I.P.K.F. acquired it; whereupon she was permitted to occupy the old D.M.O.'s quarters which was vacated by a Medical Officer. The inventory P14 shows that it is a spacious house (with fans) consisting of 4 rooms (with attached bathrooms), a hall, verandahs, kitchen, dining room and a garage. By a letter dated 06.10.89 (2R1), she informed the R.D.H.S. that since the I.P.K.F. had acquired her house without notice and as she was with children, she was in temporary occupation of the old D.M.O.'s quarters for want of alternative accommodation. On 07.10.89, the D.M.O. Vavuniya reported to the R.D.H.S. that as the office of the Regional Medical Officer (Anti-Malaria Campaign) was being shifted to the P.H.I.'s quarters, the petitioner may be allowed to occupy the building which was being vacated by the R.M.O., on condition that she should vacate it on 31.12.89 (2R2). On 20.10.89 the R.D.H.S. approved it and instructed that the petitioner be requested to shift to the said building and to immediately hand over the old D.M.O.'s quarters to the D.M.O. (p.15). This was done.

Although the petitioner was expected to vacate the R.M.O.'s quarters by 31.12.89 she appears to have been allowed to live there

until June 1990 when due to the occurrence of violence, she had to leave the area. She resumed work in September 1990 when on 26.09.90 the R.D.H.S. instructed her to hand over the R.M.O.'s quarters to the D.M.O. and to shift to the old D.M.O.'s quarters (P2). She complied with these instructions and shifted to the old D.M.O.'s quarters on 27.09.90 (P3, P16).

### **DECISION THAT THE PETITIONER SHOULD VACATE MEDICAL QUARTERS**

The 2nd respondent assumed duties as R.D.H.S. Vavuniya in November 1990. On 21.11.90 the 2nd respondent held a conference for the allocation of quarters to medical officers, which the petitioner attended. At the said conference the R.M.O. Dr. Thiyagarajah wished to occupy the R.M.O.'s quarters then occupied by the D.M.O. This was allowed. The D.M.O. did not wish to shift to the old D.M.O.'s quarters; instead he wished to occupy a quarters being vacated by an outgoing doctor. The 2nd respondent wished to occupy the old D.M.O.'s quarters then being occupied by the petitioner; and it was agreed that he would immediately occupy a part of the said quarters until the end of December 1990 when the petitioner was due to go on transfer to Negombo. On 23.11.90 the 2nd respondent made a minute of the said conference and endorsed it to the petitioner with instructions that she will be released to assume duties in Negombo on 31.12.90. She was also requested to hand over duties, with an inventory of articles (P4). Consequently, on 29.12.90 the D.M.O. appears to have called upon her to relinquish duties to which she protested by a writing dated 30.12.90 (P5). She took up the position that her transfer to Negombo had been ordered 3 years ago but was not implemented and that as she was now an employee of the North-East Provincial Council she could not be transferred except with the concurrence of the North-West Provincial Council. She indicated that pending clarification of this issue she was not prepared to proceed to Negombo.

### **REFUSAL OF THE PETITIONER TO VACATE MEDICAL QUARTERS**

On 25.01.91 the 2nd respondent reminded the petitioner that in terms of the decision made on 21.11.90, she should have vacated

the quarters occupied by her by the end of December 1990 and requested her to do so before the end of January 1991 (P6). On 30.01.91 the 2nd respondent received a letter from the Attorney-General (2R4) calling for observations on a notice of action given by the petitioner. In the said letter the Attorney-General also advised the 2nd respondent to refrain from taking steps to dispossess the petitioner (from the quarters occupied by her) pending a final decision on the notice of action.

On 08.02.91 the petitioner replied P6, the 2nd respondent's letter. In her reply (P7), she said that as her transfer to Negombo was not effective she proposed to remain in the quarters allotted to her. There followed two reminders dated 27.02.91 and 23.04.91 from the Attorney-General addressed to the 2nd respondent calling for observations on the petitioner's notice of action (2R5 and 2R6). In each of these letters the Attorney-General strongly advised the 2nd respondent to refrain from taking steps to dispossess the petitioner from the quarters occupied by her or to transfer her from Vavuniya without reference to him. However, after further consideration, the Attorney-General, by his letter dated 12.09.91 addressed to the petitioner (with copy to the 2nd respondent) declined to intervene in the matter in view of the fact that she was an employee of the Provincial Council and that the premises in question was under the control of the Council (2R7).

