FERNANDO
V.
THE SRI LANKA BROADCASTING CORPORATION AND OTHERS

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
WIJETUNGA, J.
S. C. APPLICATION NO. 81/95.
22, 23 and 30 JANUARY, 1996.

Fundamental Rights - Right of freedom of speech and expression including publication-Constitution, Article 14 (1) (a)-Stoppage of Non-Formal Education Programme (NFEP).

For many years the Sri Lanka Broadcasting Corporation's (SLBC's) Education Service (originally, the School Service) broadcast educational programmes intended primarily for students in the formal education system based on school curricula and largely exam-oriented. In June 1994 the SLBC launched the Non - Formal Education Programme (NFEP) of its Education Service dealing with a variety of topics such as human rights, ethnicity, sociology, legal and medical issues, arts and culture, politics, current affairs, the environment, behavioral science, history, archaeology, literature, drama, women's rights and pre-school teacher training. It was not a collection of irregular, sporadic or infrequent programmes but planned to cover a long period with a regular schedule of programmes. The participation was not restricted to SLBC staff and specially invited experts and resource persons, but extended to listeners as well. The petitioner had taken part in discussions on several programmes concerning current affairs, human rights and ethnic issues and had also asked questions as a listener from various resource persons live on several programmes.

By a Cabinet decision taken on 26.10.94 the new Government approved a "Statement on P. A. Government's Media Policy" which *inter alia* recognized the media's right to expose corruption and misuse of power, widened the scope of the constitutional guarantee of freedom of expression by including the Right to Information, assured to the electronic media the right of gathering and disseminating news, offered government's co-operation to media and Journalists' Associations to work towards formulating a charter that will set acceptable parameters of news programmes in all electronic media, granted media personnel in the state-sector media institutions the freedom to decide the content of news bulletins and news feature programmes, based primarily on the newsworthiness of events and undertook to amend or rescind the relevant legislation and Standing Orders of Parliament.

This Cabinet decision was conveyed on 1.11.94 to the Secretary, Ministry of Information, Tourism and Aviation for circulation by him to the relevant officials for implementation. By a circular dated 14.12.94 the 2nd respondent (Chairman, SLBC) forwarded copies to all SLBC directors and heads of departments and requested them to comply.

Tilak Jayaratne who had been the Controller of the Education Service since 1988 appeared to have been principally responsible for designing and operating NFEP. His qualifications and competence for the job was not in issue in the proceedings, nor the costs. The NFEP broadcasts were acknowledged to be of a high standard.

According to the petitioner on 6.2.95 about 6.30 a.m. an NFEP programme entitled "Kamkaru Prajawa" (The Working Community) was on the air. The programme included a telephone interview with the Hon. Minister C. V. Gooneratne. In the programme several workers of Kundanmals Ltd., were interviewed in connection with a strike and the promises given by the authorities to the workers. The Hon. Minister of Industries (Mr. C. V. Gooneratne) said that this did not come within his purview but only the Hon. Minister of Labour. Then the workers stated that the Hon. Minister of Labour had stated that he was not responsible and it was the Minister of Industries who was responsible. Workers said that before the General Election 1994, the Hon. Minister Gooneratne came to the work place and promised to solve all the problems but now he had forgotten everything. There was indication that the Hon. Minister of Labour was also to be interviewed but suddenly the programme was stopped and there was an announcement that songs would be broadcast thereafter. There was not a single NFEP broadcast after this and the NFEP virtually came to an end.

A few weeks earlier on 1.1.95 the post of Director Education Service had fallen vacant and Tilak Jayaratne was appointed Acting Director. On 4.2.95 it was announced on SLBC news bulletin that Nelson Jayaweera had been appointed to cover the duties of the Director, Education Service and another officer had been appointed as Acting Controller. Some of the staff of the Education Service submitted a written protest on 16.2.95. Thereafter by letter dated 17.2.95 Nelson Jayaweera was released from his duties in the Education Service and the Education Service was placed directly under the 3rd respondent (Director-General, SLBC).

By a notice dated 18.2.95 the 3rd respondent directed that only formal education programmes be broadcast, that the responsibility for the NFEP be vested in the Directors in charge of the National Service and the news and that the non-formal programmes be broadcast on the National Service. By another notice issued on the same day, Tilak Jayaratne was directed,

until 20.2.95 to broadcast songs during the periods scheduled for the NFEP programmes and a decision regarding those programmes would be taken after 21.2.95. On 3.3.95 Tilak Jayaratne was directed, because his section was no longer producing NFEP programmes, to retain two cassette recorders and return the remaining fourteen to the stores. By letter dated 6.3.95 the 3rd respondent informed the Director-General of the National Institute of Education that the Education Service of the SLBC has been confined to formal education programmes and the non-formal programmes have been brought under the control of the Language Directors. The petitioner alleged that the changes whether by way of "restructuring and reformatting" or otherwise were so drastic that there remained only a pretence that the NFEP was still being broadcast.

