



Comment: Legality of the State Response to the Right to Protest in the light of the Covid-19 Pandemic

November 2021

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Introduction

The right to protest, as manifested in the freedom of assembly, association, and expression, is an important feature of a democratic society that facilitates civic engagement in political processes beyond just voting at elections. This right is vital for the healthy functioning of a democracy, and while it is recognized that the right to protest can be subjected to certain limitations, it is equally important to ensure that these limitations are not the results of ad-hoc and arbitrary measures contrary to the rule of law and the equal protection of the law as guaranteed by Article 12 of the Constitution.

Sri Lanka has a rich history of protests as means of airing grievances, and for demanding accountability and recognition for rights and freedoms. In the recent months, a large number of protests have taken place across the island, including but not limited to the many protests over the controversial Kotelawala National Defence University (KNDU) Bill, the fertilizer ban, and the 'Pottuvil to Polikandy' (P2P) march.¹

However, on 6th July 2021, the police announced that protests and public meetings were banned until further notice to contain the spread of COVID-19. The police further stated that transgressors will be dealt with according to quarantine regulations.² Since then, there has been a host of arrests of persons for engaging in public protests,³ which stood in contrast with the relaxation of several regulations⁴ put in place to prevent the spread of Covid-19 in July.⁵

¹ More recently, reports emerged of a major blackout protest scheduled by the Ceylon Electricity Board (CEB) United Trade Union Alliance against the sale of nearly 40% of shares of the Yugadanavi Power Plant, Kerawalapitiya to US energy firm, New Fortress. See Ifham Nizam, 'CEB trade unions threaten blackout unless govt. suspends New Fortress deal', 1st November 2021, The Island. <https://island.lk/ceb-trade-unions-threaten-blackout-unless-govt-suspends-new-fortress-deal/>

² Sri Lanka bans protests and public meetings', 6th July 2021, ColomboPage. http://www.colombopage.com/archive_21A/Jul06_1625587252CH.php

³ Imesh Ranasinghe, 'Sri Lanka police arrest over 45 for organising protests in violation of ban', 8th July 2021, EconomyNext. <https://economynext.com/sri-lanka-police-arrest-over-45-for-organising-protests-in-violation-of-ban-83828/>

⁴ For instance, weddings with up to 150 guests and conferences with up to 50 guests have been permitted since the 10th of July 2021. See 'Travel restrictions further relaxed, inter-provincial travel restrictions extended' 10th July 2021, ColomboPage. http://www.colombopage.com/archive_21A/Jul10_1625894944CH.php

⁵ However, subsequently on 20th August 2021, in response to repeated calls by health experts for urgent measures to contain the rapid surge in COVID-19 cases, a 'quarantine curfew' was announced by Army Commander General Shavendra Silva, which has been further extended to the 6th of September. See Zulfick Farzan, 'Quarantine Curfew in effect from 10 PM on Friday (20)', 20th August 2021, NewsFirst. <https://www.newsfirst.lk/2021/08/20/quarantine-curfew-in-effect-from-10-pm-on-friday-20/>

On 9th November 2021, new regulations⁶ were introduced by way of Gazette (Extraordinary) No. 2253/10⁷ to limit the size of public gatherings and make it mandatory to obtain prior approval of Director General of Health Services to hold gatherings, activities, events or similar places of meetings.⁸ Incidentally, the regulations were introduced days before the Samagi Jana Balawegaya (SJB) planned to hold a mass demonstration in Colombo.⁹ On 15th November, updated health guidelines applicable from the 16th to the 30th of November were also issued.¹⁰ It is notable that while indoor gatherings¹¹ were among the permitted events mentioned in the schedule of the guidelines, “outdoor private gatherings” were not allowed to be held.

In his address to the nation on 20th August 2021, President Gotabaya Rajapaksa said that “[I]t is clear that this is not a time for strike actions and protests. Do not attempt to destabilize the country.”¹² Similarly, insinuations were made by several others assigning blame to protesters for the recent surge in Covid-19 cases across the island.¹³ However, Professor Tissa Vitharana, a prominent virologist and Member of Parliament for the SLPP reportedly stated that there is no evidence to show that the recent protests contributed to the rapid spread of Covid-19.¹⁴

The press release announcing the ban in July failed to establish the legal basis for the ban on protests and demonstrations, raising concerns about the legality of this measure.

⁶ The regulations were made under section 2 and 3 of the Quarantine and Prevention of Diseases Ordinance
⁷ Gazette (Extraordinary) No. 2253/10 of 9th November 2021.

http://www.documents.gov.lk/files/egz/2021/11/2253-10_E.pdf

⁸ ‘Gazette issued on obtaining prior approval of Health DG for gatherings’, 11th November 2021, Daily Mirror.
https://www.dailymirror.lk/top_story/Gazette-issued-on-obtaining-prior-approval-of-Health-DG-for-gatherings/155-224567

⁹ Anusha Ondaatjie, ‘Sri Lanka Tightens Virus Curbs on Gatherings Ahead of Protest’, 12th November 2021. Bloomberg. <https://www.bloomberg.com/news/articles/2021-11-12/sri-lanka-tightens-virus-curbs-on-gatherings-ahead-of-protest>