### **ACTION BY THE AUTHORITIES TO RECOVER MEDICAL QUARTERS OCCUPIED BY THE PETITIONER: HER TRANSFER TO BATTICALOA**

Following the Attorney-General's ruling, the 2nd respondent reported the matter to the 4th respondent who by his letter dated 28.09.91 (P8) directed the petitioner to vacate the quarters forthwith on pain of disciplinary action. The correspondence that followed consists of 3 letters addressed to the 4th respondent by the petitioner, on 18.01.91 (P9), 15.11.91 (P10(a)) and 10.12.91 (P12), and 2 letters addressed to the petitioner by the 4th respondent, on 30.10.91 (P10) and 30.11.91 (P11), the second of which was an order transferring the petitioner to the General Hospital, Batticaloa with effect from 01.01.92, for "administrative reasons". The petitioner

claimed that she was entitled to occupy the old D.M.O.'s quarters; that she resumed work after the cessation of violence as she had been assured quarters for her residence; that two clerks had also been permitted to occupy medical quarters (this is denied by the 2nd respondent who states that the houses given to the clerks are quarters meant for clerks), and that her transfer and dispossession from quarters were both discriminatory.

The 4th respondent transferred the petitioner when it was clear that she would not surrender the D.M.O.'s quarters even on the threat of disciplinary action. On the other hand, she requested the 4th respondent to direct the 2nd respondent to vacate the portion of the said quarters which the 2nd respondent was in occupation as it was inconvenient for her to share the quarters with him. Finally, on 11.12.91 the petitioner appealed to the North-East Provincial Public Service Commission against her transfer alleging that it was motivated solely by the desire to deprive her of the quarters occupied by her and that in any event, there were two other pharmacists who were more eligible for transfer than her. They are (i) Mrs. Paramakulasingham who had served in Vavuniya for 7 years as against the petitioner who has served there only for 5 years (ii) Mr. Selvaratnam a retired pharmacist who had been re-employed on a contract basis.

## **SUBMISSIONS OF COUNSEL**

The learned Counsel for the petitioner did not press the allegation of discrimination based on the orders given to the petitioner to vacate the quarters occupied by her. She had been allowed to occupy medical quarters on sympathetic grounds. She has no right to such quarters. No other pharmacist had been allowed to occupy such quarters. She alone enjoyed the favour of occupying medical quarters. The 2nd respondent is a medical officer besides being the Regional Head in Vavuniya under the Ministry of Health and Women's Affairs of the North-East Provincial Council. He is entitled to medical quarters. As such the order to the petitioner to vacate the old D.M.O.'s quarters to enable the 2nd respondent (or any other medical officer) to occupy the same cannot constitute discrimination. The allegation that two clerks are in occupation of medical quarters has

been denied. Assuming that a clerk has also been permitted such a facility, it is not alleged that it has been done as a special favour with the intention of placing him in a more advantageous position over the petitioner; and hence such clerk too will be under the same obligation as the petitioner to vacate such quarters upon being directed to do so. So that, even if a clerk is in occupation of medical quarters (on account of the exigencies of the service) it cannot constitute discrimination violative of Article 12(1) of the Constitution.

Learned Counsel for the petitioner said that the petitioner's real grievance is her transfer to Batticaloa which he submitted was done not for administrative reasons but maliciously, on account of the dispute regarding government quarters, which dispute ought to have been resolved by recourse to the remedy of ejection by legal action. Counsel pointed out to the fact that the petitioner was transferred without a replacement for her in Vavuniya. He submitted that this supported the allegation of *mala fides*. The 2nd respondent states that Mrs. Paramakulasingham whom the petitioner says could have been transferred was not in the same position as the petitioner because her husband was employed in Vavuniya Kachcheri and as such it was not proper to transfer her out of Vavuniya; and that in any event, the petitioner had served in the Vavuniya Division for 12 years which was the longest period among the pharmacists attached to the Base Hospital, Vavuniya.

Learned Counsel for the petitioner also contends that it is clear from all the facts that the impugned transfer was not effected upon a consideration of the relevant facts; that it constitutes "hostile discrimination" in that the transfer was a hostile act intentionally directed against the petitioner due to illwill created by her refusal to vacate government quarters; and that as such it is violative of the right to equal protection of the law (*see Elmore Perera v. Jayawickrama*<sup>(7)</sup> per Wimalaratne, J.). Learned Counsel for the respondents submitted that the impugned acts cannot be attributed to illwill or malice and that the petitioner's transfer was justified in that –

(a) she had created a serious problem by refusing to surrender medical quarters which are specially meant for medical officers;

(b) she abused the facility given to her to occupy such quarters in times of difficulty;

(c) she challenged the authority of her superiors;

(d) no other pharmacist created such a situation at the Vavuniya Hospital;

(e) that in these circumstances the transfer was necessary to ensure the smooth functioning of the hospital services at Vavuniya even without a replacement; and that the Batticaloa Hospital could be better served by the petitioner.

I am in agreement with the submissions of the learned Counsel for the respondents. In answer to Court, the learned Counsel for the petitioner said that assuming that this Court sets aside the transfer, the petitioner will continue to occupy the old D.M.O.'s quarters and she cannot even indicate when she may vacate the same. This clearly shows that the real object of these proceedings has been to secure her occupation of medical quarters. If so, her real grievance is not the transfer. Her conduct is tainted by the desire to enjoy a facility to which she is not entitled; and that in the circumstances she has failed to establish the charge of "hostile discrimination".

