



CENTRE FOR POLICY ALTERNATIVES
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மாற்றுக் கொள்கைகளுக்கான நிலையம்

Initial Comment

The Declaration of a State of Emergency and Regulations for the Maintenance of Essential Supplies and Services

2 September 2021

This document will briefly discuss;

- i. The legal framework for declaring a State of Emergency
- ii. Objectives of Emergency (Provision of Essential Food) Regulation, No. 1 of 2021 [these Emergency Regulations]
- iii. The scheme for the management of food supplies in these Emergency Regulations.
- iv. The competent authority for the seizing of food supplies.
- v. Whether these Emergency Regulations provide for an offence of hoarding food stocks.
- vi. The requisition of personal services.
- vii. Powers of the Commissioner General of Essential Services
- viii. What is an essential service under these Emergency Regulations?
- ix. What is the effect of a service being declared an essential service under the Regulations?
- x. Other legal provisions under which services could have been declared as essential services.
- xi. The implications of declaring a service an essential service under these Emergency Regulations as opposed to other laws.

Background

On the 30th of August 2021, by way of Gazette [2243/1](#), President Gotabaya Rajapakse issued a proclamation under Section 2 of the Public Security Ordinance (Chapter 40) as amended. In the Proclamation, the President states that '*I am of the opinion that it is considered expedient to do so in order to ensure the Public Security and well being and maintenance of supplies and services essential to the life of the community in view of the prevailing emergency situation in Sri Lanka in the context of the COVID – 19 pandemic now steadily on the rise throughout Sri Lanka*'. It has widely been reported that private banks are unable to finance food imports due to foreign exchange shortages, and as such a food shortage is expected. This is amidst rising food prices both locally and internationally¹. However, the government [claims](#) there are no shortages but only distribution issues with vendors hoarding stocks.

¹'Sri Lanka declares food emergency as forex crisis worsens', Al Jazeera, 31st August 2021
<https://www.aljazeera.com/news/2021/8/31/sri-lanka-food-prices-emergency-forex-crisis> ; Damith Wickremasekara, 'Food rationing on the cards to ensure fair prices', The Sunday Times, 29th August 2021.
<https://www.sundaytimes.lk/210829/news/food-rationing-on-the-cards-to-ensure-fair-prices-453941.html>

The present comment is prepared by the Centre for Policy Alternatives (CPA) to briefly explain the legal basis for the declaration of a state of emergency and specifically Emergency (Provision of Essential Food) Regulation, No. 1 of 2021 published in Gazette [2243/3](#) dated 30th August 2021.

Section 2 of the Public Security Ordinance (PSO) empowers the President to declare a State of Emergency in two situations; when the President is of the opinion that it is expedient to do so-

- 1) in the interest of public security and the preservation of public order, or
- 2) for the maintenance of supplies and services essential to the life of the community.

CPA has previously commented on the constitutional and legal scheme of a State of Emergency and what it entails, in the context of the State of Emergency that was declared by President Maithripala Sirisena in 2018².

Unlike the previous emergencies that were declared following unrest in 2018 and the Easter Sunday Bombings in 2019,³ the present declaration of emergency appears to be reliant on the second component relevant for the maintenance of supplies and services essential to the life of the community. However, CPA notes that regardless of the reason for the declaration of a State of Emergency, once such a declaration is made it gives the President wide powers with only limited checks and balances. With the declaration of a State of Emergency on 30th August 2021, the President is now able to promulgate Emergency Regulations dealing with any subject at any given time. Considering Sri Lanka's history with emergency, other security related laws and legacy of repression, this raises serious concerns. The implementation of the present regulation and possible future steps require close attention.

Emergency (Provision of Essential Food) Regulation, No. 1 of 2021

By the same Proclamation declaring Emergency, the President declared that the Emergency (Provision of Essential Food) Regulation, No. 1 of 2021 were to come into force. These regulations were published in Gazette [2243/3](#) dated 30th August 2021, and contain several provisions relating to the management of 'essential services'. Many of the regulations contained therein bare similarity to regulations contained in the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005, which were in operation for several years⁴. The regulations provide for the appointment of a Commissioner General of Essential Services (CGES) to implement and co-ordinate all activities relating to the maintenance of essential services [vide regulation 9].