¹⁰ Zulfick Farzan, ‘Health Ministry issues updated guidelines for 16th to 30th November’, 15th November 2021. NewsFirst. <https://www.newsfirst.lk/2021/11/15/health-ministry-issues-updated-guidelines-for-16th-to-30th-november/>

¹¹ “Maximum 1/3 of the usual capacity of the room/hall, not exceeding 150 persons. Maximum of 10 persons in a private house.” See Zulfick Farzan, ‘Health Ministry issues updated guidelines for 16th to 30th November’, 15th November 2021. NewsFirst. <https://www.newsfirst.lk/2021/11/15/health-ministry-issues-updated-guidelines-for-16th-to-30th-november/>

¹² ‘President Gotabaya Rajapaksa’s special address to the nation’, News.lk (Government official news portal), 20th August 2021. <https://www.news.lk/news/politics/item/32775-president-gotabaya-rajapaksa-s-special-address-to-the-nation>

¹³ ‘Sri Lanka’s intelligence officials blame protesters for spike in COVID cases’, Tamil Guardian, 10th August 2021. <https://www.tamilguardian.com/content/sri-lanka-s-intelligence-officials-blame-protesters-spike-covid-cases>

¹⁴ Rathindra Kuruwita, ‘Prof. Vitharana says recent protests did not contribute to rapid spread of virus’, The Island Online, 26th August 2021. <https://island.lk/prof-vitharana-says-recent-protests-did-not-contribute-to-rapid-spread-of-virus/>

Restriction of fundamental rights by way of issuing regulations has also raised similar concerns. Arrests and forcible quarantine of protesters, discussed later in the document, highlight instances of the misuse of quarantine regulations to quell dissent and enable arbitrary and selective action on the part of law enforcement authorities, with significant implications for rights and freedoms relating to assembly, association, and speech.

The Centre for Policy Alternatives (CPA) has consistently raised concerns regarding the legality of COVID-19 related restrictions, and despite this questionable legality, a considerable number of arrests have been made due to alleged violations.¹⁵

Several guides, comments, and other documents were issued previously by CPA on a range of legal and policy issues linked to COVID-19.¹⁶ The present comment will briefly examine the limitations imposed on the right to peaceful protest under the guise of managing the health crisis, with a particular focus on the current ban on protests and public gatherings. The comment will first provide an overview of the constitutional and legal basis for the right to protest in Sri Lanka, followed by an outline of the state response to several protests that were held during the Covid-19 pandemic. The comment will then identify areas of concern by assessing the ban on protests based on three criteria relating to legality, proportionality, and purpose, to demonstrate that the state response to the recent protests has adverse implications for the rule of law, independence of the judiciary, and the fundamental rights of citizens.

Constitutional and legal basis for the right to protest

The right to protest is recognized under Article 14(1)(b) of the Constitution of Sri Lanka, which guarantees that every citizen is entitled to the freedom of peaceful assembly. Article 14(1)(a) and (c) also recognize the freedom of speech and expression, and the freedom of association, respectively.

¹⁵ Centre for Policy Alternatives, 'Curfew in response to COVID-19: Legal Framework and Relevant Questions in Sri Lanka', 21st April 2020, Centre for Policy Alternatives. <https://www.cpalanka.org/curfew-in-response-to-covid-19-legal-framework-and-relevant-questions-in-sri-lanka/>; Centre for Policy Alternatives, 'An Update on the Legal Framework to Address the COVID-19 Pandemic in Sri Lanka', 12th May 2021, Centre for Policy Alternatives. <https://www.cpalanka.org/an-update-on-the-legal-framework-to-address-the-covid-19-pandemic-in-sri-lanka/>

¹⁶ Centre for Policy Alternatives, 'Brief Guide I: Evolving Legal Issues in the Context of COVID-19', 28th March 2020, Centre for Policy Alternatives. <https://www.cpalanka.org/brief-guide-i-evolving-legal-issues-in-the-context-of-covid-19/>; Centre for Policy Alternatives, 'Q and A on Regulations Issued under the Quarantine and Prevention of Diseases Ordinance & how this impacts the COVID-19 response in Sri Lanka', 6th November 2020, Centre for Policy Alternatives. <https://www.cpalanka.org/q-and-a-on-regulations-issued-under-the-quarantine-and-prevention-of-diseases-ordinance-how-this-impacts-the-covid-19-response-in-sri-lanka/>

The Constitution also provides for limited instances in which the freedom of peaceful assembly can be restricted. As per Article 15(3), it shall be subject to restrictions **prescribed by law in the interests of racial and religious harmony**. Article 15(7) provides further instances in which it can be restricted; **as prescribed by law in the interests of national security, public order, and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society**.¹⁷ Article 15(8) contains additional restrictions which apply to members of the armed forces, police, and other forces in their exercise of this right.

It is material that while the Constitution allows for the limitation of the right to peaceful assembly on several grounds, such restrictions should be prescribed by law. A law does not include a regulation,¹⁸ though a limited exception is made in Article 15(7) for regulations made under the Public Security Ordinance (PSO). Thus, any other such restriction must stem from a law that has been enacted by Parliament, and cannot be done via an executive or administrative decision. Unlike regulations under the PSO, regulations made under any other law, including the Quarantine and Prevention of Diseases Ordinance, are not considered as law.

