



Emergency Regulations promulgated in May and July 2022

On the 17th of July 2022, Acting President (as he then was) Ranil Wickremesinghe declared a State of Emergency with effect from the 18th of July 2022, by way of Gazette Extraordinary No.2288/30. Thereafter, on the 18th of July 2022, he brought into effect the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2022 by way of Gazette Extraordinary No.2289/07. These regulations were virtually identical to the regulations by the same name that former President Gotabaya Rajapaksa brought into effect in May 2022, though two minor differences made the incumbent President's regulations more draconian in effect; Sections 408-426 of the Penal Code are added to the list of offences under regulation 12, and the period of detention of a suspect before production before a Magistrate under Regulation 17(2) has been extended to 72 hours, from 24 hours.

This document examines some aspects of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2022, to determine the impact that they may have on the rights and freedoms guaranteed under the Constitution. To this end, the document examines the Emergency Regulations pertaining to;

- 1) search, arrest and detention,
- 2) offences (including new offences),
- 3) essential services,
- 4) investigations, and powers of the Attorney-General.

It must be reiterated that even in times of crisis, power must be exercised reasonably and proportionately, and that these regulations have the potential to enable disproportionate and unreasonable exercise of power which strengthens the existing climate of repression.

Former President Gotabaya Rajapaksa, for the second time in 5 weeks, and the third time in the course of his Presidency, declared a State of Emergency with effect from the 6th of May 2022. The previous State of Emergency declared by him on the 1st of April 2022 was revoked on the 5th of April, with no Emergency Regulations promulgated thereunder. However, following the 6th May declaration of emergency, the President brought into effect the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2022, by way of Gazette Extraordinary No. 2278/23.

While there were claims that public protests had to cease on account of the declaration of the State of Emergency, such claims were false, as a declaration of emergency in itself does not impact the existing laws and fundamental rights guaranteed by the Constitution. The declaration of emergency allows the President to promulgate emergency regulations which can override any law, but cannot override the Constitution. However, there are limited grounds for which the regulations can override some of the Fundamental Rights guaranteed in the Constitution (as per Article 15(7) of the Constitution). Some of the regulations contained in the recent Emergency Regulations may have the effect of suppressing the freedoms which make up the right to protest, and the free expression of dissent.

The Regulations can however be challenged by way of a Fundamental Rights Application. The courts have previously determined that Emergency Regulations must meet standards of reasonableness and proportionality. Further, the Regulations would lapse unless they are approved by Parliament within 14 days (Article 155(6) of the Constitution). The Proclamation of Emergency too must be approved by Parliament within 14 days or shall expire. The previous proclamation from the 1st of April was revoked soon after it was made and was not tested before Parliament, but on the 7th of April 2022 the Supreme Court granted leave to proceed in several Fundamental Rights Applications which, inter alia, challenged the legality of the declaration of a State of Emergency. On the 6th June 2022, the Centre of Policy Alternatives filed a Petition in the Supreme Court challenging the 6th May 2022 declaration of Emergency, and the Emergency Regulations that followed.

While Sri Lanka has been facing a situation of economic crisis for months, none of the instances in which the Presidents declared a State of Emergency warranted such a declaration. In August 2021, the Emergency was declared when food shortages first began to arise, and CPA commented on the specifics of the declaration and why it was unnecessary and excessive. In April 2022 emergency was declared when mass protests were due to be held against the President, for his own personal security rather than for any benefit to the public.

The incumbent President too appears to have declared a State of Emergency for similar collateral reasons, that are not a threat to national or public security. Thus, both this President and the former have shown a pattern of abusing emergency powers, thereby vesting more power in the already over-powerful executive.