Justification for the discontinuance of the NFEP was based in four grounds:

1. The irrelevance of the subject matter of three programmes: Pasu Vimasuma, a review of the NFEP itself, "Puvath Adahorawa" which dealt with the speculation about Lionel Fernando's resignation from the four member Government delegation to the 1995 Peace Talks with LTTE and the "Subharathi" programme asking for the views of the public on the broadcasting policy of the Education Service, as well as the "Kamkaru Prajawa" programme.

2. The possible liability of the SLBC and its top management for defamation, civil and criminal, because of the content of the programmes.

3. The criticisms (contained in "Pasu Vimasuma" of the Programme, and of the SLBC, its administration, and its top management, were irrelevant, inapproriate and unacceptable; further the staff were using the NFEP to air their own views, and their requests for listener support for NFEP were out of place.

4. Public discontent with the NFEP, as indicated by the complaints received.

Held:

1. All the four reasons given by way of justification, are without merit.

2. Article 14(1)(a) of the Constitution is not to be interpreted narrowly. Not only does it include every form of expression, but its protection may be invoked in combination with other express guarantees (such as the right to equality); and it extends to and includes implied guarantees necessary to make the express guarantees meaningful. Thus it may include the right to obtain and record information, may be by means of oral interviews,

publications, tape-recordings, photographs and the like, and, arguably, it may even extend to a privilege not to be compelled to disclose sources of information, if that privilege is necessary to make the right to information "fully meaningful". Likewise other rights may be needed to make the actual exercise of the freedom of speech effective: rights in respect of venues, amplifying devices, etc.

(*Semble* per Fernando, J : "I doubt, however, that it includes the right to information *simpliciter*".)

3. The freedom of speech of the petitioner, *qua* participatory listener has been infringed, because the stoppage of the NFEP prevented further participation by him.

Cases referred to:

1. *Ekanayake v. Herath Banda S.C. 25/91 SCM of 15.12.91.*
2. *Secretary, Ministry of Information v. Cricket Association of Bengal (1995) 2 SCC 161, 292.*
3. *Red Lion Broadcasting Co., v. F.C.C. (1969) 395 US 367, 376 (Red Lion Case).*
4. *Prabha Dutt v. Union of India, AIR 1982 S.C. 6.*
5. *Leander v. Sweden 26 March 1987, Series A No. 116 (European Court of Human Rights).*
6. *Open Door Counselling and Dublin Well Woman Centre v. Ireland, 29 October 1992, Series A No. 246 (European Court of Human Rights) N.B. Cases 5 x 6 cited in "The Article 19 Freedom of Expression Manual August 1993).*
7. *Stanley v. Georgia 394 US 557.*
8. *Martin v. City of Struthers 319 US 141, 143.*
9. *Griswold v. Connecticut (1965) 381 US 479.*
10. *Joseph Perera v. AG (1992) 1 Sri LR 199.*
11. *Visuvalingam v. Liyanage (1984) 2 Sri LR 123, 132.*
12. *Narayanan v. Kerala AIR 1973 Kerala 97.*
13. *Lamont v. Postmaster General (1969) 331 US 301, 308.*

PETITION complaining of infringement of the fundamental right of freedom of speech.

R. K. W. Goonesekera with *J. C. Weliamuna* for the petitioner.
K. C. Kamalasabayson, DSG with *S. Gamlath SSC and Chanaka de Silva SC* for respondents.

Cur. adv. vult.

30 January, 1996.
FERNANDO, J.

The Petitioner is a retired teacher: since his retirement in 1990, he has been the Organizing Secretary of the Ceylon Teachers' Union; and also the National Coordinator for the Movement for Free and Fair Elections which monitored the 1994 General and Presidential Elections. The Petitioner complains that his fundamental right of freedom of speech and expression, including publication (which I will refer to as the "freedom of speech"), guaranteed by Article 14(1) (a) of the Constitution was infringed by the 1st Respondent, the Sri Lanka Broadcasting Corporation ("SLBC"), and the 2nd to 4th Respondents (the Chairman, the Director-General and the Deputy Director-General (Programming), respectively, of the SLBC), by the sudden stoppage of the Non-Formal Education Programme ("NFEP") of the SLBC's Education Service.

THE FACTS

For many years the SLBC's Education Service (originally, the School Service) broadcast educational programmes, intended primarily for students in the formal education system: they were based on the school curricula and were, largely, exam -oriented. In June 1994 the SLBC launched the NFEP as part of its Education Service, on a new channel; it was aimed at a different section of the community; and it consisted of a series of programmes, dealing with a very wide range of topics, such as human rights, ethnicity, sociology, legal and medical issues, arts and culture, politics, current affairs, the environment, behavioral science, history, archaeology, literature, drama, women's rights, and pre-school teacher training. While the topics themselves suggest a greater emphasis on practical matters relevant to every-day life and issues of general interest, their broad scope reflects the width of the target group.

The NFEP was estimated to cost Rs. 4.5 million annually, and the Respondents have not suggested that there was any difficulty in obtaining those funds. Tilak Jayaratne who had been the Controller of the Education Service since 1988, and had followed training courses on educational broadcasting, appears to have been principally responsible for designing and operating the NFEP, with the assistance of a team of permanent and casual staff. At the hearing, the Respondents

did not question the qualifications, competence and experience of Tilak Jayaratne and his team.