Even when restricting fundamental rights through regulations under the PSO, the Courts have established certain conditions applicable to such regulations. These regulations cannot be a pretext, and must bear a proximate nexus to public security.¹⁹ Further, they must be reasonable and proportionate.²⁰

Sri Lanka is a party to the International Covenant on Civil and Political Rights (ICCPR), which provides for the rights to freedom of peaceful assembly and association, the attendant state obligations of which are reaffirmed by the International Covenant on Civil and Political Rights (ICCPR) Act.²¹

As established by the Supreme Court, *“the provisions of the Constitution and of other Law, including decisions of the Superior Courts in Sri Lanka, give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights...and the aforesaid rights recognized in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka.”*²²

¹⁷ For the purpose of Article 15(7) ‘law’ includes regulations made under the law for the time being relating to public security.

¹⁸ *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1987] 2 SLR 312 at 343

¹⁹ *Sunila Abeysekera v. Ariya Rubasinghe and others*, [2000] 1 Sri L.R 314. <https://www.lawnet.gov.lk/wp-content/uploads/2016/11/028-SLLR-SLLR-2000-V-1-SUNILA-ABEYSEKERA-v.-ARIYA-RUBASINGHE-COMPETENT-AUTHORITY-AND-OTHERS.pdf>

²⁰ *Ibid*

²¹ Act No. 56 of 2007

²² In the matter of a reference under Article 129(1) of the Constitution. SC Ref. No. 01/2008. See also CPA’s submission on the draft General Comment on Article 21 of the ICCPR (Freedom of Assembly) February 2020 https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/NGO_CentreforPolicyAlternatives.pdf

Recent protests and the state response

A number of protests were held since the onset of the pandemic, centred around various demands and causes. In a tweet published on 15th August 2021, State Minister Kanchana Wijesekara alleged that 847 protests were carried out across the island since the 20th of April.²³ The Chief Government Whip Johnston Fernando is reported to have said that it is only those who are ‘unintelligent’ that will stage protests when the country is plunged into a pandemic (ironically the statement was made at a ceremony held to inaugurate the opening of the Kelani Bridge).²⁴ His statements reflect the dismissive response of the state towards the right to protest.

What follows is a brief and non-exhaustive account of several protests and demonstrations held during the period from March 2020 to November 2021, and the state response to these protests. The response is characterised by incidents of arrests, surveillance, and the use of force.

Black Lives Matter solidarity protest

In June 2020, the Police arrested 53 protesters led by the Frontline Socialist Party for allegedly violating a court order preventing them from holding a protest in solidarity with the Black Lives Matter protests being held in the United States. While the court order was obtained to prevent demonstrations in the vicinity of the US Embassy in Colpetty, some of the arrests were made several kilometres away at Town Hall.²⁵ Swastika Arulingam, a lawyer inquiring after those arrested, was also briefly detained.²⁶ The arrested protesters were later granted bail by the Magistrate Court.

Video recordings and television footage showed police using force while the protesters stood peacefully or resisted arrest.²⁷ However, Police spokesman Jaliya Senaratne claimed that the police “used reasonable power” and that “[t]he main aim of the court order was to prevent any risk of COVID-19 spreading.”²⁸

²³ Twitter profile @kanchana_wij, 15th August 2021.

https://twitter.com/kanchana_wij/status/1426876776538468353

²⁴ ‘Only the unintelligent will stage protests when the country is into a pandemic: Johnston’, 11th July 2021, Daily Mirror. https://www.dailymirror.lk/breaking_news/Only-the-unintelligent-will-stage-protests-when-the-country-is-into-a-pandemic-Johnston/108-215835

²⁵ Arjuna Ranawana and Imesh Ranasinghe, ‘Cabinet “disapproves” of the way Police handled Black Lives Matter demos in Colombo on Tuesday – Bandula’ 11th June 2020, EconomyNext. <https://economynext.com/cabinet-disapproves-of-the-way-police-handled-black-lives-matter-demos-in-colombo-on-tuesday-bandula-70972/>

²⁶ ‘Sri Lanka: Increasing Suppression of Dissent’ 8th August 2020, Human Rights Watch. <https://www.hrw.org/news/2020/08/08/sri-lanka-increasing-suppression-dissent>

²⁷ Meera Srinivasan, ‘Concern over ‘police brutality’ in Sri Lanka’ 10th June 2020, The Hindu. <https://www.thehindu.com/news/international/concern-over-police-brutality-in-sri-lanka/article31798486.ece>

²⁸ Ibid

The P2P march ('Pottuvil to Polikandy' march)

Tamil and Muslim citizens from the Northern and Eastern Provinces took to the streets from 3 February 2021 to 7 February 2021, to demand an end to several oppressive and majoritarian practices of the state. The march commenced in Pottuvil in the Ampara District and culminated in Polikandy in the Jaffna District.²⁹ The ten key demands of the march addressed several issues, including the continuing militarisation of the North and the East, the ban on burying the Covid-19 infected remains of Muslims, justice for the families of the disappeared, and the continuing detention of Tamil political prisoners.³⁰