Search, arrest and detention

Regulation 11 -

This regulation gives the police and the military sweeping powers with regard to search and arrest in relation to several specified offences. According to the clause;

Any police officer or any member of the armed forces can;

1. Search
2. Detain for the purpose of search; or
3. Arrest

Any person who;

1. Is committing;
2. Has committed;
3. Or they have reasonable grounds to believe is concerned in or has committed any of the following offences in the Penal Code;

Section	
345	Sexual harassment
354	Kidnapping
355	Kidnapping or abducting in order to murder
356	Kidnapping or abducting with intent secretly and wrongfully to confine a person.
357	Kidnapping or abducting a woman to compel her marriage
358	Kidnapping or abducting in order to subject a person to grievous hurt, slavery
359	Wrongfully concealing or keeping in confinement a kidnapped person
360	Kidnapping or abducting a child under ten years with the intent to steal movable property from the person of such child
360A	Procreation (for prostitution or sexual intercourse)
360B	Sexual exploitation of children
360C	Human Trafficking
364	Rape
365	Unnatural offence (carnal intercourse)
365A	Acts of gross indecency between persons (the offence used to prosecute sexual acts between persons of the same sex)
365 C	Grave sexual abuse
427	Criminal trespass
428	House-trespass
429	Lurking house-trespass
430	Lurking house trespass by night
431	"House-breaking
432	"House-breaking by night
433	- Variations of trespass, and house-breaking based on the intention, time etc they are
446	committed

It is unclear what relationship some of the offences on the list, especially the sexual offences, bear to any instant unrest, and why they have been included in these regulations. The inclusion of sections 365 and 365A, which have been used to intimidate and harass the LGBTQIA community in the past, is especially concerning.

When the arrest has been by a police officer, the arrested person must be taken to the nearest police station (Reg. 11 (3)). However, when the arrest is by a member of the military, the arrested person only needs to be handed over to the nearest police station within 24 hours of arrest (Reg. 11 (2)). This means that the arrested person can be held in custody by the military in an undisclosed location for up to a day.

This is made even worse by Reg. 11 (6) which says that the arresting officer only has to report the arrest within 24 hours (a police officer to the OIC of the police station in the area and a military officer to the Commanding Officer of the area in which the arrest is made). A combination of these clauses means that an arrested person may have no protection of the law for up to 24 hours, and even their families or lawyers may not know where they are or have access to them within that time.

When the police/military officer is conducting the search, they can also question the person being searched or any other person present in the place or vehicle with regard to matters connected to the purpose of the search (Reg 11(4)), and such person is bound to furnish such information within their knowledge (Reg 11(5)). If the person being searched is a female, she can only be searched by a female officer (Reg. 11(8)).

The police/military officer is also permitted to break any inner or outer door or window to enter the place or vehicle they seek to search (Reg. 11(7)), and while they can seize or detain any property under this regulation, a receipt must be given to the person whose custody such property was in (Reg 11(10)).

While Regulation 11 purports to relate to search and arrest, sub regulations (11) and (12) provide powers that go beyond this scope. Reg. 11(11) gives the President the power to make orders prohibiting any public procession or meeting in any part of the country, along with any exceptions he may specify. Reg. 11(12) allows the IGP to make an order that within a time specified, no person shall be in any public place except with the permission of the OIC of a Police Station in any part of Sri Lanka.

The procedure for the detention of a person arrested is found in Regulation 17. A person arrested under the regulations may be detained for the purpose of investigation in terms of an Order issued by a Deputy Inspector General of Police, which shall stipulate conditions for the detention, for a period of up to two weeks (Reg 17(1)).

Regulation 17(2) provides that a person arrested should be brought as soon as possible to a police station and can be detained there for up to 72 hours, after which they must be produced before a magistrate, ‘unless an Order for his detention has been made by Deputy Inspector General of Police in terms of those regulations’. Under President Rajapaksa’s regulations, such detention was allowed for only 24 hours, however, under President Wickremesinghe’s regulations, the period of detention has been extended to 72 hours.

Furthermore, if a detention order is issued by a “Deputy Inspector General of Police in terms of those regulations” an individual can be detained for up to two weeks before they are produced before a court. This provision is even more stringent than the detention provisions in the Prevention of Terrorism Act.

