IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application No. 556/2008

SC FR Application No. 557/2008

Petitioners

U. N. S. P. Kurukulasuriya,
Convenor, Free Media Movement,
237/22, Vijaya Kumaratunga Mawatha,
Colombo 05.
(Petitioner SC FR Application No. 556/2008)

J. K. W. Jayasekara,
No. 58/10, Suhada Place,
Thalapathpitiya, Nugegoda.
(Petitioner SC FR Application No. 557/2008)

Vs.

Respondents

1. **Sri Lanka Rupavahini Corporation**
   Bauddhaloka Mawatha,
   Colombo 07.

2. **Dr. Ariyaratne Athugala**
   The Chairman & the Director-General,
   Sri Lanka Rupavahini Coporation,
   Bauddhaloka Mawatha,
   Colombo 07.

2(b-i). **Ms. Enokaa Sathyangani**

The Chairperson
Sri Lanka Rupavahini Coporation,
Bauddhaloka Mawatha,
Colombo 07.

2(c-i). **Thusira Malawwethantri**

Director General
Sri Lanka Rupavahini Coporation,
Bauddhaloka Mawatha,
Colombo 07.

3. **Lakshman Muthuthantri,**
Programme Producer,
Sri Lanka Rupavahini Corporation,
Bauddhaloka Mawatha,
Colombo 07.

4. **Anura Priyadarshana Yapa,**
Hon. Minister of Mass Media and Information,
163, Kirulapone Avenue,
Polhengoda,
Colombo 05.

4(b). **Mangala Samaraweera**

Hon. Minister of Finance and Mass Media Information,
163, Kirulapone Avenue,
Polhengoda,
Colombo 05.

5. **Hon. Attorney General,**
   Attorney-General's Department,
   Colombo 12.

6. **Sarath Kongahage**
   The Chairman & the Director-General,
   Sri Lanka Rupavahini Coporation,
   Bauddhaloka Mawatha,
   Colombo 07.

7. **Keheliya Rambukwella**
   Hon. Minister of Mass Media and Information,
   163, Kirulapone Avenue,
   Polhengoda,
   Colombo 05.

ADDED RESPONDENTS

Before: Buwaneka Aluwihare, PC, J.
Priyantha Jayawardena, PC, J. &
L. T. B. Dehideniya, J.

Counsel: J. C. Weliamuna, PC with Pasindu Silva for Petitioner.

Geoffrey Alagaratnam, PC with Lasantha Gurusinghe for 1st Respondent.

Nerin Pulle DSG with Nirmalan Wigneswaran, SSC for Attorney General.

Argued on: 29. 11. 2018

Decided on: 17. 02. 2021

Aluwihare, PC J.

Introduction

1. **The Petitioner in SC FR Application 556/2008**, a media professional and Convenor of the Free Media Movement at the time of the alleged infringement, complained of the infringement of his fundamental rights under Articles 10, 12(1), 12(2), 14(1), 14(1)(a) of the Constitution due to the abrupt termination and/or censoring of the programme '*Ira Anduru Pata*' in which he was appearing as a panelist. The particular episode of the programme in question was televised on the 'Rupavahini Channel' of the Sri Lanka Rupavahini Corporation (hereinafter referred to as 'SLRC') on 4th November 2008. The court granted leave to proceed for the infringement of Articles12(1) and 14(1)(a) of the Constitution.

2. **The Petitioner in SC FR Application 557/2018** is a viewer of the same programme '*Ira Anduru Pata*' who complained that the decision of the Respondents to abruptly stop and/or censor the televising of that particular episode of the programme on 4th November 2008 was an infringement of his fundamental rights under the Articles 10, 12(1), 12(2) and 14(1)(a) of the Constitution. The Petitioner was granted leave to proceed for the alleged infringement of Articles 10 and 12(1) of the Constitution.

3. With the consent of the learned Counsel representing the Petitioners and the Respondents, both applications were taken up for argument together. Combined written submissions were filed on behalf of the Respondents in both applications.

The Averments in SC FR Application 556/2008

4. On 3rd November 2008 the Petitioner in SC FR Application 556/2008 (hereinafter sometimes referred to as 'Kurukulasuriya') was invited by the SLRC to participate

in the programme titled '*Ira Anduru Pata*' ('ඉර අඳුරු පට' or Challenge the Darkness) to discuss the 'Private Television Broadcasting Station Regulations of 2007' (hereinafter sometimes referred to as 'the Regulations') issued and published in the Gazette Extraordinary No. 1570/35. The 3rd Respondent, a producer of programmes of the SLRC at the time had invited the Petitioner via telephone and had briefed the Petitioner regarding the programme. The Petitioner had been informed that the other two panelists would be Charitha Herath, Senior Lecturer of the Department of Philosophy of the University of Peradeniya and an advisor to the Ministry of Media and Telecommunication, and Dhamma Dissanayake, a Senior Lecturer of the University of Colombo and a Director of the Sri Lanka Foundation.

5. The Petitioner maintains that he was informed that the discussion would be televised live on the 'Rupavahini Channel' for a duration of one and a half hours from 10.30 pm until 12 midnight on the 4th of November 2008. He had also been informed that the viewers would be allowed to direct questions to the panelists via telephone calls during the telecast.

6. The Petitioner states that he accepted the invitation to participate in the programme representing the 'Free Media Movement'. The Respondents, however, dispute this assertion and state that the Petitioner was invited as an independent panelist and not as a representative of the 'Free Media Movement' or any other non-governmental organization.

7. On the 4th of November 2008 the programme commenced as scheduled, at 10.30 pm with the presenter of the programme, Chaminda Gunaratne, an employee of the SLRC introducing the panelists and the topic for discussion. The Petitioner avers that prior to the commencement of the programme it had been decided that in each round, the other two panelists would comment on the topic which would be followed by the Petitioner's response, thereby allowing each panelist to express his viewpoint, for about 5 to 10 minutes in every round and that the panelists

were expected to express their views freely, discussing the sociopolitical aspects and the adverse implications of introducing the Regulations as appearing in the Gazette.

8. The Respondents state that prior to the commencement of the programme the 3rd Respondent, the Producer of the programme, briefed the participants on the topic and the parameters of the discussion as well as the limitations applicable. According to the Respondents, the participants were specifically requested to strictly limit their presentations to the topic, refrain from obstructing the other panelists, refrain from engaging in personal attacks on the characters of individuals and to avoid making defamatory statements, or any statements that would make the SLRC and its employees, liable for contempt of court and to avoid reference to any proceedings pending before a court of law, to all of which they had agreed.