Numerous court orders were issued against the march, including an order by the Kalavanjikudi Magistrates Court to “prohibit protests planned in support of the accusation of human rights violations at the Geneva sessions” on 1 February 2021.³¹ Army Commander Shavendra Silva referred to the march as “a show” ahead of the UN Human Rights Council session, and stated that action would be taken against those who have violated “COVID restrictions.”³² The Public Security Minister also warned that the protesters would be arrested, and added that the authorities have protesters’ photographs and their vehicle number, and “know who these individuals are.”³³

Protests by families of the disappeared

Several protests were held by the families of the disappeared amidst COVID-19 related restrictions.³⁴ On 4th February 2021, the families of the disappeared in Vavuniya resisted court bans by protesting and starting a hunger strike. Vavuniya Magistrates had previously issued an order against the planned protests and hunger strikes, stating the protest “would cause damage to public health in light of the coronavirus pandemic” and instructed against “any activities that will draw attention to the upcoming United Nations Human Rights Council (UNHRC) session in Geneva.”³⁵

²⁹Mahendran Thiruvarangan, ‘The P2P march and beyond, re-imagining resistance amidst ethnic polarisation’ 24th February 2021, The Morning.

<https://www.themorning.lk/the-p2p-march-and-beyond-re-imagining-resistance-amidst-ethnic-polarisation/>
³⁰ ibid

³¹Meenakshi Ganguly, ‘Thousands March for Justice in Sri Lanka, Despite Ban’, 9th February 2021, Human Rights Watch. <https://www.hrw.org/news/2021/02/09/thousands-march-justice-sri-lanka-despite-ban>

³²Meera Srinivasan, ‘A long march in Sri Lanka – to register protest, forge a new alliance’, 9th February 2021, The Hindu. <https://www.thehindu.com/news/international/a-long-march-in-sri-lanka-to-register-protest-forge-a-new-alliance/article33792547.ece>

³³ Meenakshi Ganguly, ‘Thousands March for Justice in Sri Lanka, Despite Ban’, 9th February 2021, Human Rights Watch. <https://www.hrw.org/news/2021/02/09/thousands-march-justice-sri-lanka-despite-ban>

³⁴ Dharsha Jegatheeswaran, ‘Heeding Victims’ Voices: The Struggle of Tamil Families of the Disappeared in Sri Lanka’, 3rd March 2021, Just Security. <https://www.justsecurity.org/75095/heeding-victims-voices-the-struggle-of-tamil-families-of-the-disappeared-in-sri-lanka/>

³⁵ ‘Vavuniya families of disappeared defy court ban with protest and hunger strike on Sri Lankan Independence Day’, 4th February 2021, Tamil Guardian. <https://www.tamilguardian.com/content/vavuniya-families-disappeared-defy-court-ban-protest-and-hunger-strike-sri-lankan>

Meanwhile, an Independence Day rally held by members of the Sri Lanka Freedom Party (SLFP) in Jaffna under the slogan 'One Country, One Race' did not face such disruptions.³⁶

Protests against the fuel price increase and the chemical fertilizer ban

During a protest against the recent fuel price hike and the chemical fertilizer ban held in Akuresa, 13 members of the Janatha Vimukthi Peramuna (JVP) including two former provincial councillors were arrested. On 7th July 2021, former JVP provincial councillor Samantha Vidyaratna and national organiser of the All Island Govi Jana Federation (farmers' collective) Namal Karunaratne and the three others were arrested over a protest against the chemical fertiliser ban.³⁷ Farmers continue to protest in demand of an immediate solution to the shortage of fertilizer in the country.³⁸

Protests over the Kotelawala National Defence University (KNDU) Bill and salary demands of teachers

Teachers have been protesting since early June, to demonstrate opposition to the controversial Kotelawala National Defence University (KNDU) Bill and to make salary demands as part of trade union action.³⁹

On 8th July 2021, Sri Lanka Police arrested over 45 people for engaging in demonstrations and protests in violation of the ban on protests and public meetings.⁴⁰ Among these arrests are 31 people including Sri Lanka Teachers' Union General Secretary Joseph Stalin, who were arrested over a protest jointly organised by the Inter-University Students Federation (IUSF), the Sri Lanka Teachers' Union, and the Frontline Socialist Party, which was held against the KNDU Bill at the Parliament roundabout in Sri Jayawardenapura, Kotte.⁴¹

³⁶ T. Pratheepan, 'SLFP Independence Rally held in Jaffna', 5th February 2021, Ceylon Today.

<https://ceylontoday.lk/news/slfp-independence-rally-held-in-jaffna>

³⁷ Imesh Ranasinghe, 'Sri Lanka police arrest over 45 for organising protests in violation of ban', 8th July 2021, EconomyNext. <https://economynext.com/sri-lanka-police-arrest-over-45-for-organising-protests-in-violation-of-ban-83828/>

³⁸ Zulfick Farzan, 'Protests grow as Sri Lanka's farmers oppose chemical fertilizer ban', 18th October 2021, NewsFirst. <https://www.newsfirst.lk/2021/10/18/protests-grow-as-sri-lankas-farmers-oppose-chemical-fertilizer-ban/>

³⁹ Chanka Jayasinghe, 'Protests continue in Sri Lanka over teachers' salary demands, KNDU bill; two arrested', 4th August 2021, EconomyNext. <https://economynext.com/protests-continue-in-sri-lanka-over-teachers-salary-demands-kndu-bill-two-arrested-84563/#modal-one>