The family of the detained person can however communicate with them, and their lawyer can access them and make representations on their behalf (though subject to the conditions stipulated by the Deputy IGP in the order) during this administrative detention (Reg 17(3) and (4))

Offences

Regulation 12

This regulation attaches more stringent punishments to several offences in the Penal Code, when they are, in the opinion of the Attorney General, committed in furtherance of or in connection with or in the course of a civil disturbance or racially motivated riots prevailing at or about the time of the commission of such offence (Reg 12(3)). As per Reg. 12(1), any person who;

- Destroys or damages property or diminishes its value or utility (not specified that it must be public property),
- Causes or attempts to cause death or injury,
- Commits criminal intimidation or assault,
- Commits theft from any premises which have been left vacant, unprotected, damaged or destroyed,
- Commits any of the sexual offences specified in Regulation 11(1);
- Commits theft, extortion or robbery,
- Commits an offence contained in sections 408 – 426 of the Penal Code relating to mischief and the illegal removal of wrecks,
- Commits any of the offences relating to property in Regulation 11(1) or attempts to remove any property from such premises,
- Is part of an unlawful assembly in terms of section 138 of the Penal Code,

commits an offence, and can upon conviction by a High Court be sentenced to life imprisonment or imprisonment for a period of 20 years. What this section does is attach a sentence far harsher than the sentence provided for in the Penal Code, for offences already found in the Penal Code. For instance, the punishment for criminal trespass under the Penal Code (section 433) is imprisonment for up to 3 months or a fine of up to a thousand rupees, and under these regulations, an offender can be sentenced to life instead.

It is noteworthy that the inclusion of offences under sections 408 – 426 [described above] of the Penal Code in President Wickremesinghe's regulations were not found in President Rajapaksa's regulations.

Additionally, the section seeks to impose a mandatory minimum sentence of twenty years. Most offences in our law only provide a maximum sentence that a judge cannot exceed, giving the judge discretion to issue any sentence suitable below such maximum term. Here, however, the sentence does not read 'up to twenty years'. To allow such harsh sentences with no basis for doing so and no connection to national security is an unreasonable exercise of emergency powers.

Further, section 96 of the Penal Code provides instances in which causing the death of another person constitutes private defence (self-defence). Reg.12(2) extends these situations to any instance where an offence in Reg 12 above is being committed. Thus, even if an act of theft is being committed during the circumstances provided, the owner of the property can cause the death of the person committing the theft and claim it to be an act of self-defence.

New Offences

Regulations 13 - 16 and 18 – 22, 25 and 38

The Regulations contain several other offences which are not a part of ordinary law. They are;

Regulation 13 - endeavouring to cause disaffection among public officers, those engaged in the service of the republic or those engaged in public services (including inducing such person to breach their duties).

This regulation can be used to suppress the freedom of expression and the freedom of association (the right to protest), as what amounts to endeavouring is not clear in the regulations.

Regulation 14 - publicly displaying or distributing any poster, handbill or leaflet which are prejudicial to public security, public order or the maintenance of supplies essential to the life of the community.

This is a clear violation of the freedom of expression, and the right to information. The regulation can be abused to suppress the dissemination of any information that is prejudicial to the state, even if that information is true and accurate.

Regulation 15 - either by word of mouth or digitally (including on social media) communicating or spreading any rumour or false statement or any information or image or message which is likely to cause public alarm, public disorder or racial violence or which is likely to incite the committing of an offence.

The wording of this particular Regulation is unclear, but it appears that it is not only false statements that come within the ambit of the regulation but also any information or image which may cause public alarm, disorder etc. This would amount to a violation of the freedom of expression and the right to information. While the Emergency Regulations in place from 2005 during the war had the provision to prevent rumours and false statements, it did not extend to factual information, thus making the 2022 regulations more severe in their application.