9. During the course of the programme it had been interrupted only once for a very brief commercial break at 11.00 pm to convey the time. Thereafter around 11.14 pm, after a lapse of approximately 45 minutes from the commencement of the programme the discussion was interrupted and the programme interrupted by a commercial break with the presenter stating; "හොඳයි ප්‍රශ්න සමාජයේ ඇති වෙනවා නම් ඒ ප්‍රශ්නවලට විසඳුම් තියෙන්න ඕන. ඉතින් අනිවාර්යෙන්ම විසඳුම් ලබාගන්නේ කොයි ආකාරයෙන්ද කියන එක පිළිබඳවයි අපි කතා කළ යුතුව තිබෙන්නේ. එය තමා සමාජයේ අනාගතය සඳහා වැඩි වශයෙන් හේතුවක් බවට පත්වන්නේ. අපි කෙටි විරාමයක් ලබා ගන්නවා දැන්." (In short; "If issues arise in the society, we must deliberate as to how solutions can be found to resolve those problems. Now we take a short break.")

10. The Respondents claim that during the first round of discussion the Petitioner deviated from the guidelines of the programme and made a political speech alleging that the media was exercising self-restraint and referred to a court case pending against a journalist under the Prevention of Terrorism (Special

Provisions) Act. The Petitioner had also disturbed the presentations of the other panelists. The Petitioner on the other hand, denies this claim and states that he abided by the instructions.

11. Following the commercial break, the programme did not recommence although the presenter and the panelists were present in the studio. Instead, a series of advertisements were televised followed by a number of songs. The 3rd Respondent had thereafter come to the studio and said that he was facing a difficulty in continuing with the programme. Upon inquiry he had intimated that when the commercial break was taken the line had been transferred to the Main Control Room which is under the direct control of the 2nd Respondent and that the line had not been transferred to the studio room to continue the programme.

12. Shortly thereafter, the 3rd Respondent had informed them, that the programme could not be continued as it had been stopped by the authorities. According to the Petitioner the 3rd Respondent had stated that, the programme could only have been stopped on the instructions of the 2nd Respondent.

13. The Respondents take up the position that, once the telecasting of the programme had commenced, the 2nd Respondent had received several telephone calls querying as to why his Corporation had permitted a Petitioner who had challenged the validity of the Private Television Broadcasting Station Regulations of 2007 by way of a Fundamental Rights Application, to appear on National Television and refer to matters which were the subject of a case pending before the Supreme Court (paragraph 11(a) of the 2nd Respondent's Statement of Objections). The 2nd Respondent has stated that at that point he sought the advice of the legal adviser of the 1st Respondent Corporation, Attorney-at-Law Jayantha De Silva and realized that it was not proper to discuss any matter which is pending before a court of law on live television.

14. The 2nd Respondent had also expressed [to the 3rd Respondent] his own concern over the same matter (per paragraph 11(d) of the Objections). The 3rd Respondent had replied that the Petitioner had not divulged to him any information about the pending Fundamental Rights application, and that he would speak to the Petitioner during the commercial break that was to follow. An affidavit by the 3rd Respondent ('1R3') has been submitted.

15. The legal advisor had then, via telephone, notified the 2nd Respondent that the court reporters had confirmed that the Petitioner and several others had filed Fundamental Rights Applications challenging the Regulations under discussion and the matter had been fixed for support on 5th, 6th or 14th November 2008. The 2nd Respondent had then been advised that since the matter is accordingly *sub judice,* it would be inappropriate to discuss the same on live television as any inappropriate statement made by the panelists would make the entire Board of Directors liable to face contempt of court proceedings. Attorney-at-Law Jayantha de Silva has confirmed this position by his affidavit produced marked 'IR2'.

16. The Respondents claim that the 2nd Respondent had reasons to believe that the Petitioner intended to embarrass the management of the 1st Respondent Corporation since the Petitioner had suppressed the fact that he had litigated on the very topic he was invited to discuss. In view of such apprehensions, the 2nd Respondent, as the Chairman of the Board of Directors and the Director General of the 1st Respondent Corporation, had immediately directed the 3rd Respondent to terminate the programme and informed the Main Control Room of his decision. (per paragraph 11(g) and 11(h) of the Objections and paragraph 12(h) of the affidavit of the 2nd Respondent).

17. The Petitioner on the other hand has flatly refuted the 2nd Respondent's claim in his counter affidavit. He states that, he had revealed his intention to challenge the regulations at a stakeholder meeting convened by the Minister of Mass Media and Information, on 4th November 2008, two days prior to the filing of the application.

The Petitioner argues that the 2nd Respondent and the panelist Charitha Herath, who were attendees at that meeting, were fully aware of the pending litigation, and that in any event, the fact that a case was pending in court should not prevent a broadcaster from debating issues of public importance.

18. The Petitioner argues that the justification offered for the termination of the programme should be rejected for several reasons. The contemporaneous recordings regarding the manner and reasons for stopping a programme midway are generally compiled by the Production Division but no such document has been produced by the Respondents for the perusal by the court. Even though the Petitioner repeatedly inquired the reason for stopping the programme neither he, nor the other panelists, had been informed of any reasons by the officials of the 1st Respondent Corporation. The Petitioner refutes the contents of the affidavits marked 'IR2' and 'IR3' submitted by the Legal Consultant of the SLRC and the 3rd Respondent respectively, and states that, in the case of the latter affidavit, the 3rd Respondent was well aware of the pending litigation at the time of inviting him to participate in the discussion.

19. The Respondents in turn argue that the Petitioner was only an invitee and that the 1st Respondent Corporation was at liberty to revoke the invitation at their discretion. They further contend that neither the Petitioner nor any citizen has the absolute right to demand an opportunity to express their views or make speeches on National Television.

<u>The Averments in SC FR Application 557/2008</u>

20. The Petitioner in SC FR Application 557/2018 (hereinafter sometimes referred to as 'Jayasekara') claims that he has been engaged in media journalism for over 15 years, and that he is a regular viewer of the programme '*Ira Anduru Pata*'. The Petitioner states that he had been closely following the developments regarding

the introduction of the Private Television Broadcasting Station Regulations of 2007.

21. According to Petitioner Jayasekera, the programme usually spanned a duration of one and a half hours to two hours and included a 'phone-in' component where the viewers were given the opportunity to participate via telephone thereby making it a participatory programme. On 4th November 2008 there had been several advertisements regarding the programme on the Rupavahini channel, prior to it being telecast.