⁴⁰ On 12th of July 2021, the Ceylon Teachers' Union (CTU) submitted a written complaint to the United Nations (UN) High Commissioner for Human Rights Michelle Bachelet on the alleged suppression of peaceful protests and the forced quarantine measures taken by the Police. See Pamodi Waravita, 'Teachers' union writes to UN Rights Chief', 13th July 2021, The Morning. <https://www.themorning.lk/teachers-union-writes-to-un-rights-chief/>

⁴¹ Meanwhile, 4 others including Nuwara Eliya district JVP organiser Manjula Suraweera Arachchi were arrested over another protest held in Hatton against the KDU Bill on the same day. See Imesh Ranasinghe, 'Sri Lanka police arrest over 45 for organising protests in violation of ban', 8th July 2021, EconomyNext. <https://economynext.com/sri-lanka-police-arrest-over-45-for-organising-protests-in-violation-of-ban-83828/>

Video footage of the protest also showed protesters, including elderly women, being forcefully frog-marched into police buses.⁴² News reports claimed that they had been arrested for flouting quarantine regulations, and 16 protesters were later referred to quarantine centres against their will⁴³ after being released on bail.⁴⁴

Following the public condemnation of the arrests and forcible quarantine, the protesters were released from quarantine centres several days short of the required 14-day period.⁴⁵

The SJB also held a protest near Parliament on the 8th of July against the ban on protests⁴⁶ and subsequently filed three fundamental rights petitions in the Supreme Court challenging arrests made under quarantine regulations.⁴⁷ Several other fundamental rights petitions and one application for a writ of Habeas Corpus were filed regarding the arrest and forced quarantine of the protesters.⁴⁸

Protests over the KNDU Bill⁴⁹ and salary demands continued despite the ban. For instance, two protesters were arrested at a protest held on 3rd August 2021 with the participation of the IUSF and others near the Parliament complex in Sri Jayawardenapura, Kotte,⁵⁰ and 44 were arrested during a protest for higher

⁴² Sri Lanka main opposition SJB files FR petitions against protestor arrests: report' 9th July 2021, EconomyNext. <https://economynext.com/sri-lanka-main-opposition-sjb-files-fr-petitions-against-protestor-arrests-report-83861/>

⁴³ The forced quarantine of the protesters also prompted strike action from several teachers' trade unions. See Imesh Ranasinghe, 'Forced quarantine of protesters: Teachers' unions in Sri Lanka refuse to teach online' 12th July 2021, EconomyNext. <https://economynext.com/forced-quarantine-of-protesters-teachers-unions-in-sri-lanka-refuse-to-teach-online-83922/>

⁴⁴ 33 including Stalin taken for quarantine despite being bailed' 8th July 2021, SriLankanMirror. <https://srilankamirror.com/news/23732-iusf-convener-joseph-stalin-29-others-arrested-for-staging-protest>

⁴⁵ Imesh Ranasinghe, 'Quarantined protesters in Sri Lanka released several days short of 14-day isolation period' 16th July 2021, EconomyNext. <https://economynext.com/quarantined-protestors-in-sri-lanka-released-several-days-short-of-14-day-isolation-period-84091/>

⁴⁶ Imesh Ranasinghe, 'Sri Lanka police arrest over 45 for organising protests in violation of ban', 8th July 2021, EconomyNext. <https://economynext.com/sri-lanka-police-arrest-over-45-for-organising-protests-in-violation-of-ban-83828/>

⁴⁷ Sri Lanka main opposition SJB files FR petitions against protestor arrests: report' 9th July 2021, EconomyNext. <https://economynext.com/sri-lanka-main-opposition-sjb-files-fr-petitions-against-protestor-arrests-report-83861/>

⁴⁸ 'Quarantine Detention in Sri Lanka: Teachers' union writes to UN; Six FRs filed in SC & one habeas corpus writ', 13th July 2021, Sri Lanka Brief. <https://srilankabrief.org/quarantine-detention-in-sri-lanka-teachers-union-writes-to-un-six-frs-filed-in-sc-one-habeas-corpus-writ/>

⁴⁹ On 4th August 2021, the Government decided to postpone the debate on the KNDU Bill in Parliament, till further consultations are held and the opportunity is given for other members of Parliament to express their views on the bill, without a set date for the continuation of the debate. See Rebecca Pavey, 'Debate on KNDU Bill postponed', 4th August 2021, Ceylon Today. <https://ceylontoday.lk/news/debate-on-kndu-bill-postponed>

⁵⁰ Chanka Jayasinghe, 'Protests continue in Sri Lanka over teachers' salary demands, KNDU bill; two arrested', 4th August 2021, EconomyNext. <https://economynext.com/protests-continue-in-sri-lanka-over-teachers-salary-demands-kndu-bill-two-arrested-84563/#modal-one>

wages outside the Presidential Secretariat in Colombo on 4th August 2021.⁵¹ Concerns have also been raised with regards to reports of arrests made by police officers in civilian clothing.⁵²

The teachers' protests are among the many on-going trade unions protests held across the country to demand solutions to a plethora of issues, with the participation of teachers, principals, health sectors workers, and others.⁵³

Mass rally by Samagi Jana Balawegaya (SJB)

