

# Sri Lanka: The legal right to a lawful strike

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## **Laws and regulations governing strikes are not adequate to address the island's complex realities**

Sri Lanka is going through unprecedented trying times. While the Covid-19 pandemic is often blamed for most of the economic and social issues, some issues are the result of the authorities failing to address small issues that existed for years, if not decades.

The spate of strikes Sri Lanka saw in the past few months, especially those launched by teachers and principals as well as health sector employees, is also a result of issues that had been left unaddressed for a long time, according to the trade unions that have launched such trade union actions. Even though most of the demands that have become the basis of their strikes are understandable, what the Government and the public find it difficult to agree with is the manner in which those strikes are conducted, which often inconveniences the public and not the authorities.

The latest of these strikes – i.e. the strike action launched by 18 non-medical health sector trade unions including those of the nursing and paramedical services, public health inspectors, and medical laboratory technologists – is alleged to have inconvenienced those in poor health conditions, which the larger society has condemned.

### **Right to strike/protest**

Trade unions' decisions to launch strikes/protests was first questioned and criticised by the public, especially those who were inconvenienced by such actions. While the public criticised the abrupt manner in which strikes were launched, certain opposition to strikes emerged from the Government as well.

Recently, Justice Minister President's Counsel M.U.M. Ali Sabry was reported to have said during an interview with a private media institution that the rights of those employed in crucial economic points to strike must be abolished. These points, according to him, include the ports, the Customs, the Ceylon Electricity Board, and the Ceylon Petroleum Corporation, among others.

He had opined: "For all of them, the right to strike must be abolished. This should be done through the Constitution. The Army cannot strike. The Police cannot strike. These people strike for even the simplest of things. They are playing with the lives of the people."

This statement attracted widespread opposition from trade unionists, who said that the minister's statement was "anti democratic" and a "threat". They also demanded an apology from the minister as well as the withdrawal of the statement in question.

Meanwhile, in a context where health sector trade unions had begun strikes over a number of demands and several power outages had also occurred, the Government, on 11 February, issued a gazette notification declaring as essential services the supply of electricity, and all services pertaining to the maintenance, reception, care, feeding and treatment of patients in hospitals,

nursing homes, dispensaries, and other similar institutions. This was issued in accordance with the Essential Public Services Act, No. 61 of 1979.

However, despite this move, strikes led by health sector trade unions can be seen in several areas.

### **Strikes as a trade union action**

According to senior trade unionist, Free Trade Zones and General Services Employees' Union Joint Secretary Anton Marcus, trade union actions are a tool to bargaining with employers, and that they must be a last resort, not a first step. However, due to the nature of the culture of employee-employer discussions, which he said was very weak, most of the time, trade unions have to opt for strikes.

"There are several steps that need to be taken before launching a strike. If we take the private sector, for example, the employees who have a concern should discuss with the employers first. If they fail to reach a solution, the trade unions with which the employees in question are linked and the trade unions with which the employers are linked should hold talks. If they fail to reach a solution, they should seek the Labour Department's intervention. If all these attempts to find a solution by those directly involved in the matter fail, then, they can exercise the right to launch trade union actions." He further noted that when the above-mentioned attempts fail, a discussion is held before launching trade union actions, which, most of the time, are strikes.

The situation in the public sector, according to Marcus, is different. He noted that when it comes to the public sector, there is no proper mechanism with regard to finding solutions to issues that affect employees, and that the situation is such that solutions to issues have to be sought from the relevant minister because most issues in the public sector are political in nature.

He explained: "There are two sides to this situation - on the one hand, owing to political interests, such as the need to appoint their acquaintances to various positions after elections, ministers want to keep the situation unaddressed, while on the other hand, from the trade unions' side, unionists or employees try to use their power to resolve the issues with politicians because the proper method described above is a time consuming method."

Adding that this is a complex situation, he said that attempts have been made in collaboration with the International Labour Organisation's (ILO) Sri Lanka Office to introduce a conflict/dispute resolution mechanism to the public sector, even though both the parties - employees and employers - were not willing to proceed with the said attempts. He expressed concerns that in the public sector, disputes emerge politically, and that it needs to change.

Marcus spoke about the roles and responsibilities of employees and employers as well: "Trade unions too have a social responsibility to take into account, especially with regard to how their actions might affect the public, when fighting for their demands. If they can make an announcement regarding their trade union actions in advance, the public gets an opportunity to face the situation without being affected. But, when trade unions do not do that, the public tend to express their opposition."

The relationship between employees and employers, he said, needs to change, as the present situation has led to employers having a bad attitude about trade unions as if they are a terrorist group.