For the foregoing reasons, I hold that the alleged infringement of the petitioner's fundamental rights under Article 12(1) has not been established and dismiss her application, but without costs.

**RAMANATHAN, J.** – I agree.

**P. R. P. PERERA, J.** – I agree.

**WIJETUNGA, J.** – I agree.

**FERNANDO, J.**

I have had the advantage of reading, in draft, the judgment of my brother Kulatunga, and I agree with his conclusion that the petitioner has failed to establish any violation of her fundamental rights.

However, I wish to state my views in regard to what constitutes "executive or administrative action", and the liability of the State for violations of fundamental rights by executive or administrative action.

### **"Executive or Administrative Action"**

Learned Counsel for the petitioner commenced his arguments by reiterating the opening paragraphs of his written submissions:

- "(a) Although the Constitution does not define 'executive or administrative action', the Supreme Court has held that the 'Constitutional guarantees of fundamental rights are directed against the State and its organs . . . In the context of fundamental rights, the 'State' includes every repository of State power. The expression 'executive or administrative action' embraces executive action of the State or the agencies or instrumentalities exercising governmental functions. It refers to exertion of State power in all its forms' (*Perera v. The University Grants Commission*)<sup>(6)</sup>. 'the Courts have been progressively extending the concept of State and today it has come to include almost any institution performing public functions' (*Gunaratne v. People's Bank*)<sup>(8)</sup>.
- (b) In order to ascertain whether a particular institution is an organ or instrumentality or agency of the State, the 'functional' and 'governmental control' tests have been customarily applied. Does the institution exercise and perform governmental functions? Is it charged with or entrusted with functions which otherwise the Central Government would have performed? Does the State exercise control over that institution? (*Roberts v. Ratnayake*)<sup>(9)</sup>. It was also said in this case that 'where a Public Authority is charged or entrusted with Governmental functions, the 'Governmental Control test' is inappropriate and inapplicable' (p.69). However that may be, it is my respectful submission that a Provincial Council satisfies the two tests referred to above and constitutes an organ or agency of the State."

Articles 3 and 4 of the Constitution refer to the three powers of government; governmental power therefore includes the legislative

and the judicial power of the people. It is clear that in Articles 17 and 126 (and probably also in Article 157) "executive" action refers to the result of the exercise of the executive (but not the legislative or the judicial) power of the people. With much respect, therefore, I find it difficult to agree that this phrase "refers to exertion of State power in all its forms". The word "administrative" is significant, and cannot be treated as a mere superfluity. The classification of governmental powers is not always easy; there are grey areas of uncertainty, as well as residual and ancillary powers which, analytically or historically, do not fit neatly into one of the traditional categories (see, for instance, *AG v. Liyanage*<sup>(10)</sup>, where an essentially administrative power was held to be ancillary to the judicial power). Accordingly these powers which cannot appropriately be classified as legislative, judicial, or executive, but are nevertheless "administrative" in a public law sense, are also included in the phrase "executive and administrative". Thus the question whether an act falls within the ambit of this expression cannot be determined on the assumption that it includes *all* exertions of State power, or the performance of a governmental power of function; nor on the basis that if particular institutions, functionaries or officials are "legislative" or "judicial", their acts are necessarily excluded. In the scheme of the Constitution, as laid out in Articles 3 and 4, one of the powers of government is the judicial power of the people; the judiciary thus exercises a governmental power of function. The acts of a judicial officer, in the exercise of judicial power, are not within the ambit of Article 126; however, it may not follow that every act of a judicial officer is excluded, for it is not inconceivable that some acts may be "administrative" in character and thus not in the exercise of the judicial power of the people. In my view, therefore, the test must always be whether the impugned act was "executive or administrative", not whether the institution or the person concerned can be characterised as "executive" (or "governmental", which is often used as if it were equivalent). Of course, reference to the "executive" character of such institution or person, and the degree of "executive" control, may be justifiable, and necessary, in borderline cases, but ultimately the decision must depend on whether the act is "executive or administrative" in character, and not upon the status of the institution or the official.

In the case before us, Article 154C provides for the exercise of the executive power, and there is no dispute that the impugned acts were done in pursuance thereof. Those acts were therefore "executive or administrative action", regardless of the character or status of the institutions and the officials involved.

### **Liability of the State**

Since the Petitioner has failed to establish her allegations, it is strictly unnecessary to deal with this question. However, it was one of the matters referred to this Bench. Chapter III of the Constitution enumerates fundamental rights, and while Articles 17 and 126 confer jurisdiction on this Court in respect of infringements by "executive or administrative action", there is no provision as to who is liable therefor. While I agree with my brother Kulatunga that in appropriate cases relief may be granted both against the offender and the State, it is nevertheless unnecessary to decide whether the State is "primarily" liable. It is sufficient to state that this Court has the power and the discretion under Article 126(4) to make appropriate orders for relief, taking into consideration the degree of culpability or responsibility of the several respondents.

*Application dismissed.*

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