Regulation 16 - making a false statement, when a request or order for information is made under a regulation which requires that information is given, or in terms of a declaration or other document required by a regulation or an order under a regulation.

Regulation 18 - attending at or being near the residence, business or any place that another happens to be at, in such a manner that amounts to intimidate any person in that house or place or to obstruct the approach thereto or egress therefrom, or to lead to breach of the peace.

Intimidation is defined as creating a reasonable apprehension of injury to that person or a family member (including any injury or damage caused by a wrongful action to a person or to his business, occupation, employment or other source of income) or their property. This is a wide definition which could be used to curb the right to protest, the freedom of expression, and the freedom of movement.

Regulation 20 - without lawful authority, causing any obstruction or damage to any public road, bridge, culvert of any public road, to any railway or to a public transport vehicle.

Again, this regulation may in effect be detrimental to the freedom of association, impacting the right to protest.

Regulation 21 - attempting, aiding and abetting, or conspiring to commit one of the offences in the Regulations is also made an offence.

Regulation 22 - giving assistance to a person, knowing or reasonably believing them to have committed an offence under these regulations, with the intention of preventing, hindering or interfering with the apprehension, trial or punishment of that person for the said offence.

Regulation 25 - if a person becomes aware of an intention or an attempt of a preparation to commit, or the commission of an offence under any emergency regulation, they must give information thereof to the nearest Grama Niladhari or to the Officer-in-charge of the nearest police station. Failure to do so is made an offence.

This Regulation is similar to Section 21 of the Code of Criminal Procedure (CCP), however, CCP provision is only applicable to Penal Code offences. The above Regulation contributes to the existing climate of surveillance and intimidation.

Regulation 38 - Failure to furnish any article (including books, accounts, documents) when requested by or on behalf of a competent authority, when the authority or person making the request is of opinion that it is necessary or expedient to obtain or examine in the interests of the national security or the maintenance of public order or for the purposes of any emergency regulation

If an offence under these regulations is committed by a group of persons, then, in the case of a body corporate all the directors, or in the case of a firm all the partners shall be deemed to be guilty of the offence unless they prove that it was committed without their knowledge (Reg. 23).

Any person failing to comply with a Regulation, or any order/direction made thereunder is guilty of an offence, and shall be tried before a High Court without a jury, or a Magistrates Court, and can be sentenced to rigorous imprisonment for 3 months to 5 years, and to a fine between Rs. 500 - and Rs. 5000.

Regulation 12(3) provides that section 306(2) of the Code of Criminal Procedure (CCP) shall not apply when a person is convicted of an offence under the Regulations. This is the section which allows a judge, 'having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed', to conditionally discharge the offender, on their recognizance to be on good behaviour (though liable to be sentenced for the offence if necessary within a period of 3 years from the time of the conditional release).

Omitting this section of the CCP is an ouster of judicial discretion, as it is the judge who hears the case that has the discretion to determine the nature of the sentence which may be most just and equitable.

Essential Services

Regulations 8 - 10

Under the Regulations the President can appoint a Commissioner General of Essential Services [CGES] who is tasked with the coordination of all activities relating to the supply and maintenance of essential services (Reg. 8(1)). The CGES is able to exercise the power conferred on any other person under the Regulations in carrying out their duty. The CGES is also able to delegate power to others in order to carry out assigned functions (Regs. 8(3) and (5)).

The President may by Order published in the Gazette, declare any service to be an essential service, if it appears to be so necessary for the maintenance and preservation of public order and for the maintenance of supplies and services essential to the life of the community (Reg 9(1)). When a service has been declared an essential service, then;

If a person engaged in that service *inter alia* fails or refuses to attend work, refuses or keeps away from work, or does not perform their duties according to the terms and conditions of service or fails to work, even if such work is outside normal work hours, they will be considered to have been terminated or resigned from service, and additionally they will be convicted of an offence, even if such absence or refusal to work had been due to abetting a strike or organisational activity.

