

**STUDY OF THE CONSTITUTIONAL PRINCIPLES AND LANDMARK
CONSTITUTIONAL CASES OF SRI LANKA w.r.t LABOUR LAW.**

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This research paper is a study of the constitutional rights with respect to labour and industrial matters and the rights given to them by various judicial judgements in Sri Lanka.

It also enumerates the various principles developed over the years by the labour tribunals and Courts of Sri Lanka for the welfare of labour such as the Control Test, Integration Test and the Economic Reality Test.

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In order to understand the rights given to the workers in Sri Lanka it is important to understand the constitutional framework in which these rights were conferred upon them. This section mentions the various Articles of the Constitution of Sri Lanka which are relevant to understand the rights conferred on workers.

ARTICLE 14

The freedom to form an association and freedom to form a union is guaranteed in the Constitution as a Fundamental Right. The relevant extract of the Constitution of Sri Lanka i.e Article 14 is as follows

14. (1) Every citizen is entitled to:-

(a) the freedom of speech and expression including publication;

(b) the freedom of peaceful assembly;

(c) the freedom of association;

(d) the freedom to form and join a trade union;

(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching;

(f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;

(h) the freedom of movement and of choosing his residence within Sri Lanka; and

(i) the freedom to return to Sri Lanka.

RESTRICTIONS TO ARTICLE 14

However these freedoms enshrined in Article 14 are not absolute, but are subject to certain restrictions which are laid down in Article 15 as follows:-

Freedom of speech and expression including publication is subject to such restrictions prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

Freedom of peaceful assembly is subject to restrictions as may be prescribed by law in the interests of racial and religious harmony.¹

¹ Article 15 (3)

Freedom of association; is subject to restrictions prescribed by law in the interests, of racial and religious harmony or national economy.²

Freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise are subject to restrictions prescribed by law in the interests, of national economy or in relation to

(a) the professional, technical, academic, financial and other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise' and the licensing and disciplinary control of the person entitled to such fundamental right, and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.³

Freedom of movement and of choosing his residence within Sri Lanka is subject to such restrictions prescribed by law in the interests of national economy.⁴

These rights enshrined in Article 14 are also subject to restrictions prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

² Article 15(4)

³ Article 15 (5)

⁴ Article 15(6)

INFRINGEMENT OF FUNDAMENTAL RIGHTS IN LABOUR MATTERS

Having understood the various fundamental rights, it is also incumbent to know the manner of enforcing these rights and redressal in case of infringement.

Article 17 of the Constitution of Sri Lanka is pertinent to note in this context.

*17. Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by **executive or administrative action**, of a fundamental right to which such person is entitled under the provisions of this Chapter.*

EXECUTIVE AND ADMINISTRATIVE ACTION - INTERPRETATION BY SRI LANKAN COURTS

The words “executive and administrative” action was subject to a lot of controversy and has come up for interpretation before the Supreme Court of Sri Lanka in a number of cases. These words “executive” and “administrative” are not defined in the Constitution of Sri Lanka.

Sukhdev Singh & Others v. Bhagatram Sardar Singh Raghuvanshi AIR (1975) SC 1331 : 1975 SCR (3) 619 at page 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.”

Rienzie Perera and Another v University Grants Commission⁵, [1978-80] 1 Sri L R 128

“The wrongful act of an individual, unsupported by State authority, is simply a private wrong. Only if it 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” The expression executive and administrative action means “exertion of State power in all its forms.”

Trade Exchange (Ceylon) Ltd. v. Asian Hotels Corporation Ltd. [1981] 1 Sri LR 67

In this case the Supreme Court of Sri Lanka affirmed the Decision of the Court of Appeal and held that the action of a public commercial company is not amenable to a writ of certiorari. The

⁵ [1978-80] 1 Sri L R 128 at page 138

court held that notwithstanding the fact that the respondent company was a public commercial company incorporated under the Companies ordinance, and shares were controlled by the Government and most of the capital was contributed by the government, the court refused to accept the respondent public company as an agent of the government.

The question in this case was whether the action of a public commercial company, incorporated under the Companies Ordinance, was amenable to the writ of certiorari and other writs?