By Gazette [No. 2243/5](#) dated 30th August 2021, Major General Niwunhellage Don Senarath Piyasiri Niwunhella⁵, was appointed to this role.

² Dr. Asanga Welikala, 'Understanding a State of Emergency: March 2018', Centre for Policy Alternatives, March 2018. <https://www.cpalanka.org/understanding-a-state-of-emergency-march-2018/>

³ 'UNDERSTANDING EMERGENCY: EASTER SUNDAY ATTACKS 2019', Centre for Policy Alternatives, 2019. https://www.cpalanka.org/wp-content/uploads/2019/04/QA_SoE.pdf

⁴ Gregory Norton, The Emergency Regulations 2005, consolidated upto 2007, available at - <https://www.refworld.org/pdfid/471712342.pdf>

⁵ 'Army Chief Recalls Battlefield Gains & Extends Best Wishes to Major General Niwunhella', Sri Lanka Army, January 2021. <https://www.army.lk/news/army-chief-recalls-battlefield-gains-extends-best-wishes-major-general-niwunhella>

CPA notes that this appointment is the latest step in side-lining the civilian administration and compounding fears of entrenching militarisation in the guise of an economic crisis⁶.

Objectives of the Regulations

The objectives of the regulations are purportedly *'to prevent the hiding, interrupting the distribution, charging high prices of especial food bulks including rice and sugar and causing market irregularities which cause inconvenience to the consumers and the welfare of the people'*. To that end, they provide that *'authorized officers or authorities shall cause to buy the bulks of essential food including paddy, rice, sugar based on the guaranteed price or the imported prices at the customs and, supply to the public at a reasonable price and the State banks shall take measures to recover the loans borrowed from such banks to buy such bulks from the creditors.'* [Vide Regulation 2].

However, upon observing the scheme of the Regulations, it appears that their purpose is not only limited to the purchase of foods and distributing them to the public. While parts I and III of the regulations appear to serve this purpose, part II of the Regulations create a scheme for the management of 'essential services'.

Powers and procedures for the management of food supplies.

What is the scheme for the management of food supplies?

While the objective of the regulation purports to relate to food supplies, CPA notes that the scheme of the regulations do not place heavy emphasis on the procedure by which 'authorities shall cause to buy the bulks of essential foods', raising concerns of possible arbitrary steps that may be taken in the absence of clear procedures.

What is provided is where a competent authority deems it necessary to seize any essential food items including paddy, rice and any vehicle transporting such items for the purpose of providing essential supplies and services to the public, such competent authority may seize such food items including paddy and rice and any vehicle transporting such commodities. [vide regulation 12(1)]. While this section provides no guidance as what the competent authority must consider when deeming it necessary to do so, the following section suggests that it must be for the purpose of maintaining public order and for providing essential supplies and services to the public.

The regulations stipulate that the competent authority must take into account the 'state certified prices or custom specified prices' under the instruction of the CGES when providing these supplies to consumers [vide regulation 12(2)]. The competent authority can also make orders relating to vehicles used for the transport of food supplies [vide regulation 12(3)], and can get the assistance of a police officer or public officer when carrying out functions under regulation 12 [vide regulation 12(4)].

⁶ CPA has previously commented on the increasing militarisation, including of the Pandemic response. Bhavani Fonseka & Uvin Dissanayake, 'Sri Lanka's Vistas of Prosperity and Splendour: A Critique of Promises Made and Present Trends', Centre for Policy Alternative, July 2021. <https://www.cpalanka.org/wp-content/uploads/2021/07/Sri-Lankas-Vistas-of-Prosperity-and-Splendour-A-Critique-of-Promises-Made-and-Present-Trends.pdf>

Who is the competent authority for the seizing of food supplies?