Two other aspects of the NFEP need to be stressed. It was not a collection of irregular, sporadic or infrequent programmes, but was planned to cover a long period with a regular schedule of programmes. Thus the schedule for the whole of 1995 was available early in 1995, and provided for almost 24 hours broadcasting (in Sinhala) per week: approximately 6 hours each on Sundays, Mondays, Tuesdays, and Wednesdays. There were similar programmes in Tamil on Saturdays, Thursdays and Fridays. A second important feature was that participation was not restricted to SLBC staff and specially invited experts and resource persons, but extended to listeners as well. The Petitioner averred that he had taken part in discussions in several programmes concerning current affairs, human rights and ethnic issues, and had also asked questions as a listener from various resource persons live on several programmes. That was not denied by the Respondents.

The NFEP commenced before the August 1994 Parliamentary General Election, and continued thereafter. By a Cabinet decision taken on 26.10.94 the new Government approved a "Statement on PA Government's Media Policy", which included the following:

> "The subject of media freedom has gained considerable importance in the past few years, particularly due to the direct and indirect restrictions imposed on the media by the previous government, and the new broad-based activities by journalists to expand the scope of media freedom in the country . . .
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> . . . The threats levelled in the recent past against journalists as well as media institutions have largely emanated in response to their attempts to expose and to bring to the notice of the public corruption and abuse of political power. In order to eradicate one major threat to media freedom, our government recognizes the media's right to expose corruption and misuse of power.
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> 2. Freedom of Expression: In order to ensure media freedom, the following measures will be immediately taken:

i. Freedom of Expression is already guaranteed to all media through the present Constitution, and it shall be our endeavour to carry out all reforms with regard to the media in keeping with this salutary provision in the Constitution. In future amendments to the Constitution, the government shall seek to widen the scope of this constitutional guarantee by including the Right to Information.

ii. All electronic media will be granted the right of gathering and disseminating news. We urge the state-owned and private electronic media to present balanced coverage of news, exercising freedom with responsibility. The government will (extend) its cooperation to media and journalists' associations to work towards formulating a charter that will set acceptable parameters of news programmes in all electronic media.

iii. Media personnel in the state-sector media institutions will have the freedom to decide the content of news bulletins and news feature programmes, based primarily on the newsworthiness of events. We will not use state-owned media for partisan political propaganda.

iv. In order to rescind or amend where necessary, the Government will draft legislation, reforming the Press Council Law, the Official Secrets Act, Parliamentary Powers and Privileges Act, and the existing laws relating to Cabinet secrets and contempt of court so that the freedom of expression as well as the public right to information concerning the spheres of governmental activity (will) be ensured.

Priority will be given to rescinding the existing Parliamentary Privileges Act and replace it with a new Act. The provisions of the new Act will not be an obstacle to free and fair reportage of the proceedings of Parliament; it will also transfer to the higher judiciary the responsibility of inquiry and punishment for any breaches of parliamentary privilege. We will also seek to amend the Standing Orders of Parliament to permit journalists to cover the proceedings of Parliamentary Consultative Committees."

This Cabinet decision was conveyed on 1.11.94 to the Secretary, Ministry of Information, Tourism and Aviation, for circulation by him to the relevant officials for implementation. By a circular dated 14.12.94,

the 2nd Respondent forwarded copies to all SLBC directors and heads of departments, and requested them to comply. By letter dated 27.12.94 the Minister appointed Tilak Jayaratne as Chairman/Member of a Committee established to implement one aspect of that decision, by making recommendations to improve the economic conditions and status of journalists.

On 6.2.95 the NFEP broadcasts commenced at 5.30 a.m. with a programme entitled "Subharathi" (which, the Petitioner says, means "the voice that carries knowledge"). According to a transcript (2R7) produced by the Respondents, remarks were made to the following effect: the NFEP was of a high standard, and had set an example to the electronic media; its quality was largely due to the suggestions and criticisms of listeners; it had retained its independence, both before and after the new Government came into power; the producers of the NFEP were not prepared to turn back from that path; however, now there were obstacles to progress; should the producers proceed independently as before, or should they be puppets of the management? Listeners were invited, if they could, to convey their views on two specified telephone lines which were kept open.

Thereafter, says the Petitioner:

"On 6-2-95, at or about 6.30 a.m., I was listening to the Education Service and there was a live presentation with short recorded portions on tape. The programme was called "Kamkaru Prajawa" ("The Working Community") which included a telephone interview with the Hon. Minister C. V. Gooneratne. To the best of my knowledge, in the said programme, several workers of the Kundanmals Ltd. were interviewed in connection with a strike and the promises given by the authorities to the workers. The Hon. Minister of Industries stated (that) he is not responsible for labour matters as this did not come under his purview but only the Hon. Minister of Labour. Then the workers stated that the Hon. Minister of Labour had stated that he was not responsible and it was the responsibility of the Minister of Industries who is responsible for (the) labour which falls within his purview. Workers said that before the General Election 1994, the Hon. Minister Gooneratne came to the work place and promised to solve all the problems but now he has forgotten everything. Then the Minister said that anyway now it is the

responsibility of the Hon. Minister of Labour. There was (*sic*) indication that the Hon. Minister of Labour was also to be interviewed but suddenly the programme was stopped and there was an announcement that songs would be broadcast from then onwards. On that day there was not a single NFEP broadcast until the close of transmission in the morning session."