22. The Petitioner Jayasekara claims that the presenter specifically stated that the viewers can directly ask questions on matters pertaining to the said regulations. A copy of the recording of the programme furnished by the Petitioner in Application 556/2008 confirms this averment. About two minutes into the programme, the presenter announced that viewers could express their views or ask questions.

23. The Petitioner had waited in anticipation to participate in the programme by raising questions and expressing his views, when the programme was interrupted by a commercial break. When the programme did not recommence after the commercial break as is the usual practice, the Petitioner had called the SLRC general number i.e. 0112-599 506 and queried whether the programme for the day had been stopped. The receptionist had given the Petitioner another number and requested him to clarify the matter with the 'Producing Section'. The Petitioner had not been successful in contacting the 'Producing Section' as no one had answered the call. The Petitioner had then reverted to the receptionist who had informed him that they were unable to provide further assistance regarding the discontinuation of the programme. Around 11.45 pm the Petitioner had managed to contact Uvindu Kurukulasuriya, the Petitioner in Application 556/2008 over the phone who had then confirmed that the programme for that particular day had been terminated by the SLRC.

Analysis

24. There is no question that the duration of the programme was scheduled to exceed 45 minutes, and that on 4th November 2008, the telecast did commence at the planned time. The Programme schedule for 4th November 2008 of the Rupavahini Channel marked 'P2', indicates that the "*Ira Anduru Pata-Live Discussion*" was scheduled to commence at 22:30 hrs. and was to continue up to the "*End of transmission*" at 24:00 hrs. There is nothing to indicate that any other programme was slotted for that period. It is also apparent that the prior understanding was that the programme was to continue beyond 23:14 hrs. This is borne out by the presenter's words immediately before the short break "…අපි කෙටි විරාමයක් ලබා ගන්නවා දැන්." (We are taking a short break now.) per 'P3', the recording of the programme submitted by Petitioner Kurukulasuriya.

25. Therefore, it is evident that paragraph 2 of the Respondents' Statement of Objections, where they deny that the programme was scheduled to be telecasted for a period of one and a half hours and that there would be telephone calls from viewers, does not appear to be correct.

26. The Respondents have alleged that during the first round of the discussion the Petitioner deviated from the topic of discussion by making political speeches, alleging that the Media was subject to self-censorship, and referring to a pending court case against a journalist detained under the Prevention of Terrorism Act. Having viewed the recording of the programme, I observe that the Petitioner did in fact make those statements; namely that Sri Lanka's global ranking in media freedom has fallen from 52 to 165, journalists had been murdered and kidnapped under the incumbent government, journalists who wrote security analyses had been assaulted or threatened, there was a self-imposed censorship in the whole media sector, these regulations were being introduced during the tenure of a president who used to be a friend of the media, and that a journalist was being detained for more than 100 days without a hearing.

Making a Political Speech

27. The judgements of the Supreme Court constitute a body of jurisprudence that has evolved over the years, and the Supreme court has recognized that the right to comment on public issues and criticize public officials and public institutions is essential for the exercise of civil and political freedoms so valued by democratic society (See **Joseph Perera v. The Attorney General** (1992) 1 Sri LR 199; **Amaratunga v. Sirimal and Others** (1993) 1 Sri LR 264; **Wijeratne v. Vijitha Perera, Sub-Inspector of Police, Polonnaruwa and Others** (2002) 3 SLR 319; **Deshapriya and Another v. Municipal Council Nuwara Eliya and Others** (1995) 1 Sri LR 362; **Dissanayake v. University of Sri Jayawardenapura** (1986) 2 SLR 254; **Sunila Abeysekara v. Ariya Rubasinghe, Competent Authority and Others** (2000) 1 SLR 314). This view was succinctly expressed in **Deshapriya and Another v. Municipal Council Nuwara Eliya and Others** (*supra*);

> *"The right to support or to criticise governments and political parties, policies and programmes is fundamental to the democratic way of life; …and democracy requires not merely that dissent be tolerated, but that it be encouraged* (***De Jonge v. Oregon*** *(2),* ***Amaratunga v. Sirimal****(3),* ***Wijeratne v. Perera*** *and* ***Pieris v. A. G.*** *(s)."* (at page 370)

and thus, in **Amaratunga v. Sirimal** (*supra*);

> *"Criticism of the Government, and of political parties and policies, is per se, a permissible exercise of the freedom of speech and expression under Article14 (1)(a)."* (at page 271)

28. Accordingly, I cannot agree with the Respondents' contention that a speech should be censored purely for being political. I do not think that all political speeches should be shunned and censored. A speech that promotes or pays excessive homage to a particular political party or politician in a partial and an imbalanced manner may be distasteful to a section of the society. It may even sit very oddly in

a programme that is not concerned with political matters. An invitee must be both responsible enough and ethical enough to abide by the agreed parameters of the discussion and confine himself to the topic under discussion. The need to observe the ethical and responsible conduct should not however provide an excuse for censoring the opinions of another. The Constitution of Sri Lanka only curtails free speech to maintain racial and religious harmony, parliamentary privilege, to avoid contempt of court and defamation or to avoid incitement to an Offence. The nature of the expression being *political* is certainly not a criterion recognized in the Constitution to limit freedom of expression. Even if it were a criterion for limitation, in the present case the Petitioner did not mention the name of any political party or politician whose interests, he sought to advance nor did he state that media freedom in the country would have been in a better state under a different government. He voiced his dissatisfaction with a certain state of affairs, he criticized the incumbent government. It was an opinion, and from the perspective of the SLRC, could be considered political dissent, which however does not call for the restriction of such comment. An expression that is well within the parameters of the law as set out in Article 15, does not lose its legitimacy for being political or for being unpalatable to those who listen to it. If every speech which points out the shortcomings of an incumbent government or politicians were to be interpreted as being a political speech and censored, no legitimate criticism which could promote better governance would ever be made.

29. At this point I would also like to cite the unanimous view of the Supreme Court expressed in **Fernando v. The Sri Lanka Broadcasting Corporation and Others** (1996) 1 SLR 157 (at page 172);

> *"…the media asserts, and does not hesitate to exercise, the right to criticize 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."*

The media is not restrained from publicizing or broadcasting criticism provided that such criticism is legitimate, and the objective of the criticism is not for one to obtain an undue advantage to the disadvantage of another.