On 16th November 2021, the SJB, the main opposition party, launched a mass protest in Colombo, attended by supporters from many parts of the country. The protest was held against several current economic issues, relating to the rising cost of living, commodity prices and shortages.⁵⁴ While the police were instrumental in obtaining a number of court orders to prevent the SJB from holding protests, several Magistrates rejected the police requests for court orders,⁵⁵ with the Colombo Additional Magistrate Bandara Nelumdeniya granting permission to conduct protests in compliance with health guidelines.⁵⁶ News reports also emerged of incidents where the police placed spike strips⁵⁷ to prevent buses from proceeding forward for the protest, and other instances where supporters were prevented from reaching Colombo by the police at provincial borders.⁵⁸

⁵¹ 'Forty-four arrested after protest by striking Sri Lankan teachers in Colombo', 6th August 2021, World Socialist Web Site. <https://www.wsws.org/en/articles/2021/08/07/slte-a07.html>

⁵² 'Opposition cries foul as cops in civvies arrest Sri Lanka student union leader'. 6th August 2021, EconomyNext. <https://economynext.com/opposition-cries-foul-as-cops-in-civvies-arrest-sri-lanka-student-union-leader-84655/>

⁵³ Zulfick Farzan, 'Teachers, Principals, Activists, Fishermen stage over 40 protests', 9th November 2021, NewsFirst. <https://www.newsfirst.lk/2021/11/09/teachers-principals-activists-fishermen-stage-over-40-protests/>

⁵⁴ 'Galle Road blocked at Kollupitiya due to SJB protest', 16th November 2021, Ada Derana. <http://www.adaderana.lk/news/78462/galle-road-blocked-at-kollupitiya-due-to-sjb-protest>

⁵⁵ 'Court orders SJB to adhere to health guidelines during protest rallies', 16th November 2021, Ada Derana. <http://www.adaderana.lk/news/78461/court-orders-sjb-to-adhere-to-health-guidelines-during-protest-rallies>

⁵⁶ 'Galle Road blocked at Kollupitiya due to SJB protest', 16th November 2021, Ada Derana. <http://www.adaderana.lk/news/78462/galle-road-blocked-at-kollupitiya-due-to-sjb-protest>

⁵⁷ Zulfick Farzan, 'SJB Protest: Police use Spike Strips to prevent buses from entering Colombo', 16th November 2021, NewsFirst. <https://www.newsfirst.lk/2021/11/16/sjb-protest-police-use-spike-strips-to-prevent-buses-from-entering-colombo/>

⁵⁸ 'Sri Lanka Opposition to proceed with its protests today amidst enjoining orders', 16th November 2021, ColomboPage. http://www.colombopage.com/archive_21B/Nov16_1637044208CH.php

Concerns arising from present restrictions

While recognizing that steps have to be taken to combat the spread of Covid-19, which may extend to restrictions on certain fundamental rights, three crucial criteria must be met when such restrictions are put in place;

1. The restrictions must be in accordance with the law,
2. The restrictions must be proportionate to the outcome sought, and
3. The restriction must not be put in place for collateral purposes.

Legality of measures

The ban on protests and public meetings was announced through a press release by the Police Media Division. The Police have further stated that violations of the ban will be dealt with according to quarantine regulations.⁵⁹ However, the press release makes no mention of the legal basis underpinning the ban on protests and public meetings.

The Additional Magistrate of Colombo Hon. Lochani Abeywickrama recently recognized that the rights to expression, speech, and protest are constitutionally protected, and as such, these freedoms cannot be overridden by quarantine law.⁶⁰

The lack of clarity with regards to the restriction on freedom of association and assembly is at variance with the provisions of the constitution which require such restrictions to be prescribed by law. While there is limited scope for restriction of rights via regulations, this is reserved for regulations made under the Public Security Ordinance, which is not the case with the present regulations. The current restrictions are thus unconstitutional.

During the recently held Judicial Service Commission (JSC) meeting, Magistrates were reportedly instructed to use Sections 98 and 106 of the Criminal Procedure Code to control protesters and public gatherings amidst the health crisis,⁶¹

⁵⁹Imesh Ranasinghe, 'Sri Lanka police arrest over 45 for organising protests in violation of ban', 8th July 2021, EconomyNext. <https://economynext.com/sri-lanka-police-arrest-over-45-for-organising-protests-in-violation-of-ban-83828/>

⁶⁰Aazam Ameen, 'Colombo Additional Magistrate educates police on people's rights and quarantine law', 17th August 2021, The Morning. <https://www.themorning.lk/colombo-additional-magistrate-educates-police-on-peoples-rights-and-quarantine-law/>

⁶¹Lakmal Sooriyagoda, 'Judges and lawyers express dismay over recent JSC meeting', 15th August 2021, Daily Mirror. https://www.dailymirror.lk/latest_news/Judges-and-lawyers-express-dismay-over-recent-JSC-meeting/342-218276#.YRkDbvDY2U4.twitter

raising concerns about the implications for the independence of the judiciary and the rule of law.⁶² According to these reports, concerns were raised about the impact this direction may have on the discretion to exercise the judicial mind by Magistrates.⁶³ Several Magistrates also reportedly expressed concerns about the subtle pressure implied in a letter issued by the JSC Secretariat stating that the failure to participate in this event could impact ‘promotions, annual salary increments, foreign training and appointment to the High Court.’⁶⁴