"Trade unions are part of the existing system, and the system would not exist without trade unions. Trade unions are a party we can identify as a social partner, and there should be a social dialogue with the participation of those social partners. However, these social partners also need to be

strong. If one social partner is weak and another is strong, there would be no genuine dialogue between these parties. For that to happen, trade unions must exist. Also, there is no culture of holding proper discussions between employers and employees while giving employees the due recognition.”

Moreover, Marcus noted that there are also issues on the part of trade unions, especially when they are linked to political parties and are on a mission of trying to fulfil the interests of political parties.

### **Legal situation**

Sri Lanka’s Constitution, under Article 14 of the Fundamental Rights (FR) Chapter, recognises the citizens’ freedom of speech and expression, freedom of peaceful assembly, and the freedom to form and join a trade union.

However, as per Article 15(3), these rights can be restricted on various grounds such as racial or religious harmony, while Article 15(7) says that restrictions may be imposed “in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing the due recognition of and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society”. In addition, Article 15(8) says that restrictions may be applicable to those in the armed forces, the Police force and other forces charged with the maintenance of public order when it comes to the exercise of their FR including those pertaining to strikes and protests that come under Article 14.

Sri Lanka’s law does not comprehensively discuss what laws and/or regulations are applicable to the conduct of strikes as a trade union action except in the case of strikes in essential services and under what grounds strikes can be launched. Strikes are, however, recognised by the law, and several laws mention the role of strikes in various employment-related laws.

According to the Trade Unions Ordinance, No. 14 of 1935, a “strike” is defined as “the cessation of work by a body of persons employed in any trade or industry, acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment”.

In addition, the Ordinance recognises a related situation called “lockout” which, according to the definition provided, means “the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him/her in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him/her, to accept terms or conditions of or affecting employment”.

At the same time, the Ordinance mentions several instances where strikes as a trade union action are taken into account.

In the definition of a trade union, the Ordinance says that a “trade union” means any association or combination of workmen or employers, whether temporary or permanent, having among its objects, among other things, “the promotion or organisation or financing of strikes or lockouts in any trade or industry or the provision of pay or other benefits for its members during a strike or lockout, and includes any federation of two or more trade unions”.

At the same time, the Ordinance, under Section 18, which refers to the consequence of the failure to register or of the withdrawal or cancellation of registration, says that if any trade union does not apply for registration in due time, or if the registration of any trade union is refused, withdrawn, or cancelled, then, among other things, the trade union shall not, nor shall any of its officers or agents

on behalf of the union, take part in any trade dispute or promote, organise or finance any strike or lock out, or provide pay or other benefits for its members during a strike or lockout.

The main law that imposes restrictions on strikes is the Industrial Disputes Act, No. 43 of 1950, which specifies conditions under which those employed in essential industries can launch strikes.

The Act, which says that “lockout” and “strike” under this Act have the same meanings as in the Ordinance, identifies and mentions grounds for the conduct of strikes and lockouts in essential industries under its Section 32(2). It reads: “No workman shall commence, or continue, or participate in, or do any act in furtherance of, any strike in connection with any industrial dispute in any essential industry, unless written notice of intention to commence the strike had, at least 21 days before the date of the commencement of the strike, been given in the prescribed manner and form by such workman or on his/her behalf to his/her employer.”

Under Section 40, which refers to offences, it specifies, among other things, acts pertaining to strikes amounting to offences. Under Sections 40(e), 40(f), and 40(m), the Act says that, “being bound by a collective agreement or by a settlement under this Act or by an award of an arbitrator or an industrial court and being a workman or a person other than a workman, incites or induces a workman to strike or to discontinue employment or work, with a view to procuring the alteration of any of the terms and conditions of that agreement, settlement or award”; “being bound by a collective agreement or by a settlement under this Act or by an award of an arbitrator or an industrial court and being a workman, takes part in a strike or discontinues employment or work, with a view to procuring the alteration of any of the terms and conditions of that agreement, settlement or award”; or “being a workman, commences, continues, or participates in, or does any act in furtherance of, a strike in any essential industry after an industrial dispute in that industry has been referred to an industrial court or after an application for a reconsideration of an award relating to such dispute has been referred to such court under Section 27 of the Act, but before the court has made an award in respect of such dispute or reached a decision on such application,” shall be guilty of an offence under the Act.