30. The jurisprudence of the European Court of Human Rights on the right to freedom of expression is mainly concerned with whether there has been an interference with the right and whether such interference can be justified. It is useful as a source of persuasive guidance in Sri Lanka in determining the parameters within which permissible interference on the freedom of expression can be justified. The European Court of Human Rights in its noteworthy decision in **Lingens v. Austria** (8 July 1986, Series A No. 103) provided a guideline for 'acceptable criticism'. The matter in issue was whether the confiscation of two articles written by an Austrian journalist and the imposition of a fine on him for accusing the retiring Chancellor of supporting a former Nazi to engage in the country's politics, was a restriction of the Freedom of Expression recognized in Article 10 of the European Convention on Human Rights. At paragraph 42 of the judgment, it was stated that while the press should respect the entitlement to the protection of reputation which extends to all persons, the 'limits of acceptable criticism' were wider regarding politicians in order to allow the freedom of political debate necessary in a democratic society and to afford "*the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.*" In **Ceylan v. Turkey** (8 July 1999, Reports 1999-IV) the European Court held that "*the limits of permissible criticism are wider with regard to government than in relation to a private citizen or even a politician*" (at paragraph 34).

31. The permissible grounds for restricting criticism of the government were emphasized in **Joseph Perera v. Attorney General** *(supra)* at page 225;
"…criticism of government, however unpalatable it be, cannot be restricted or penalised ***unless it is intended or has a tendency to undermine the security of the State or public order or to incite the commission of an offence****. Debate on public issues should be uninhibited, robust and wide open and that may well include vehement, caustic and sometimes unpleasantly sharp attacks on Government.*

Such debate is not calculated and does not bring the Government into hatred and contempt." [emphasis added.]

32. In the present case, the Petitioner Kurukulasuriya criticized the then incumbent President, a person holding public office, at a forum telecasted by the Rupavahini Channel. In my view the Petitioner, in the exercise of freedom of speech and expression, was making a legitimate criticism of a public figure. The Petitioner did not denigrate the President in harsh words or resort to malicious comments about the President. I am of the view, that his criticism of the President was neither character assassination nor defamatory. The Respondents have not contested the facts presented by the Petitioner regarding the repression of the media. As correctly held in **Mallawarachchi v. Seneviratne, OIC Kekirawa** (1992) 1 SLR 181 "*A true statement, made in the public interest or in the protection of a lawful interest, would be clearly in the exercise of freedom of speech although* ex facie *defamatory. Such statements may be made by way of criticism of those holding or seeking public office, particularly where relevant to such office.*" Therefore, truth is a defence for defamation and even if the statement in question was defamatory, unless the falsity of the statement is proven or at the very least contested, neither the 1st Respondent Corporation nor this Court can presumptively bar a citizen from exercising his rights, on the ground of defamation.

33. Regardless of whether the Petitioner appeared in the programme in the capacity of the Convener of the Free Media Movement or not, the matters he adverted to, would be issues of concern to him as a journalist. As described by the Respondents themselves, the objective of the programme was to discuss current issues in the country. Discussion entails the examination of an issue by considering wide, varied and conflicting opinions and perspectives. At the commencement of the programme, the presenter introduced the topic of discussion as "The Regulations and Media Freedom". In that light, reference to any alleged persecution of journalists and censorship can hardly be called irrelevant to the topic as it has a direct impact on media freedom. It is only natural that the Petitioner will present

his perspectives and experiences as a journalist. A skewed discussion focusing only on the positive aspects of the topic cannot be a successful discussion which can advance democratic values.

Issue of Sub Judice

34. Sub judice or commenting on ongoing legal proceedings is one form of contempt of court recognized in Sri Lanka. Although contempt of court as an offence is recognized, the constituent elements of contempt of court have not received statutory recognition. What would constitute contempt in the eyes of the court would vary according to the facts and circumstances of each case.

35. It is pertinent to note that in common law jurisdictions contempt of court operates as a safeguard mainly regarding pending judicial proceedings in which the opinion of a jury or the veracity of witnesses, may be affected by comments or opinions expressed publicly. Buckley J. has explained this situation in the English case of **Vine Products Ltd. v. MacKenzie & Co. Ltd.** (1965) 3 All ER 58 (at page 62); "*It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case.*"

36. The Petitioner Kurukulasuriya did not speak of anything that would materially interfere with the judicial proceedings in the particular criminal case or, criticize the court. He merely alluded to the factual situation regarding the detention of the said journalist. The Petitioner stated that the journalist was detained for writing two articles, to highlight the regime abusing provisions of the Prevention of Terrorism Act. That statement could hardly influence public opinion and have a material impact on the outcome of the case. Therefore, it would be an overreaction to say that the Petitioner made a statement that would be held in contempt.

37. Fundamental Rights applications pivot on the application of the law and judges, are in general immune to material in the public domain that may create bias. Therefore, even though the main subject matter of the programme i. e. the regulations, relates to the Fundamental Rights application filed by the Petitioner, the concern of sub judice is minimal. The Respondents have submitted that the decision in **Re Garumunige Tilakaratne** (1999) 1 SLR 134 provides justification for the Respondents to take an extra cautionary approach and discontinue the programme. In the said case, it was held that a news reporter who reported a speech by a politician in which comments were made prejudging the outcome of an election petition had committed contempt of court for 'causing the publication' of the speech. However, no punishment was imposed on the reporter by the court which observed *"that Contempt of Court is an offence purely* sui generis *and one that is vaguely defined; and taking account of the fact that the cognizance of the offence involves in this case an exceptional interference with the fundamental right of freedom of speech and expression, including publication….and considering the fact that the respondent did not have the consequences of his act as a conscious object of his conduct; and considering that, although as a reporter he had duties and responsibilities, yet his role in the publication was a comparatively subordinate one,…"*

38. The approach with regard to the application of Article 14(1)(a) and the limitations that apply, cannot be uniform and the considerations as to its application should necessarily vary, taking into account the type of the media that it concerns, be it print, radio or television. The reason being that, in the case of the print media, it may allow the writer or the editor a comparatively wider margin of time and the degree of authority in controlling the content of a particular news item or column. The same may not be available to a producer or a broadcaster of a live television programme. Therefore, the court's reasoning in **Re Garumunige Tilakaratne** (*supra*) that the reporter of the offending news item should be held liable for sub judice for reporting the news item, cannot be applied to the instant application as the former was a newspaper, whereas the instant application is

concerned with a live television programme where speakers were invited to express their own views in a discussion which was simultaneously being telecast to the public.

39. As an experienced journalist, the Petitioner Kurukulasuriya could have acted more responsibly by specifically disclosing beforehand that he had filed a fundamental rights application regarding the same regulations that were to be discussed in the programme. In an ideal situation, the uncertainty about being held in contempt could have been avoided altogether if the Producer could have checked beforehand with the 3rd respondent, whether the topic of discussion was subject to any legal impediments such as being a matter pending before the court. Taking into consideration, however, the tight schedules and the limited resources for checking for possible legal impediments in the process of putting together a live discussion programme aired weekly, it would be an undue burden to expect the SLRC to adopt such stringent measures. Furthermore, I do not wish to limit the platform for adverse opinions and varied perspectives by setting a standard that would cause the media to steer clear of providing the opportunity for 'risky' views to be expressed.