In response to this, the BASL⁶⁵ observed that the “...contents of such a meeting/webinar should not leave the impression, either in the mind of the participating judges or the public, that it has any bearing on the manner of the discharge of judicial functions or that it was intended to have the effect of stifling any judicial officer from the independent exercise of his or her judicial mind and discretion in a particular case based on the law and accepted principles of judicial interpretation.”⁶⁶ The JSC responded to the public outcry by stating that the webinar had not been organised by the JSC but by the Sri Lanka Judges’ Institute.⁶⁷

The role of ad-hoc structures such as the National Operation Centre for Prevention of COVID-19 Outbreak (NOCPCO) headed by General Shavendra Silva⁶⁸ also gives rise to the corresponding concern about the increasing militarization of the pandemic response. The lack of transparency, oversight and accountability of these ad-hoc structures have grave implications for the freedom of assembly and association, and the militarised response to the health crisis may result in shrinking the space for civic participation in democratic actions and processes.

⁶² ‘Sri Lanka: Judges must be left alone to make their own independent decisions relating to restrictive COVID measures’, 18th August 2021, International Commission of Jurists (ICJ). <https://www.icj.org/sri-lanka-judges-must-be-left-alone-to-make-their-own-independent-decisions-relating-to-restrictive-covid-measures/>

⁶³ Ibid

⁶⁴ Pamodi Waravita, ‘JSC says it did not organise webinar’, 23rd August 2021, The Morning. <https://www.themorning.lk/jsc-says-it-did-not-organise-webinar/>

⁶⁵ Representatives of The Bar Association of Sri Lanka (BASL) were reportedly shown the recording of the meeting on the instructions of Judicial Service Commission (JSC) Chairman and Chief Justice Jayantha Jayasuriya. BASL President Saliya Pieris later confirmed that he and other BASL representatives had viewed the recording, but added that they were yet to issue a response. See Ranjith Padmasiri, ‘BASL leaders watch video of controversial meeting’, 29th August 2021, Sunday Times. <https://www.sundaytimes.lk/210829/news/basl-leaders-watch-video-of-controversial-meeting-453937.html>

⁶⁶ ‘BASL expresses grave concerns; seeks answers from JSC’, 22nd August 2021, The Sunday Times. <https://www.sundaytimes.lk/210822/news/basl-expresses-grave-concerns-seeks-answers-from-jsc-452873.html>

⁶⁷ Pamodi Waravita, ‘JSC says it did not organise webinar’, 23rd August 2021, The Morning. <https://www.themorning.lk/jsc-says-it-did-not-organise-webinar/>

⁶⁸ Centre for Policy Alternatives, ‘Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force’, 8th April 2020, Centre for Policy Alternatives. <https://www.cpalanka.org/structures-to-deal-with-covid-19-in-sri-lanka-a-brief-comment-on-the-presidential-task-force/>

More than a year into the pandemic, Sri Lanka has failed to enact laws for dealing with the health crisis, while rushing to pass several other laws.⁶⁹ While the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill was recently passed in Parliament without a vote,⁷⁰ the lack of initiative and delays on the part of the Government to enact a comprehensive and innovative law related to issues raised during the pandemic demonstrates a disregard for the legality of measures implemented to address issues related to COVID-19 and paving the way for uncertainty and ad-hoc measures.

Proportionality

The proportionality of restrictive measures related to protests and their implementation has been a cause for concern. Video footage of arrests during several protests emerged, displaying instances of disproportionate use of force by law enforcement authorities.

A letter addressed to the Health Services Director General Asela Gunawardena and Police Chief Chandana Wickramaratne by the BASL noted that the ban applies to protests involving mass gatherings of people, and as such, protests which comply with the existing health guidelines are not in fact prohibited.⁷¹ The letter also expressed grave concern regarding the arrest and detention of protesters by the police ostensibly for violating health regulations relating to COVID-19,⁷² and the excessive use of force and heavy-handedness of the police in dealing with the protesters.⁷³

On 10th July 2021, the United Nations Resident Coordinator in Sri Lanka Hanaa Singer-Hamdy echoed these concerns by asserting that the restrictions imposed to combat the spread of Covid-19 must not go beyond the legitimate protection of public health.⁷⁴

⁶⁹ Such as the Twentieth Amendment to the Constitution and the Colombo Port City Economic Commission Bill

⁷⁰ 'Speaker certifies Covid-19 Temporary Provisions Bill', 26th August 2021, Daily Mirror.

https://www.dailymirror.lk/latest_news/Speaker-certifies-Covid-19-Temporary-Provisions-Bill/342-219081

⁷¹ 'BASL Condemns Arrest and Forced Quarantining of Peaceful Protesters', 10th July 2021, Colombo Telegraph.

<https://www.colombotelegraph.com/index.php/basl-condemns-arrest-and-forced-quarantining-of-peaceful-protesters/>

⁷² 'BASL condemns Police actions as heavy-handed and unlawful', 11th July 2021, The Sunday Times.

<https://www.sundaytimes.lk/210711/news/basl-condemns-police-actions-as-heavy-handed-and-unlawful-449047.html>

⁷³ 'BASL Condemns Arrest and Forced Quarantining of Peaceful Protesters', 10th July 2021, Colombo Telegraph.