Further, any person who among other things interrupts, obstructs, delays or prevents the maintenance of such service or a person going to their workplace, or incites, induces or encourages a person not to report to duty, to leave service (even if they don't actually leave such service), or to set up a parallel service (in the event they are employed in a government department) or prevents the accepting or offering of employment, shall be guilty of an offence punishable by a term up to 3 years. This is even applicable when the encouragement or persuasion is done by any act, speech or article.

It is unclear what the threshold for meeting the requirements of ‘incites’, ‘induces’ or ‘persuades’ are, raising the concern that even a speech or article which critiques the functioning of an essential service may result in the author of the same being convicted of an offence.

In addition to the sentence, the Regulations say that when any person is found guilty of the offences in Regulation 9, the court SHALL order that all property, movable or immovable, of that person shall, by virtue of such conviction, be deemed to be forfeited to the Republic (even if it had been disposed of after these regulations came into force) (Reg. 9(5)).

Additionally, a person who works in a service declared essential can ‘whenever deemed to be necessary, be requisitioned’ by the secretary to the Ministry of Defence, in consultation with the Minister in charge of the relevant service (Reg. 9(6)).

The President can also appoint a competent authority in relation to any essential service, and that competent authority can order that no person can enter or remain in any place or premise used for the maintenance of that essential service, without permission. If a person contravenes this order, they can be removed from the place or premise by the Police, Armed Forces, or any other person authorised to do so.

Investigations and Trials

Regulations 25 - 35

A police officer or a person duly authorised under the emergency regulations investigating into an offence under any emergency regulation shall, notwithstanding anything to the contrary in any other law have, the right to question any person, including a person detained or held in custody under any emergency regulation and to take such person from place to place for the purpose of such investigation during the period of such questioning (Reg 28(1)). While the above regulation does not explain who “a person duly authorised” may be, according to Regulation 37(1), any other officer authorised by the Commander of the Army, Commander of the Navy or Commander of the Air Force can question detainees and it shall be the duty of the person so questioned to answer the question addressed to him.

Further, during the period that any person is held in detention or custody, a police officer investigating an offence under any emergency regulation shall have a right of access during reasonable hours to any such person for the purpose of such investigation (Reg 29). Similar provisions are contained in Section 115(4) of the Code of Criminal Procedure (CCP) in relation to Penal Code offences. However, as per Regulation 35, Chapter XI of the CCP (which details provisions related to the information given to police officers and inquirers, and their powers to investigate, including Section 115) shall not apply to any investigations conducted under any emergency regulations.

Further, under the Section 115(4) of the CCP, court authorization is required to take an accused from place to place for questioning, and to have a right to access during reasonable hours. No such requirement of judicial sanction is included in Regulations 28 and 29. In light of various allegations of torture in custody and in detention centres levelled against the police, implementation of the above regulations, especially in the absence of court supervision, is a cause for grave concern.

Regulation 37(2) allows such other officers to remove such a person from any place of detention or custody and keep him in the temporary custody of such officer for a period not exceeding seven days at a time for questioning or “any other purpose connected with such questioning.” These vaguely-worded provisions can be broadly construed, and compound concerns about the misuse of these regulations to violate freedom from arbitrary arrest and torture, and restrict access to due process guarantees provided for detainees.

Further, a duty is cast on persons to give all assistance to a Police Officer or to other person duly authorised, investigating into an offence under any emergency regulation and every person questioned during an investigation shall truthfully answer all questions put to them, and notwithstanding anything to the contrary in any other law, shall disclose all information including the contents of any document, touching the subject matter of the investigation, irrespective of the capacity in which such person has received such information or knowledge of the contents of such document (Reg. 28(2)).