Or in other words, whether the action of a public commercial company could be challenged under 126 of the Constitution of Sri Lanka as falling within Executive or Administrative action of the state.

Accordingly the Supreme Court held that the action taken by a public company is not amenable to a writ of certiorari.

However the decisions in *Rajaratne* and *Leo Samson* brought a radical change and widened the scope of executive and administrative action. Various Indian judgements were also referred in these cases. The courts developed the “control test”

THE CONTROL TEST

Though a plain reading of the Article will imply that only executive or administrative actions taken by the state can be challenged under Article 126 of the Constitution, the Sri Lankan courts have not adopted a very literal interpretation of these phrases and instead widened the ambit of this phrase.

A catena of cases decided by the Supreme Court of Sri Lanka over the years have evolved the principle of CONTROL TEST which is a guiding light for the Judges to decide in similar cases. The control test is applied to determine the degree of control that the Govt. enjoys over the entity in question in order to come to a conclusion whether the action of the entity would amount to executive or administrative action and therefore if the said action can be challenged under Article 126 of the constitution. The various cases in this context can be studied as follows:-

s Rajaratne v Air Lanka Ltd

In this case the petitioner alleged that there were different criteria and different standards applied in recruitment of the same post, which resulted in unjust discrimination and therefore violation of the fundamental rights enshrined in Article 12.

In order to ascertain whether the case could fit into the ambit of Article 126, the Court had to first ascertain whether Air Lanka was an agent of the government and whether its actions would amount to executive or administrative actions. The control test was applied in this case. While applying the control test, the court took into consideration the Articles of Association of the

company, manner of appointment of directors, share capital held by the government etc. to ascertain the degree of control that Air Lanka enjoyed over the affairs of the company.

“All the above circumstances enumerated by me show that Air Lanka is no ordinary company. It has been brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors. It has been so created for the purpose of carrying out a function of great public importance which was once carried out by the government through the agency of a statutory corporation. In reality Air 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 purposes 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. Its action- can therefore properly be designated as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution. The petitioner has thus established that he is entitled to relief under Article 126(4).”

The court also clarified that while applying the control test, it should be borne in mind that it is not necessary that the Company in question should be brought into existence by a Special Statute. 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.

The decision in s Rajaratne v Air Lanka Ltd was reiterated in the year 2001 in the case Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd. and Others, [2001] 1 Sri LR 365,

EXECUTIVE AND ADMINISTRATIVE ACTION OF STATE, ITS AGENTS AND INSTRUMENTALITIES.

The question arises that though Article 126 includes only executive and administrative actions, will the phrase executive and administrative action include the even the executive or administrative action of the State or its agents or instrumentalities?

3 leading cases in this context by the SC are:-

Wijetunga v. Insurance Corporation of Sri Lanka (1982) 1 Sri L R 1

This case explained the concept of State and Agency and Instrumentality of the government. Relevant excerpts from the judgement are:-

"action by the organs of the government alone constitutes the executive or administrative action that is a sine qua non or basic to proceedings under Article 126..... While there can be no doubt that the expression would include official acts of all government departments and its officers, a problem could be envisaged when the acts of entities other than that of the government are being questioned."

*"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 Directors of the Corporation, though appointed by the government with a 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 labelled 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."*

Leo Samson V Sri Lankan Airlines And Others [2001] 1 Sri LR 94

"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."

The contention of the first respondent was that after the signing of the shareholders agreement by Govt and Emirates, wherein emirates was made an investor and was given the power to appoint directors (including managing director), the impugned decisions remain that of the Investor and the Government has no control over the Board of Directors. Hence the petitioner cannot

approach the SC under 126 because the impugned actions complained of do not constitute executive or administrative action.

On a close observation of the provisions of the Memorandum and Articles of Association and the Shareholders Agreement of Air Lanka, the court found that the management, power, control and authority over the business of the Company was vested in the Investor (Emirates) and with certain management decisions being vested exclusively with it (Emirates)."

The court therefore concluded that the Govt had lost deep and pervasive control over the Company, the impugned actions were no longer executive or administrative action and therefore the contention of the respondent was accordingly accepted.