<https://www.colombotelegraph.com/index.php/basl-condemns-arrest-and-forced-quarantining-of-peaceful-protesters/>

⁷⁴ Pamodi Waravita, 'Teachers' union writes to UN Rights Chief', 13th July 2021, The Morning.

<https://www.themorning.lk/teachers-union-writes-to-un-rights-chief/>

Collateral purpose of the ban

According to the press release,⁷⁵ the purpose of the ban on protests involving mass gatherings is to minimize the risk of the spread of COVID-19. However, the examples discussed in this paper demonstrate how the quarantine regulations set in place to contain the spread of COVID-19 have been misused to impose restrictions on rights and freedoms, and to provide leeway for arbitrary action by the law enforcement authorities under the guise of managing the health crisis. These examples include the forcible quarantine of protesters and the crackdown on free speech, which stand in contrast with the lax regulations imposed on public gatherings other than protests.

CPA notes that the detention of protesters in quarantine centres established for the purpose of containing the spread of COVID-19 was a punitive action that lacks legal merit. Forcible quarantine of protesters even after they have been granted bail suggests that quarantine regulations are being used as an arbitrary, extra-judicial punishment.

The ban on protests is also in tandem with the crackdown on comments against the Government, even in instances where it did not involve public assembly. Activist Shehan Malaka who was reportedly involved in the 'Black Flag Campaign' by the Catholic Church was called for questioning by the Criminal Investigation Department (CID) over statements he made on social media.⁷⁶ The CID also questioned a doctor who spoke out on social media about the situation in a national hospital, allegedly inquiring about his 'mental state'.⁷⁷ Trade Unionist Ananda Palitha was arrested for making statements on an imminent fuel shortage, but was released on bail on the basis that factual statements could not be a reason for arrest.⁷⁸ The crackdown on criticism further suggests that the ban on protests was based on collateral purposes.

The ban on protests and public gatherings was inconsistent with the revision of health guidelines in July which permitted, among other things, the limited capacity functioning of organisations and events⁷⁹,

⁷⁵ 'Sri Lanka bans protests and public meetings', 6th July 2021, ColomboPage. http://www.colombopage.com/archive_21A/Jul06_1625587252CH.php

⁷⁶ 'CID summons social activist for questioning', NewsWire, 23rd August 2021. <https://www.newswire.lk/2021/08/23/cid-summons-social-ativist-for-questioning/>

⁷⁷ 'CID questions Dr. Najith Indika who posted a Facebook post about the crisis faced by Avissawella Hospital with the increase in Covid patients', Nation Today, 15th August 2021. <https://www.nationtoday.lk/sri-lankan-news/cid-questions-dr-najith-indika-who-posted-a-facebook-post-about-the-crisis-faced-by-avissawella-hospital-with-the-increase-in-covid-patients/>

⁷⁸ 'Expressing the TRUTH no reason to Remand' - Magistrate, Releases Unionist', News First, 22nd August 2021. <https://www.newsfirst.lk/2021/08/22/expressing-the-truth-no-reason-to-remand-magistrate-releases-unionist/>

⁷⁹ 'Travel restrictions further relaxed, inter-provincial travel restrictions extended', 10th July 2021, ColomboPage. http://www.colombopage.com/archive_21A/Jul10_1625894944CH.php

and concerts.⁸⁰ Prior to the recently imposed 'lockdown', the Government was blowing hot and cold, on the one hand suggesting that Covid-19 is not so grave as to warrant restrictions on movement, and on the other taking a tough stance on protests in the name of Covid-19, demonstrating hypocrisy and suggesting that the ban on protests is done for a collateral purpose.

Further, the Kandy Perahera was held despite the surge in COVID-19 cases, and while it was not open to the public, more than 5000 artistes were reported to have taken part in the procession.⁸¹ The final day of the Perahera took place even after the rest of the country went into 'lockdown'.

If public health concerns truly warrant limitations on rights and freedoms at present, the gravity of the health crisis should not be underplayed, and appropriate and stringent guidelines should be issued to reflect these concerns and minimize risks in all areas of public life. While the country went into a 'lockdown' on 20th August 2021, at the time where a number of protests were taking place, the restrictions on other public gatherings were minimal.

Conclusion

The state response in curtailing the right to peaceful protest amidst the Covid-19 pandemic has not been in accordance with the Constitution, leading to disproportionate actions which demonstrate hypocritical and collateral intentions. The increasing trend towards the use of the Covid-19 health crisis as a pretext to suppress dissent is deeply concerning and must be stopped. In a country with a rich history of expression through protest, it is important that people are not silenced, and their right to protest is upheld and respected. Whilst noting the need to take health precautions, the pandemic should not be exploited in order to set a precedent where constitutionally protected freedoms are denied and democratic principles are allowed to decay.

⁸⁰Zulfick Farzan, 'COVID restrictions further relaxed; Indoor Musical Shows & Betting Centers to open', 16th July 2021. <https://www.newsfirst.lk/2021/07/16/covid-restrictions-further-relaxed-indoor-musical-shows-betting-centers-to-open/>

⁸¹'Sri Lanka Kandy Perahera goes online in Covid crisis', 12th August 2021, EconomyNext. <https://economynext.com/sri-lanka-kandy-perahera-goes-online-in-covid-crisis-84828/>