These averments were not denied by the Respondents. The Petitioner adds that thereafter the NFEP virtually came to an end:

". . . almost all the programmes with quality and editorially independent programmes are not broadcast now. In one programme, legal counselling was broadcast but important issues in human rights or any controversial legal issues were not dealt with. Although a very few programmes are broadcast in the nature of Non Formal Programmes, there is no quality, intellectual discussion or people's participation . . . (the) aforesaid programmes are broadcast only in order to please the Government and to give a biased, one-sided picture to the people and to pretend that the NFPs are still broadcast."

A few weeks earlier, the post of Director, Education Service, had fallen vacant on 1.1.95. On 11.1.95 Tilak Jayaratne was appointed as Acting Director. According to the Petitioner, it was announced on the SLBC news bulletin on 4.2.95 that Nelson Jayaweera had been appointed to cover the duties of the Director, Education Service, and that another officer had been appointed as Acting Controller. Some of the staff of the Education Service submitted a written protest on 16.2.95. Thereafter, by letter dated 17.2.95 Nelson Jayaweera was released from his duties in the Education Service, and the Education Service was placed directly under the 3rd Respondent, Director-General, SLBC. In his affidavit, the 2nd Respondent claims that when the post of Director fell vacant, "in accordance with the usual practice the next senior officer, in this case Mr. Jayaratne, was requested to cover the duties of the Director until a suitable replacement was appointed"; no explanation was ventured, however, as to how Tilak Jayaratne was superseded - not by a "replacement" - but by another officer also "covering up duties", and how that officer was then released without a "suitable (permanent) replacement".

By a notice dated 18.2.95 the 3rd Respondent directed that only formal education programmes be broadcast, that the responsibility for the NFEP be vested in the Directors in charge of the National Service and the News, and that the non-formal programmes be broadcast on the National Service. By another notice issued the same day, Tilak Jayaratne was directed, until 20.2.95, to broadcast songs during the periods scheduled for the NFEP programmes, and he was also told that a decision regarding those programmes would be taken after 21.2.95. On 3.3.95 Tilak Jayaratne was directed, because his section was no longer producing NFEP programmes, to retain two cassette recorders and to return the remaining fourteen to the main stores. By letter dated 6.3.95, the 3rd Respondent informed the Director General of the National Institute of Education that the Education Service of the SLBC:

> "has been confined to formal education programmes and the non-formal programmes have been brought under the control of the Language Directors. These arrangements will enable the Education Service to devote more time for planning their programmes in consultation with you."

Despite this the Respondents claim that, apart from restructuring and reformatting certain programmes, no changes have been made in the Non-Formal Education programmes (except for the changes during the period up to 20.2.95). They have produced neither the schedule of broadcasts nor any other documents showing the nature and content of the programmes broadcast after 20.2.95. Thus they have failed to tender material to rebut the Petitioner's allegations that the changes (whether by way of "restructuring and reformatting", or otherwise) were so drastic that there remained only a pretence that the NFEP was still being broadcast.

THE CONTENTIONS

Mr. Goonesekea contended that the NFEP had been stopped arbitrarily and without reason; and that thereby the Petitioner's fundamental right of freedom of speech had been infringed. His principal submission may be summarized thus: freedom of speech is the right of one person to convey views, ideas and information to others; communica-

tion is the essence of that right; such communication necessarily postulates a recipient, because without a recipient the right is futile; and therefore freedom of speech implies and includes the right of the recipient to receive the views, ideas or information sought to be conveyed. So, he argues, the Petitioner as a regular listener to the NFEP had the freedom of speech to receive whatever was broadcast on the NFEP, and when it was suddenly stopped that freedom was impaired. His subsidiary contention, advanced with noticeably less enthusiasm, was that the petitioner was not simply a listener, but a participatory listener - because he was not just passively receiving information, but was himself actively communicating views, ideas and information by means of the NFEP; and that stopping the NFEP infringed his right as a participatory listener, and thereby his freedom of speech.

Mr. Kamalasabayson, DSG, for the Respondents, submitted that it was for valid reasons that the NFEP had been stopped on 6.2.95, and that in any event it had not been permanently stopped, but had later been resumed.

Mr. Goonesekera strenuously denied that there been any such resumption, stating that whatever was being broadcast now was completely different in character to the NFEP. Mr. Kamalasabayson admitted that, as noted earlier, the Respondents had submitted no evidence to prove the resumption of the NFEP.

On the legal issue, Mr. Kamalasabayson contended that if a third party had caused the stoppage of the broadcasts, a listener might have been able to complain that that infringed his freedom of speech; but a listener had no such right where the stoppage was the decision of the broadcaster itself: for if a person chose not to speak, how, he asked, could any one else claim a right to listen? The first submission seemed to concede a fundamental right to a mere listener, and so we asked him whether (where a third party stopped the broadcasts) if the broadcaster himself did not complain of the infringement, a listener had an independent right to receive information, which would entitle him to complain of that stoppage? He hesitated to concede such a right, and it thus becomes necessary to consider whether a listener does have any such right.