40. The Respondents have submitted opinion pieces written by the Petitioner ('IR4 (a) to (e)') which would arguably amount to contempt of court to demonstrate that the Petitioner has acted in a similar manner on previous occasions. Those opinion pieces, however, are of little use as justification for the discontinuation of the programme as they have been published much later in 2011 and 2013. In any event, if the Respondents were aware beforehand that the Petitioner had earned a notoriety for writing and publishing contemptuous material it is unlikely that they would have taken the risk of inviting the Petitioner to the programme.

Infringement of Article 14 (1) (a)

41. Article 14(1)(a) of the Constitution guarantees to every citizen the freedom of speech and expression including publication. The exercise of this fundamental right is subject to restrictions that may be 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 (Article 15(2)). Further, Article 15(7) stipulates that restrictions may be 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 for meeting the just requirements of the general welfare of a democratic society.

42. Justice Mark Fernando in **Fernando v. Sri Lanka Broadcasting Corporation** (*supra*) adopted the view expressed in the Indian Case of **Secretary, Ministry of Information v. Cricket Association of Bengal** (1995) 2 SCC 161, 292 *"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."* His Lordship went on to state further that due to the limited nature of frequencies available for television and radio broadcasts only a handful of persons are bestowed with the privilege of operating via them and thereby they become "*subject to a correspondingly greater obligation to be sensitive to the rights and interests of the public*." (at page 172).

43. The Sri Lanka Rupavahini Corporation is a statutory body established by the Sri Lanka Rupavahini Corporation Act No. 6 of 1982 (as amended). Section 7(1)(c) of the said Act reads thus;

> *"7(1) The functions of the Corporation shall be—…*
> *(c) that any news given in the programme (in whatever form) is presented with due accuracy and* ***impartially*** *and with* ***due regard to the public interest.***" (emphasis added).

The provision no doubt imposes a statutory obligation on the SLRC to present any news conveyed through their programmes impartially and with due regard to public interest.

44. It becomes evident from the above cited precedent and statutory obligations that neither the 1st Respondent Corporation nor the other Respondents can lawfully abridge the right of the Petitioner to present a view that is not flattering to the government that controls the SLRC especially where it is in the interest of the public to know the state of media freedom in the country. The Respondents' argument that there is no positive duty cast on the Respondents to provide a forum for the Petitioner to exercise his fundamental right of speech and expression does not apply here due to airwaves being public property and attracting a higher standard of duty as well as due to the statutory obligation imposed on the 1st Respondent, by the Sri Lanka Rupavahini Corporation Act No. 6 of 1982.

45. The discontinuation of the programme, therefore, in my view, amounts to an infringement of the exercise of Article 14(1)(a) of the Petitioner Kurukulasuriya. The Petitioner has alleged that no reasons were given for the discontinuation of the programme even after he inquired about it, and the Respondents have not contested this allegation. It is curious that the 3rd Respondent nor any other employee of the SLRC had not inquired from the Petitioner about the case filed by him after it became known that he had filed such a case. Failure to divulge to the petitioner that his own past record had been the reason for discontinuing the programme hints of a lack of bona fides on the part of the Respondents. The admission of the 2nd Respondent that he had received several telephone calls questioning why the Petitioner Kurukulasuriya was allowed to appear on National Television and present a case, gives rise to the suspicion that the 2nd Respondent's decision was influenced by those who found his views unpalatable. It appears that the Respondents have used sub judice as a cover to evade responsibility for circumscribing the Petitioner's freedom of speech and expression.

46. The danger of suppressing dissent was emphasized in **Gunawardena v. Pathirana, OIC, Police Station, Elpitiya** (1997) 1 Sri LR 265. Stating that dissent, or disagreement manifested by conduct or action, is a cornerstone of the Constitution, which should not only be tolerated but encouraged by the Executive as obligated expressly by Article 4(d), Justice Mark Fernando cited the dictum of Justice Jackson in **West Virginia State Board of Education v. Barbette** (1943) 319 US 624, 641;

> *"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment was designed to avoid these ends by avoiding these beginnings."* (at page 277)

47. The lack of credibility in the version of the Respondents, together with their conduct in abruptly discontinuing the programme without informing the Petitioner Kurukulasuriya the reason for such a drastic step, reflects of an imperious attitude on the part of the Respondents, that they have absolute discretion and control over views that are telecasted through the television channel that they are steering. Media institutions certainly should be given discretion to curate their programmes, but such discretion must be exercised within the objectives and parameters set out in the law referred to earlier. Media institutions must curate their programmes to include all views and cater to all citizens equally without manipulating the leverage they have over public opinion. Unfortunately, attitudes that shun media ethics and legal obligations appear to influence the conduct of many of the Sri Lankan media institutions, whether state-owned or private.

48. Sub judice is a legal safeguard and media institutions should not be allowed to use a safeguard as a cloak to stifle the citizen's right to freedom of expression guaranteed by the Constitution. Sub judice is not meant for justifying autocratic and stifling conduct relating to freedom of expression. These safeguards are for

the purpose of creating an equal marketplace of ideas with minimal risk of polarization. Preventing views that are either disagreeable or disadvantageous to the broadcaster or the agenda that they seek to further, from reaching the public, impinges on the citizen's entitlement to exercise freedom of expression. Although the Supreme Court's power to strike down acts or omissions that may lead to the infringement of fundamental rights is expressly with regard to executive or administrative action, the courts as an organ of government is mandated by Article 4(d) of the Constitution to respect, secure and advance fundamental rights declared and recognized by the Constitution. Therefore, I have no hesitation in observing that it is not desirable for even a semi-private body to be allowed to make inroads into fundamental rights, in the absence of express prohibitions. As Shakespeare put it, "*We must not make a scarecrow of the law, setting it up to fear the birds of prey, and let it keep one shape till custom make it their perch and not their terror.*" (***Measure for Measure*** *(1604) Act 2, Scene 1.)*

Infringement of Article 10

49. Leave to proceed was granted to the Petitioner in application 557/2008 for the alleged infringement of Article 10. By virtue of Article 10 every person, regardless of whether they are a citizen or not, is entitled to **freedom of thought**, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. Article 10 is an absolute right without any constitutionally recognized restrictions or fetters.