Jayakody V Sri Lanka Insurance And Robinson Hotel Co. Ltd And Others [1987] 2 Sri LR

The other question which arose in this case was whether appointment, disciplinary control etc. of employees of state and state agencies constituted 'executive or administrative action'?

"Executive or administrative action" (within the meaning of Chapter III of the Constitution) would include even the executive or administrative action of the State or its agents or instrumentalities.

Hence a study of the above cases shows that only those actions which constitute as an executive or administrative action within the meaning of Article 17 of the constitution can be challenged under Article 126. What constitutes administrative or executive action depends upon a number of factors which will establish the deep and pervasive control by the Government.

EXECUTIVE AND ADMINISTRATIVE ACTION IN ARTICLE 17 OF SRI LANKA

AND

CONCEPT OF STATE IN ARTICLE 12 OF INDIAN CONSTITUTION

: A COMPARITIVE ANANLYSIS

Similar to the concept of executive and administrative action, the concept of state and other authorities in Article 12 of the Indian Constitution has been radically developed and widened by the Indian courts.

The judgements of Indian Courts in this context have been referred in number of case by Sri Lanka.

12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local **or other authorities** within the territory of India or under the control of the Government of India.

Name of the Indian case	Sri Lankan case in which Indian case was referred
<i>Ramana Dayaram Shetty v. International Airport Authority</i> <i>and</i> <i>Ajay Hasta v. Khalid Mujib</i>	<i>Rajaratne v Air Lanka Ltd.</i>
<p>RATIO</p> <p>In order to ascertain whether a particular corporation comes within the definition of Article 12 (authority), It is immaterial whether the corporation is created by 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. Whatever be its genitival origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute.⁶</p>	
<i>Som Prakash v. Union of India</i>	<i>Leo Samson V Sri Lankan Airlines And Others</i>
<p>RATIO</p> <p>The preponderant considerations for pronouncing an entity as State agency or instrumentality are (i) financial resources of the State being the chief funding source, (ii) functional character being governmental in essence, (iii) plenary control residing in Government, (iv) prior history of the same activity having been carried on by the Government and made over to a new body, and (v) some element of authority or command. Whether the legal person is a corporation 'created by a statute, as distinguished from under a statute, is not an important criteria although it may be an indicium."</p>	

⁶ Justice bhagwati in *Ramana Dayaram Shetty v. International Airport Authority*

INTEGRATION TEST AND ECONOMIC REALITY TEST

Many times the courts have found the control test to be inadequate. Hence the economic reality test and the integration test were found to be appropriate in some cases. These tests have been adopted from English case laws. The various Sri Lankan cases in which this test was applied is as follows:-

Perera v. Marikar Bawa

The applicant worked as a head tailor with a tailoring company on a commission basis. The work was done by him personally or under his guidance or supervision. He was not required to sign any register. He was not entitled to any bonus as in case of other employees. He did not make any contribution to the EPF.

The court came to the conclusion that it is not appropriate to apply the control test in this case. Accordingly the court applied the integration test and held that the work of the applicant is an integral part and parcel of the company since he possessed certain specialized skills.

The court relied on the words of Denning L.J that the test is whether hand the employee is employed as part of the business and his work is an integral part of the business or whether his work is not integrated on to the business but is only accessory to it. The court concluded that though the applicant was not at par with the other employees, but he was part and parcel of the organization and was hence a workman as per the integration test.

Rev. Father Alexis Benedict of Youth Fisheries Training Project v. Denzil Perera and Others,

A youth development project was established to train youth in deep sea fishing. The development project availed the services of the applicants who were trained fishermen, these applicants were paid an equal share of 50% for the catch at the end of each month. The other 50% was to the project to meet the expenses for maintenance, repairs, renewals, etc. though there were no letters of appointment issued to the applicants, An Employees' Provident Fund Scheme and an Insurance Scheme were introduced by the project for the benefit of these applicants. Accommodation was also provided to the applicants. The court applied the control test, integration test and economic reality test and stated that the project exercised control over many aspects of the venture and bore the financial risk of the venture. The court decided that they were integral part of the project and were employees of the appellant as a matter of economic reality.