JUSTIFICATION FOR STOPPINGTHE NFEP

Both Counsel agreed that if the Respondents were justified in stopping the NFEP on 6.2.95, no question of infringement of fundamental rights would arise. Mr. Goonesekera submitted that it was because of the "Kamkaru Prajawa" programme that the Respondents had acted, and that, he said, afforded no justification whatever for the stoppage.

Mr. Kamalasabayson contended that although the stoppage took place midway through the "Kamkaru Prajawa" programme, it was because of other, more weighty, reasons connected with previous programmes, that the decision was taken to stop the NFEP. In his affidavit the 2nd Respondent accepted the responsibility for that decision, which he took on 6.2.95 soon after the contents of the "Subharathi" programme had been brought to his notice. He urged the following matters in justification:

> Some of the NFEP programmes were ceasing to be educational in character; two were mentioned, namely, "Pasu Vimasuma" ("Review") of 15.1.95, and "Puvath Adahorawa" ("News Half Hour") of 5.2.95, and transcripts were produced as 2R1 and 2R2.
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> This was due partly to the format of the said programmes, and partly to the fact that the general public were allowed direct access by telephone to the broadcasts.
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> The said programmes were being used to air the views of certain staff members on irrelevant matters, relating to SLBC administration.
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> Complaints were received, and three of these (dated 25.11.94, 2.12.94, and 5.12.94) were produced.
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> The programme format and implementation exposed the SLBC to criminal and/or civil liability, and embarassment.
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> Certain steps were proposed for the restructuring and reformatting of the said programme - what these steps were and the process of consultation were not disclosed; a memorandum was prepared seeking Cabinet approval - this was not produced.

Certain sections of the Education Service appeared to oppose the above proposals, but without endeavouring to meet the 2nd Respondent, they sought to solicit support from the public on a matter which was purely internal to the SLBC. Tilak Jayaratne went to the extent of sending a questionnaire, dated 2.3.95, in his capacity as Controller, directing that answers be sent to an outside organization.

The "Subharathi" programme, broadcast on 6.2.95, asked the public for their views on the broadcasting policy of the Education Service.

The contents of the two programmes mentioned (2R1 and 2R2) may be summarized as follows. "Pasu Vimasuma" was a review of the NFEP itself. Reference was made to political pressures before the 1994 General Election,and the efforts made to establish a tradition of a free media; the high expectations after the new Government was elected; the exposure of the former regime's wrongdoings, and especially violations of the human rights of the people; these were commended by the new management; when some officials tried to stop certain programmes, the Free Media Movement opposed this, and the Minister agreed to the latter's requests; the PA manifesto on Media Freedom was converted from election promise to operative law. Specific complaints were made that necessary facilities were not provided: a guest speaker had not been provided with transport, although promised; and publicity for the NFEP had not been given on other SLBC broadcasts, despite approval by the Chairman. A programme which provided for listener participation was stopped. Finally, it was said that although the Government desires media freedom, political appointees try to suppress it.

"Puvath Adahorawa" dealt with speculation about Lionel Fernando's resignation from the four-member Government delegation to the 1995 Peace Talks with the LTTE. Because no reasons had been given, there was wide speculation why he had resigned; some said that he had refused to proceed with talks under the LTTE flag; others claimed that the LTTE had wanted the Government to remove him from the delegation, and that he resigned because the Government did not include him in the second round; it was also said that he resigned on account of

allegations first heard over LTTE Radio; and it was believed by some that there must have been some substantial reason for his conduct, because he resigned although the President had wanted him to withdraw his letter of resignation. The comment was also made that the success of the Talks depends on the acceptance of the proposals by both sides, and not on the presence of a particular person, and so his resignation would not affect the outcome.

The Respondents do not suggest that there were constraints in respect of money, time, equipment or personnel which required the discontinuance of the NFEP. Their claim of justification has four components:

1. The irrelevancy of the subject-matter of three programmes (2R1, 2R2 and 2R7), as well as the "Kamkaru Prajawa" programme.

2. The possible liability (of the SLBC and its top management) for defamation, civil and criminal, because of the content of programmes.

3. The criticisms (contained in "*Pasu Vimasuma*") of the Programme, and of the SLBC, its administration, and its top management, were irrelevant, inappropriate and unacceptable; further, the staff were using the NFEP to air their own views, and their requests (in 2R7) for listener support for the NFEP were out of place.