50. The Petitioner Jayasekara's contention that, the presenter (of the programme) specifically stated that viewers can ask questions on matters pertaining to the regulations in discussion is correct, as evidenced by the recording of the programme submitted by the Petitioner Kurakulasuriya. About two minutes from the commencement of the programme, the presenter can be heard announcing that viewers can express their views or ask questions.

51. I am unable to agree with the argument of the Respondents that the mere desire to participate, is insufficient to clothe the Petitioner Jayasekera with the character of a participatory listener. Even though the Respondents point out that the Petitioner had called the SLRC only after the programme was discontinued, it appears that, in spite of announcing that the viewers can phone in, a telephone number for the public to communicate was not immediately announced. This might have been with the expectation of opening the telephone lines to the viewers at a later round of the discussion. I am of the view that, by being a viewer of a programme with a participatory component via telephone, the Petitioner Jayasekera becomes a participatory viewer. Even though every viewer of the programme may not have had the intention of making use of the phone-in component, the fact that the invitation to phone-in is extended in general to all viewers who may at any time during the programme decide to avail themselves of it, makes every viewer a participatory viewer. To my mind, categorization of the viewer ought to be based on the nature of the programme, rather than on whether the viewer intended to actually participate or not.

52. Having disposed of that concern, I would now make a distinction between the Petitioner's entitlement to gain the information that was being disseminated through the television programme, and being given the opportunity to phone-in and raise any questions he may have in relation to the topic of discussion or express his opinion in relation to the topic. At the outset, it must be accepted that the ability of a viewer to join a programme via a telephone call is subject to the overriding discretion of the producers of the programme. The limited time allocated for the phone-in component necessarily has to be counterbalanced with the number of phone calls they may receive. The producers may be further required to restrict certain phone calls and give priority to others, in order, *inter alia*, to avoid duplication of questions or opinions, to provide a value-addition to the discussion and to confine the programme to the prior-agreed bounds.

53. On the other hand, the right of the Petitioner as a viewer to gain information from the programme, in the instant circumstances, cannot also be ignored. The programme itself was a weekly panel discussion which sought to place before the public the various aspects of a chosen topic- in the present case the media regulations that were to be introduced by the government- through speakers comprising of various stakeholders or experts. The purpose of the programme was to impart information to the public and enlighten them as suggested by even the title of the programme '*Ira Anduru Pata*'. Furthermore, the public had an interest in learning about the regulations, especially those like the Petitioner whose choice of a programme could be curtailed by the regulations. The views expressed in the programme could have aided the Petitioner to form an opinion about the regulations and would likely have provided the clarifications he needed on any issues as to the proposed regulations. The ability to form and hold an opinion on regulations that would have an impact on oneself is, to say the least, a characteristic of the democratic way of life.

54. It is in the backdrop of the afore-stated, that one ought to consider as to whether the conduct of the Respondents in abruptly terminating the programme, has infringed the Petitioner Jayasekera's fundamental right of 'freedom of thought' enshrined in Article 10 of the Constitution.

55. Justice Marshall in the US case of **Stanley v. Georgia** 394 US 557 (1969), delivering the opinion of the Supreme Court held;

> *"It is now well established that the Constitution protects the right to receive information and ideas… This freedom [of speech and press] … necessarily protects the right to receive…This right to receive information and ideas, regardless of their social worth, is fundamental to our free society."*

The Appellant's claim in the said case was that his right to freedom of expression had been violated. Here it is useful to note that the Constitution of the United States **does not** explicitly recognize the right to freedom of thought. This may be the

reason for the US courts to recognize the freedom of thought as a peripheral right or a right included in freedom of speech.

56. The decision in **Fernando v. Sri Lanka Broadcasting Corporation** (*supra*) is significant in that, the Supreme Court considered the US Supreme Court decision in **Stanley v. Georgia** and found it difficult to regard the decision as being one relating to freedom of speech. The Court in the case of **Fernando** (*supra*) considered whether the right to information *simpliciter* falls within the ambit of the right to freedom of expression or the right to freedom of thought. It was observed (at page 177) that;

> "*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****.*" [emphasis added]

57. Justice Fernando was of the opinion that the better rationale is to regard information *simpliciter* as the "*staple of food of thought*" (as was done in the **Stanley v. Georgia**) *and "a corollary of the freedom of thought guaranteed by Article 10."* Fernando J. went on to state that *"Article 10 denies government the power to control men's minds, while Article 14 (1) (a) excludes the power to curb their tongues.*" observing that this distinction may be the reason for the difference in the restrictions placed on those two rights respectively.

58. It appears that, the earlier decisions relating to 'information' have followed the thinking of the US Supreme Court. **Joseph Perera v. The Attorney General** (*supra*) which was decided a few years anterior to **Fernando** (*supra*), advanced a different view from that in **Fernando**. The right to receive information was seen as a right

peripheral to freedom of expression, rather than a right included in freedom of thought. Citing Justice Douglas' words (at page 223) in **Griswold v. Connecticut** (1965) 28 US 479, to the effect of; "*The right of freedom of speech and press include not only the right to distribute,* ***the right to receive, the right to read and freedom of inquiry*** *and the right to teach... These are proper peripheral rights.*" [emphasis added]. Chief Justice Sharvananda went on to state [in **Joseph Perera**] 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 need.*" (at page 223-224). It was further observed that in a democratic polity, government shall be by the consent of the people and that such consent should not only be free but also grounded on adequate information. However, in **Fernando** the court was reluctant to follow this view on the basis that it was *obiter* as the Petitioner's rights were not found to be infringed in that particular case.

59. In a previous case, **Visuvalingam v. Liyanage** (1984) 2 SLR 123- where the court held that the readers and contributors of a newspaper which was banned from publication by the Competent Authority had *locus standi* to seek relief under Article 126 of the Constitution- Wimalaratne J., with Colin-Thome J., Ranasinghe J. and Abdul Cader J. agreeing (at page 132-133), was of the opinion that the freedom to receive information is encompassed within the freedom of speech and expression guaranteed by Article 14(1)(a) and that the restrictions that may be placed on the freedom of speech and expression would apply to the freedom to receive information.

60. Justice Rodrigo in his opinion in the said **Visualingam** case observed, along the same lines, that; "*To impart information there must be a recipient to receive it. So a reader or hearer is inseparably linked to the concept of publication. One does not exist without the other. Likewise, if one ceases to exist, so does the other.*" Justice Rodrigo stating that; significantly the right to receive information finds no place specifically in our Constitution, did not consider **Stanley v. Georgia** (*supra*),

which was relied on later in **Fernando v. SLBC**, based on the distinction that it dealt with "*the First Amendment to the US Constitution relating to Freedom of the Press and not to a provision corresponding to Article 14(1)(a) of our Constitution.*" (at page 150).