Another law that discusses strikes in essential services/industries is the Public Security Ordinance, No. 25 of 1947. Its Section 17, which refers to essential services, says that when a service has been declared an essential service (as per Subsection 1 of the Ordinance), any person who, by any physical act or by any speech or writing, incites, induces or encourages any other person to commit any act specified in Paragraph (b) of Section 17(2) (whether or not such other person commits in consequence any act so specified), shall be guilty of an offence, provided that any cessation of work in consequence of a strike commenced by a registered trade union solely in pursuance of an industrial dispute shall not be deemed to be an offence under the provisions of the Ordinance.

The acts in question have been specified under Section 17(2)(b): “Any person who, by violence to person or property, or by spoken or written threat, intimidation or insult of any kind to whomsoever addressed or by molestation of any description, or in any other manner whatsoever, impedes, obstructs, delays or restricts the carrying on of that service; or compels, incites, induces or encourages any other person employed in or in connexion with the carrying on of that service to surrender or depart from his/her employment (whether or not such other person does so surrender or depart in consequence); or prevents any other person from offering or accepting employment in or in connection with the carrying on of that service.”

In addition, the Essential Public Services Act says: “Where any person is prosecuted for an offence under this Act, it shall not be a defence for him/her to prove that any act or omission constituting the offence was done or omitted to be done by him/her in furtherance of a strike commenced by a trade union to which such person belongs.”

However, the abovementioned legal provisions are not the only ones that concern strikes and/or protests. During the past few months, citing public health and/or public security as grounds, permission for strikes was denied on several occasions, especially in the Covid-19 context where large gatherings were banned and/or limited. In July of last year, the Police announced that public meetings such as protests were banned until further notice, in order to control the spread of Covid-19, and that action will be taken against those who violate these regulations in accordance with quarantine regulations.

## **International regulations**

The ILO's Committee on the Freedom of Association has recognised that strike action is a right and is not simply a social act, and the ILO's Principles Concerning the Right to Strike states that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.

With regard to the right to strike and prohibitions regarding that right, the principles say: "Since the Committee first laid down its earliest principles on the subject of strikes, and given that strike action is one of the fundamental means for rendering effective the right of workers' organisations 'to organise their activities', the Committee has chosen to recognise a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. Obviously, the Committee also accepts the prohibition of strikes in the event of an acute national emergency."

In 1983, a committee of experts defined essential services as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population" which was later adopted by the ILO Committee. However, Sri Lanka has declared certain services such as ports services and the supply of petroleum-related products as essential services, which the Committee considers to be not essential services in the strict sense of the term but says could change depending on the situation.

With regard to the deprivation of the right to strike, the principles say: "When a country's legislation deprives public servants who exercise authority in the name of the State or workers in essential services of the right to strike, the Committee has stated that the workers who thus lose an essential means of defending their interests should be afforded appropriate guarantees to compensate for this restriction."

Adding that in most cases, the law lays down a series of conditions or requirements that must be met in order to render a strike lawful, the Principles also state that the Committee has accepted several prerequisites including the obligation to give prior notice, the obligation to have recourse to conciliation, mediation and voluntary arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage, the obligation to observe a certain quorum and to obtain the agreement of a specified majority, the obligation to take strike decisions by secret ballot, the adoption of measures to comply with safety requirements and for the prevention of accidents, the establishment of a minimum service in particular cases, and the guarantee of the freedom to work for non-strikers.

With regard to the provision of conciliation, mediation and voluntary arbitration, the Committee has stated: "In a large number of countries, legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is compatible with Article 4 of Convention Number 98, which encourages the full development and utilisation of machinery for the voluntary negotiation of collective agreements. Such machinery

must, however, have the sole purpose of facilitating bargaining; it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.”

According to the Committee, compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or the health of the whole or part of the population.

With regard to instances where employees are requisitioned to report to work when a strike is taking place, or a “back-to-work order”, the Committee said that “whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation” and that “where an essential public service, such as the telephone service, is interrupted by an unlawful strike, a government may have to assume the responsibility of assuring its functioning in the interests of the community and, for this purpose, may consider it expedient to call in the armed forces or other persons to perform the duties which have been suspended and take the necessary steps to enable such persons to be installed in the premises where such duties are performed”.

The current situation in Sri Lanka as far as strikes are concerned has two sides. While employees of any profession have a right to launch strikes to win their demands, especially if requests and proposals regarding their issues have not received adequate attention, the rights of the tax paying public to receive public services is also a factor that cannot be ignored. Balancing these two aspects is the challenge that the Government is facing, and delaying or denying measures to achieve that will likely worsen the situation as it has during the past few months.

At the same time, Sri Lanka needs clearer laws regarding launching strikes, to give trade unionists the opportunity to launch strikes without causing an unbearable pressure on the public, and the solutions to the ongoing trade union actions should look into such long-term measures as well.

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