4. Public discontent with the NFEP, as indicated by the complaints received.

I find all these contentions to be without merit. If the reason for Lionel Fernando's resignation had not officially been disclosed, the public had an interest in knowing that reason. On the other hand, the Government may have had some justification for not disclosing it, at that particular point of time. But so long as there were no legal restrictions - and the Respondents have not referred us to any - on the disclosure or the discussion of that reason, public discussion was legitimate. Likewise, industrial unrest, its causes and its resolution, were matters of public interest, especially to workers who must have been

an important target group of the NFEP: and as I observed (although in a different context in *Ekanayake v Herath Banda,*[1] "every concerned citizen would have discussed these issues with great interest and agitation". Indeed, the Government's Media Policy amply justified such programmes. As for Mr. Kamalasabayson's submission that it was for the management of the NFEP to determine what was relevant to non-formal education, and that there was no point in ascertaining the ideas, the views and the needs of the "student", by way of a review of the NFEP, that is a narrow and out-dated view of education, especially of non-formal or adult education. However competent the "teachers" might have been, it was useful for them to know the shortcomings of the NFEP, what improvements were possible, and the needs of the listener, in order to plan more fruitfully for the future.

Mr. Kamalasabayson has not been able to show us anything even faintly defamatory in the three programmes specifically mentioned (i.e. 2R1, 2R2 and 2R7), or in "*Kamkaru Prajawa*", or otherwise; the possibility of legal action is thus mere speculation,and in any event it has not even been suggested that there was any difficulty in scrutinizing the script of programmes before broadcast. The 2nd Respondent's allegation that there were dangers in the public being allowed direct access by telephone to the NFEP broadcasts, is unacceptable: the Petitioner stated in his counter-affidavit that such calls were subject to screening before broadcast, and Mr. Kamalasabayson conceded this at the hearing.

The three programmes do contain some criticisms. The Respondents have not averred that these are untrue or exaggerated, and it must be presumed that what was said was factually correct. Their Counsel says that the SLBC could not allow itself to be criticised in its own broadcasts. The criticisms were not something irrelevant, but related to matters connected to the success of the NFEP. What is more, the criticisms were restrained in language and balanced in content: thus the Chairman was commended for his positive response, while subordinates who failed to comply with orders from the top were criticised. Mr. Kamalasabayson argued that these issues should have been raised internally. However, the Respondents have not averred that this was not done; and in any event such a default would, at most, have justified a reprimand to the officer concerned but not the stoppage of the

whole NFEP. As to its right to stifle criticism of itself on its own broadcasts, it is well to remember that the media asserts, and does not hesitate to exercise, the right to criticise public institutions and persons holding public office; while, of course, such criticism must be deplored when it is without justification, the right to make and publish legitimate criticism is too deeply ingrained to be denied. Here, too, it is relevant to note that the Government's Media Policy was intended to encourage criticism, in the public interest, in order to expose shortcomings. If nothing else, the right to equality requires that the media itself is not immune from justifiable criticism, internally and externally. And in the context of broadcasting, the observations of the Supreme Court of India, in *Secretary, Ministry of Information v Cricket Association of Bengal,*[2] are apposite:

"Broadcasting media by its very nature is different from press. Airwaves are public property . . . It is the obligation of the State . . . to ensure that they are used for public good."

The frequencies available for television and raido broadcasts are so limited that only a handful of persons can be allowed the privilege of operating on them (cf. *Red Lion Broadcasting Co. v F.C.C.*[3]) Those who have that privilege, including the State, are therefore subject to a correspondingly greater obligation to be sensitive to the rights and interests of the public.

I also cannot accept the 2nd Respondent's reference to the questionnaire which Tilak Jayaratne sent as being any justification for the conduct of the Respondents.That was sent only on 2.3.95, and could not have constituted justification for the two decisions taken long before that date: to remove Tilak Jayaratne from the post of Acting Director, and to stop the NFEP.

The three complaints produced were to the effect that while media freedom was necessary, yet there should be some limit to criticisms of the Government, the SLBC and high officers. As I have pointed out, the criticisms were far from excessive.

In any event, all these matters - irrelevancies, possible legal liability, criticisms and complaints - should have been communicated to

Tilak Jayaratne and his team; if he could not explain or justify them, he should have been reprimanded and directed to avoid repetition; and if he declined to do that, the offending programmes should have been replaced. The baby should not have been thrown out with the bath water. The undue haste with which the 2nd Respondent acted suggests that the stoppage was not *bona fide.*

Different considerations might have arisen if the NFEP had been justifiably stopped, e.g. with proper notice, or in response to listener opinion, or even simply discontinued after the expiry of the current schedule. I express no opinion on that aspect of the case. I hold that the sudden and arbitrary stoppage of the NFEP was not justified, and, if done without the consent of those responsible for its production, would have amounted to an infringement of their freedom of speech, besides being inconsistent with Government policy on Media Freedom. But those persons have not complained, and I make no finding in respect of their rights. The question is whether the Petitioner can complain, *qua* listener.

FREEDOM OF SPEECH AND EXPRESSION, INCLUDING PUBLICATION

There are *dicta* in decisions, both local and foreign, which appear to support Mr. Goonesekera's submission that mere listeners can complain, because the freedom of speech includes the right of the recipient to receive information. It is necessary to examine these decisions in order to ascertain their true *ratio decidendi*, and their relevance to the interpretation of Article 14(1) (a) of our Constitution.