61. As the above cited judicial pronouncements indicate, the question as to whether the right to receive information *simpliciter* is within the right to freedom of speech and expression or within the freedom of thought, has been approached in different ways by the Supreme Court.

62. The International Covenant on Civil and Political Rights (ICCPR) as well as the European Convention on Human Rights (ECHR) recognizes Freedom of thought in conjunction with the Freedom of conscience and religion. Article 18 (1) of the ICCPR stipulates that "*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*" While Article 9 (1) of the ECHR reads thus; "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*"

63. On the other hand, the European Court of Human Rights has combined the right to information with the freedom of expression. Article 10 of the Convention guarantees freedom of expression, including the "*freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*" In **Guerra and Others v. Italy** Application No. 14967/89; (1998) 26 EHRR 357; [1998] ECHR 7 where the residents in the vicinity of a chemical factory brought an action against the Government of Italy for failing to furnish them with information about the health risks posed by the emissions from the factory, it was stated that "*The Court reiterates that freedom*

to receive information, referred to in paragraph 2 of Article 10 of the Convention, ***basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him*** *(see the* ***Leander v. Sweden*** *judgment of 26 March 1987, Series A no. 116, p. 29, 74). That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.*" (at paragraph 53) [emphasis added]. Although the European Court has been reluctant to impose positive obligations to ensure the right to information, the right has been recognized as a corollary of the freedom of expression.

64. In the present applications, the programme in question was stopped without notice. The audience was not informed that the programme for the day was to be discontinued, nor given the reasons for the sudden discontinuation. It amounts to a sudden and arbitrary stoppage given the statutory obligation of the SLRC to present their programmes with due regard to public interest. The manner of halting the programme without any respect to the wishes of the audience cannot be viewed lightly. The learned President's Counsel for the Respondents argued that the State is not under any positive duty to sponsor or provide State resources for the petitioner to exercise such rights and drew the attention of the court to 'Hohfeld's First Amendment' analysis by Fredrick Schauer [2008, The George Washington Law Review Vol 76, 914]. The learned President's Counsel pointed out that the 'negative duty' cast upon the State is to not infringe, restrict or interfere, when a person is exercising or enjoying his right with whatever means or resources available to him.

65. In the said analysis **Schauer**, makes an interesting point regarding positive and negative rights under the US Constitution; *"...the existing American constitutional framework is* ***one that prohibits government*** *action rather than one that allows the citizens to demand it.*" [Page 920, emphasis added]. Even in the instant case, Petitioner Jayasekera's complaint is against the positive action on the part of the SLRC authorities, in terminating the programme arbitrarily. In the case of **Rambachan v. Trinidad and Tobago Television Company Ltd** [decision 17 July,

1985], Justice Jeyalsingh, commenting on the importance of access to television in the present day society stated, "... *Government is duty bound to uphold the fundamental rights and with television being the most powerful medium of communication in the modern world, it is in my view idle to postulate that freedom to express political views means what the Constitution intends it to mean without the correlative adjunct to express such views on television. The days of soapbox oratory are over, so are the days of political pamphleteering".* Although the advent of Social Media has challenged the prominence of Television, it still remains a force to reckon with in Sri Lanka. In areas with limited internet connections or limited signal coverage, the State-owned television channels which enjoy better coverage remain the foremost mode of communication and dissemination of information, apart from print media.

66. Although the contours of the right to freedom of thought do not appear to have significantly crystallized through fundamental rights jurisprudence except perhaps with regard to freedom of religion, to lose the freedom of thought is to lose one's dignity, democracy and one's very self. This might be the reason that the right is made absolute with no room for derogation. To my mind what the right aims to secure is, one's mental autonomy. Arguably, the domain of the right to freedom of thought should extend to include an external action that is constitutive of thought. (See *Simon McCarthy-Jones in 'The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century'* at https://www.frontiersin.org/articles/10.3389/frai.2019.00019/full)

67. The law must protect the citizen from threats to the freedom of thought by the State and its agencies; government needs to act positively in facilitating mental autonomy. One significant way to foster mental autonomy would be to provide information in an 'autonomy supportive' context. The rights of the listeners to reply was considered in the case of **Red Lion Broadcasting Co. v. FCC,** 395 US 367 (1969) where the US Supreme Court stated; *"It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and*

experiences which is crucial…". Two of the rights on which the decision in **Red Lion Broadcasting** (*supra*) was based on were, the listener's right to equality and the listener's right to information needed to make his freedom of speech effective. In my view, information is needed not only to make 'freedom of speech' effective, information is equally relevant to make freedom of thought effective as well for, if one were to form an opinion, information is an essential ingredient and opinions are formed through the thought process. Thus, one cannot detach 'information' from the faculty of thought; they are inextricably interwoven.

68. The Respondents argued that the right to receive specific information from any particular person or group of persons or a source (such as information on TV Regulations from panelists of a programme televised by SLRC) could not be recognised under Article 10 since the jural correlative would impose a corresponding positive duty on the panelists or the SLRC to provide such information. I do agree, that as the law stood at the time the alleged infringement took place. There was no affirmative obligation on the State to provide information to persons (The enactment of the Right to Information Act No. 12 of 2016 has now changed this position). A licensed broadcaster, however, cannot be placed on the same plane as any other institution, due to the special status they enjoy in being given permission to use airwaves which are public property.

69. There could be a number of persons seeking broadcast licenses, but due to limited availability of frequencies to allocate, even though all applicants may have the identical right to a license, only a selected few can be granted the license and others will necessarily have to be denied the license. In that context a licensee is permitted to broadcast, but as observed in the case of Red Lion Broadcasting (*supra*) the licensee has no constitutional right "*to be the one who holds the license or to monopolize a radio frequency to the exclusion of his*

fellow citizens". In that context a broadcaster who operates on a (frequency) license granted by the State has the duty to uphold and safeguard the rights of the public. As Justice White said in the **Red Lion Broadcasting** case;

> *"Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment [freedom of speech and press].* ***It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."*** [emphasis is mine]

70. As far as Petitioner Jayasekera was concerned in the circumstances of the Application 557/2008, I am of the view that the Petitioner was entitled to receive information purported to be disseminated by the programme in addition to what he may have gathered had he got the opportunity to pose questions to the panelists through the phone-in component of the programme. I agree with the opinion adopted by His Lordship Justice Mark Fernando in the case of **Fernando v. SLBC** (*supra*) *" …that information is the staple food of thought and that the right to information simpliciter, is a corollary of freedom of thought guaranteed by Article 10".* As I have stated earlier in the judgement, the decision to terminate the programme was not due to any justifiable reasons on the part of the Respondents and I hold it was done arbitrarily on the direction of the 2nd Respondent. In the circumstances I hold that the fundamental right to freedom of thought, of Petitioner Jayasekera, enshrined in Article 10 of the Constitution has been infringed.