There is also a duty cast on person questioned during an investigation to deliver to the police officer or a person duly authorised to investigate into an offence under any emergency regulation any article or other thing including a document in the custody or possession of such person when directed so to do by such police officer or person duly authorised (Reg. 28(3)). Any person who contravenes the provisions of this regulation or breaches any duty imposed thereunder commits an offence under regulation 49 of these regulations (Reg. 28(4)).

There are concerns about the effect of the duties cast in this Regulation on privileged communication (Attorney-Client/Doctor-Patient).

Regulation 30 provides that the powers of a police officer under any emergency regulation shall be in addition to, and not in derogation of, his powers under any other written law. The emergency

regulations allow more powers and leeway to the police, which is alarming in light of rampant militarisation and securitisation already underway, as well as documented accounts of police abuses, and disproportionate force used against peaceful protesters in the recent months

Regulation 34(2) provides that no person suspected or accused of having committed an offence in terms of these regulations be admitted to bail except under exceptional circumstances.

Role of the Attorney-General

The Attorney-General may decide in which court the offences alleged to have been committed by persons under the emergency regulations, or under any other written law where the acts or omission constituting such offences were consequent on, or arose out of, or were done or omitted to be done in, whether directly or indirectly, the exercise or performance, or the supposed exercise or performance, of any power or duty under such regulations, shall be inquired into or tried. Such court shall be a court which would have had jurisdiction if such offences were committed within the jurisdiction of such court (Reg. 32).

As such, the written sanction of the Attorney-General is a requirement for instituting prosecution in the Magistrate Court, but the President may by order declare that this provision shall not apply in respect of any offence against any such emergency regulation as may be specified in the order and accordingly, so long as such order remains in force, that paragraph shall not apply to any such offence (Reg. 33).

Miscellaneous

Regulation 36

As per subsection (1), during the continuance in force of this regulation, any police officer of a rank not below that of a Sergeant, any member of the Sri Lanka Army of a rank not below that of a Corporal, any member of the Sri Lanka Navy of a rank not below that of a Leading Seaman, or any member of the Sri Lanka Air Force of a rank not below that of a Corporal, may order any person or persons in or about any public road, railway, public park, public recreation ground or other public ground, seashore, or in or about, or in the vicinity of, the premises of any public building or Government department, to remove himself or themselves from that place and it shall be the duty of such person, or each such person, as the case may be, to comply with such Order.

Moreover, according to subsection (2), in the event that any person/s do not comply with the order, such officer may proceed to give effect to such order by force including armed force, and may cause such person to be removed or arrested and confined

This regulation may restrict the freedom of movement, assembly and association while also adding to the broad powers and leeway afforded to the military by way of the regulations as a whole. The regulation also raises concerns about the leeway given to use of disproportionate force in order to enforce such orders

As per subsection (3), during the continuance in force of this regulation, sections 306 (1), (2) and (4) of the Code of Criminal procedure Act, No. 15 of 1979, shall not apply to or in relation to any person who is charged with, or is convicted of, any offence under any emergency regulation. As a result of the above provision, conditional discharge by court “having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offense, or to the extenuating circumstances under which the offence was committed...” is not afforded to persons charged with or convicted of an offence under these regulations.

Regulation 39

Exempts members of the armed forces from certain provisions of the Motor Traffic Act.

Regulation 40

(1) The President may, by Order, appoint any person, by name or by office, to be the Coordinating Officer for any area in Sri Lanka as specified in the Order.

(2) Where a Coordinating Officer is appointed by the President by Order for any area in Sri Lanka, such Officer shall exercise, perform and discharge in that area all the powers, duties and functions conferred or imposed on a Government Agent under any written law or otherwise, and for that purpose every reference shall in its application in case of that area, be construed as a reference to such Coordinating Officer.

(3) The President may, by Order, appoint any person, by name or by office, to be Coordinator-in-Chief to exercise supervision over the Coordinating Officer.

(4) The President may appoint, by name or by office, such Deputy Coordinators-in- Chief as may be necessary to assist the Coordinator in Chief for the performance of his duties under these regulations.