The first group of decisions deals with a person's right to receive information, which is either related to or necessary for the exercise of his own freedom of speech. *Prabha Dutt v Union of India*,[4] seems to fall into this category. The Court upheld the right of journalists to interview prisoners under sentence of death, who were willing to be interviewed, thus acknowledging their right to obtain information, through the interviews (cf. also *Red Lion Broadcasting Co v F.C.C.*, (*supra*)) but it by no means follows that there is a right to information *simpliciter* (i.e., for one's own edification only), and not intended to facilitate the exercise of the freedom of speech.

Other decisions which have upheld the right to receive information are not helpful because they deal with Constitutional provisions which - unlike ours - expressly recognise that right. Thus the European Court of Human Rights has held that the right to receive information "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him" (*Leander v Sweden*,[5] and *Open Door Counselling and Dublin Well Woman Centre v Ireland*, [6] both cited in "The Article 19 Freedom of Expression Manual", August 1993). In the latter case the Court noted that family planning counsellors wished to impart, and women wished to receive, information about where to obtain abortions outside Ireland. An injunction which prohibited counsellors from giving such information was held to violate Article 10(1) of the European Convention, which expressly provides:

"Everyone has the right to freedom of expression. This right shall include freedom . . . to receive and impart information."

A third category of decisions deals with rights of listeners to reply to adverse comments made about them; thus in *Red Lion Broadcasting Co v F.C.C.*, (*supra*) where a listener had been subjected to a personal attack by a guest speaker, it was held that the broadcasting station was bound to provide him with the tape, a transcript, or a summary of the broadcast, and time to reply, free of charge. It was observed that:

"It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (at p.390)

The decision, however, did not turn upon the broad principle of a listener's right, passively, to receive information, but was based on two other rights: his right to equality, and his right to information needed to make his freedom of speech effective. The broadcasting station had permitted the guest speaker time to attack him; it was therefore bound to treat him equally; equal treatment demanded equal time to reply, and a reply through the very same medium; and that reply was an exercise of his freedom of speech. In order to exercise that freedom

effectively, he needed information about the attack, and therefore he had a right to the tape or a transcript. So that case did not involve just the right to information, but a right to information ancillary to the freedom of speech.

Fourthly, there are decisions, under Constitutional provisions similar to ours, containing statements suggesting that listeners (or readers) do have a right to receive information. Thus in *Stanley v Georgia,* [7] the Supreme Court set aside a State obscenity statute insofar as it penalised merely private possession of obscene matter:

> "It is now well established that the Constitution protects the rights to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive . . . *Martin v City of Struthers,*[8] . . . This right to receive information and ideas, regardless of their social worth. . . is fundamental to our free society.
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> Moreover, in the context of this case . . . that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."(at p.564)

I find it difficult to treat this as being a decision based on freedom of speech. It seems referable, rather, to the freedom of thought:

> "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." (at p.565; cf. also *Griswold v Connecticut,*[9] "freedom of speech. . . includes . . . freedom of thought").

Sharvananda, CJ. observed in *Joseph Perera v AG,*[10] that;

> "Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read, what it needs. No

> one can doubt if a democracy is to work satisfactorily that the ordinary man and woman should feel that they have some share in Government. The basic assumption in a democratic polity is that Government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources. The crucial point to note is that freedom of expression is not only politically useful but that it is indispensable to the operation of a democratic system. . .
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> Public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. Public opinion, in order to meet such responsibilities, demands the condition of virtually unobstructed access to and diffusion of ideas. The fundamental principle involved here is the people's right to know. The freedom of speech guaranteed by the Constitution embraces at the least the liberty to discuss publicly all matters of public concern, without previous restraint or fear of subsequent punishments (*Thornhill v State of Alabama*). . . The welfare of the community requires that those who decide shall understand them. The right of the people to hear is within the concept of freedom of speech." (at 223-224).

The three Petitioners were arrested while they were taking steps to organise a meeting; one Petitioner was the intended speaker. The Court held that an Emergency Regulation, which was relied on to justify the arrest, was *ultra vires* Article 12; (by a majority) that the original arrest and detention was not illegal; and that the subsequent detention was unduly prolonged. There was no finding that their freedom of speech had been infringed, and thus observations regarding the right to hear, read, and receive information, are *obiter.*

Finally, there are a few decisions the *ratio decidendi* of which is that the right to information *simpliciter* is part of the freedom of speech. In *Visuvalingam v Liyanage.*[11] a newspaper had been banned. Two applications were filed by several petitioners who were regular readers; one was also a regular contributor to a column, for which he was

paid. They alleged that the ban violated their fundamental right of freedom of speech, and also their right to equality (because other newspapers had not been bannd, but only subjected to censorship). The Deputy Solicitor General had argued that the petitioners had no *locus standi* because the order was against the printers, publishers and distributors of the newspaper, and they alone were entitled to complain. What had been restricted was the right to publish; the right to read flowed from publication; and there could be no right to read what had not been published. The Petitioners had replied that within the ambit of the freedom of speech is included the freedom of the recipient of information; in order to give a meaning to the freedom of speech one has of necessity to recognise the freedom of the recipient to information, news, and views.