Infringement of Article 12(1)

71. Leave to proceed was granted for the infringement of Article 12(1) in both Applications 556/2008 and 557/2008.

72. The 'classification theory' or the approach that it is essential to prove that there was unequal treatment of equals or equal treatment of unequals for a violation of Article 12 to be recognized, which was followed in the early stages of the fundamental rights jurisprudence of Sri Lanka (See the full bench decision in **Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others** (1985) 1 SLR 285, **C.W. Mackie and Co. Ltd v. Hugh Molagoda, Commissioner General of Inland Revenue and Others** (1986)1 SLR 300) has now been replaced in favour of a broader approach to granting relief.

73. The broader approach has been adopted in a number of subsequent cases, to strike down arbitrary and mala fide exercise of power and guarantee natural justice and legitimate expectations. The ambit of Article 12(1) has been extended so far as to even include Rule of Law. Chief Justice H. N. J. Perera in **Sampanthan v. The Attorney General** SC FR 351/2018-356/2018, SC FR 358/2018-361/2018 decided on 13th December 2018, listing out a number of cases where the broader approach was adopted (**Chandrasena v. Kulatunga and Others** (1996) 2 SLR 327, **Premawathie v. Fowzie and Others** (1998) 2 SLR 373, **Pinnawala v. Sri Lanka Insurance Corporation and Others** (1997) 3 SLR 85, **Sangadasa Silva v. Anurudda Ratwatte and Others** (1998)1 SLR 350, **Karunadasa v. Unique Gem Stones Ltd and Others** (1997) 1 SLR 256, **Kavirathne and Others v. Pushpakumara and Others** SC FR 29/2012 SC Minutes 25.06.2012, **Jayanetti v. Land Reform Commission** (1984) 2 SLR 172 **Shanmugam Sivarajah v. OIC, Terrorist Investigation Division and Others** , [SC FR 15/2010, SC Minutes 27. 07. 2017]) went on to hold, (at page 87);

> "*I am unable to agree with the submission that Article 12 (1) of the Constitution recognizes 'classification' as the only basis for relief. In a Constitutional democracy where three organs of the State exercise their power in trust of the People, it is a misnomer to equate 'Equal protection' with 'reasonable classification'. It would clothe with immunity a vast*

majority of executive and administrative acts that are otherwise reviewable under the jurisdiction of Article 126. More pertinently, if this Court were to deny relief merely on the basis that the Petitioners have failed to establish 'unequal treatment', we would in fact be inviting the State to 'equally violate the law.' It is blasphemous and would strike at the very heart of Article 4 (d) which mandates every organ of the State to - respect, secure and advance the fundamental rights recognized by the Constitution. Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people."

74. In the present Applications, the discontinuation of the programme affected the Petitioner Kurukulasuriya as well as the other panelists who were appearing in the programme alike, by preventing them from expressing their views. In the case of Petitioner Jayasekara the discontinuation of the programme for the day affected the Petitioner along with all the other participatory viewers of the programme in that they were unable to receive the information they sought by watching the programme and even if they wished so, they were unable to make use of the phone-in component. Thereby it is clear that the Petitioners' entitlement to equality before the law and the equal protection of the law was derogated from. The law (Sri Lanka Rupavahini Corporation Act No. 6 of 1982) requires the SLRC to maintain high standards in its programmes in the public interest [Section 7 (1) (a)] and the SLRC is under a duty to maintain a balance in the subject matter [Section 7(2) (a)] and to ensure that news given in whatever form is presented with due accuracy, impartially and with due regard to the public interest [Section 7 (2) (c)]. The decision- without any legitimate reason for doing so- to discontinue the programme for the day, without offering any reasons for such discontinuation and without informing the viewers of the discontinuation of the programme is

arbitrary and mala fide. Therefore, I hold that the rights of both Petitioners under Article 12(1) have been infringed.

Compensation

75. The matter of awarding compensation for the infringement of fundamental rights has been discussed by the Supreme Court in a number of cases. Judicial opinion in such matters has been that, compensation should not be limited only to the extent of the monetary loss caused. I am of the view that regard should be had to the curtailment of liberty that resulted in such infringement as well. In **Gunawardena and Another v. Pathirana** (*supra*) and **Deshapriya and Another v. Municipal Council Nuwara Eliya** (*supra*), both cases involving the seizure of publications, the following opinions were expressed in relation to the awarding of compensation;

> *"In deciding whether the petitioners are each entitled to …compensation, …I must not fail to take account of the numerous decisions of this Court, stressing the importance of the freedom of speech, the right to criticise governments and political parties, and the importance of dissent; of the degree of intrusiveness and undue haste which characterized the infringements; … and of the fact that the amount of compensation must not be restricted to the proprietary loss or damage caused."* See page 274, **Gunawardena and another v. Pathirana, OIC, Police Station, Elpitiya and others** (*supra*).
>
> *"We are here concerned with a fundamental right, which not only transcends property rights but which is guaranteed by the Constitution; and with an infringement which darkens the climate of freedom in which the peaceful clash of ideas and the exchange of information must take place in a democratic society. Compensation must therefore be measured by the yardstick of liberty, and not*

weighed in the scales of commerce." See page 371, **Deshapriya and Another v. Municipal Council Nuwara Eliya** (*supra*).

76. The First Respondent, SLRC being a state corporation, the question of whether the State should be ordered to pay compensation needs to be dealt with. There is no question that the State is responsible for safeguarding fundamental rights, and the ordering of compensation should depend on the circumstances particular to each case, keeping in mind that the State coffers should not be emptied haphazardly because the State pays out from the tax-payers money.

77. I am of the view that it is just and equitable to make order, directing the State to pay the two Petitioners [FR Applications 556 and 557] Rs.30,000 each and I also direct the 2nd Respondent to pay each of the Petitioners in the said Applications, Rs.50,000 as compensation.

Judge of the Supreme Court

Justice Priyantha Jayawardena, PC

I agree.

Judge of the Supreme Court

Justice L. T. B. Dehideniya

I agree.

Judge of the Supreme Court