The Court held that public discussion was important in a democracy, and that for its full realisation public discussion demanded the recognition of the right of the person who is the recipient of information; and said;

> ". . . the fundamental right to the freedom of speech and expression includes the freedom of the recipient. Accordingly the Petitioners have a *locus standi* to seek relief under Article 126. But like all fundamental rights, the fundamental right of the recipient is also subject to the same restrictions."(at p.132)

However, dealing with the merits, the Court held that, in the circumstances, the ban was a lawful restriction on the fundamental right of the publishers of the newspaper; and accordingly that fundamental right of the Petitioners, as readers and contributors, had also been lawfully restricted.

In the strict sense, when A merely reads (or hears) what B writes (or says) in the exercise of B's freedom of speech, it does not seem that A receives information in the exercise of A's freedom of speech, because that would be to equate reading to writing, and listening to speaking. Accordingly, while preventing A from reading or listening would constitute a violation of B's freedom of speech, it may not infringe A's freedom of speech. A's right to read or listen is much more appropriately referable to his freedom of thought, because it is information that enables him to exercise that right fruitfully.

I have similar reservations about *Narayanan v Kerala*,[12] The question was whether restrictions could be placed on books provided to a person in detention. It was held that while books conducive to instigating violence, disturbing public order, etc., could lawfully be denied, nevertheless other books could not. It was observed that the freedom of speech meant that "a person under detention can continue to give expression to his views, indulge in writing books, in reading books, and in learning subjects, and generally in acquiring knowledge".

In *Lamont v Postmaster General*,[13] the Supreme Court considered the constitutionality of a statute which required the detention and destruction of mail containing "communist political propaganda" unless the addressee requested delivery by filling and returning a reply card. Lamont was engaged in publishing and distributing pamphlets. It was held that the statute, as construed and applied, was unconstitutional because it imposed a limitation (viz. returning the reply card) on the unfettered exercise of the freedom of speech:

> "It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . the right to receive publications is such a fundamental right."(p.308)

However, so far as Lamont was concerned, he was receiving the publications for the purpose of distribution, and his claim to the publications was thus for the purpose of exercising his freedom of speech.

Lamont's case was considered together with another similar case (*Fixa v Heilberg*). Only one judgment was given, and that does not disclose the purpose for which the plaintiff, Heilberg, wanted the publications. In the absence of a finding that he wanted them for the exercise of his freedom of speech, the judgment seems to support a right to information *simpliciter*.

Neither these decisions nor the arguments of Mr Goonesekera persuade me that the right to receive information, *simpliciter*, is included in the freedom of speech and expression. Those decisions do

not set out the process of reasoning by which the conclusion was reached that the freedom of speech does include the right to receive information, *simpliciter.* The observations in *Stanley v Georgia*[7] suggest a better *rationale* that information is the staple food of thought, and that the right to information, *simpliciter,* is a corollary of the freedom of thought guaranteed by Article 10. Article 10 denies government the power to control men's minds, while Article 14(1) (a) excludes the power to curb their tongues. And that may explain and justify differences in regard to restrictions: e.g. that less restrictions are permissible in regard to possession of obscene material for private use than for distribution. In our Constitution no restrictions are permitted in relation to freedom of thought, while Article 15 permits some on freedom of speech. But leave to proceed was not sought, and the case was not presented in the pleadings or at the hearing, on the basis of Article 10, and so no finding is permissible on that basis.

CONCLUSION

The decisions I have considered demonstrate that Article 14(1) (a) is not to be interpreted narrowly. Not only does it include every form of expression, but its protection may be invoked in combination with other express guarantees (such as the right to equality, as in the *Red Lion* case;(*supra*) and it extends to and includes implied guarantees "necessary to make the express guarantees fully meaningful" (as noted in *Lamont*(*supra*). Thus it may include the right to obtain and record information,and that may be by means of oral interviews (as in *Dutt*[4],) publications (as in *Lamont*), tape-recordings (as in the *Red Lion* Case), photographs, and the like; and, arguably, it may even extend to a privilege not to be compelled to disclose sources of information, if that privilege is necessary to make the right to information "fully meaningful". Likewise, other rights may be needed to make the actual exercise of the freedom of speech effective: rights in respect of venues, amplifying devices, etc. I doubt, however, that it includes the right to information *simpliciter.*

However, I have no hesitation in holding that the freedom of speech of the Petitioner, *qua* participatory listener, has been infringed, because the stoppage of the NFEP prevented further participation by him. He was thus in the same position as the contributor of a column in *Visuvalingam*[11] and the plaintiff in *Lamont.*[13]

The evidence does not disclose any responsibility on the part of the 3rd and 4th Respondents for that infringement. I declare that the 1st and 2nd Respondents have infringed the Petitioner's fundamental right under Article 14 (1) (a). As for relief, this application was only taken up for hearing in January 1996, by which time the 1995 schedule for the NFEP had expired. Considering also that the question involved arose for the first time, a direction to resume the NFEP is inappropriate. I direct the 1st Respondent to pay the Petitioner a sum of Rs. 15,000 as compensation and Rs. 5,000 as costs.

DHEERARATNE, J. - I agree.

WIJETUNGA, J. - I agree.

Relief granted.