Regulation 6(1) provides for the appointment of a 'Competent Authority', and states that; *'For the purpose of any emergency regulation, any person may be appointed as the competent authority generally for the whole Sri Lanka or for any area or the place as specified in the document by which such person is appointed: Provide that, the appointment of two or more persons as the competent authority for any purpose of any regulation or any specified area or place, shall not be deemed to be prevented by any preceding provisions of this regulation'*.

However, Regulation 12(5) provides that 'for the purpose of regulation 12, the "competent authority" means the Chairman of the Consumer Affairs Authority, Inspector General of Police or a District Secretary of any District'. It thus appears that the wider power of appointing 'any person' as the competent authority under regulation 6 is restricted by the narrower clause specifying who can be a competent authority under clause 12(5)⁷.

Is there an offence of hoarding food stocks?

There is no single provision which explicitly makes it an offence to hoard food. However, regulation 11(1) provides for that *'where any premises is alleged to have been used for the commission of an offence or in connection with the commission of an offence under these regulations, the Superintendent of Police of the relevant area shall take such premises which has been used to store essential food stocks, including paddy, rice and sugar, into his possession and remove any person found or residing therein and shall prevent and protect such premises from unauthorized entry by any person'*, thus suggesting that there is such an offence as per the regulations.

It is an offence as per the regulations to contravene or fail to comply with an order made under the regulations [vide regulation 13(2)]. It is noted however that under regulation 12 the competent authority is only empowered to make an order relating to the use of vehicles, and no reference to orders that can be made relating to hoarding stocks is set out therein. The offence may be intended to relate to the decision of the competent authority to seize necessary food items under regulation 12(1), but this has not been made clear through the scheme of the regulations as there is no reference to an order.

What is the requisition of personal services?

The regulations provide that *'the President may direct or authorize one or more authorities or officers determined in that behalf to direct any person by warrant under his hand to do any work in aid of or in respect of the maintenance of an essential service or to provide any personal service'* [vide regulation 13(1)]. This is similar to regulation 10 of the 2019 Emergency Regulations which were introduced in the aftermath of the Easter Sunday Bombings.

Thus, any person can be directed to do any work, in aid or in respect of the maintenance of an essential service or to provide any personal service, and while the term 'order' is not used in the instant regulations unlike the 2019 Emergency Regulations, it is likely that the failure to comply with such order would be an offence.

⁷ The only instance in which a 'competent authority' is referred to in the Regulations are in reference to regulations 11 and 12, both of which specify who the authority must be. It thus raises questions whether clause 6, which is identical to clause 5 of the 2005 Emergency Regulations was a superfluous addition.

Commissioner General of Essential Services

The CGES is appointed by the President [vide regulation 9(1)] and has the power to appoint deputy or assistant commissioners [vide regulation 9(2)], and delegate any powers duties or functions vested in him, to them [vide regulation 9(3)]. Regulation 9 of the instant regulations are similar, though not identical, to regulation 9 in the 2005 Emergency Regulations. It is the duty of the CGES to implement and co-ordinate all activities relating to the maintenance of essential services. The CGES has wide powers when doing so, as he can exercise any power assigned to the secretary of the Ministry of Defence, a competent authority under regulation 11, a competent authority under regulation 12 (for the purposes in that regulation) or an authority under regulation 13 [vide regulations 9(4)]. In carrying out his functions, the CGES can also give directions to the competent authority under regulation 11, or any authority or officer assigned powers under regulation 13. Despite the wide powers given to the CGES, the functions he is expected to carry out are not clearly described in the regulations.

Part II of the Regulations relating to essential services

What is an essential service under the Regulations?

Part II of the Regulations deal with 'essential services'. These are defined as '*any service which is of public utility or essential for the life of the community declared by the President and includes any Department of Government or branch thereof and which is specified in the Schedule hereto and shall also include any service which may thereafter be declared in terms of regulation 10 of these regulations*' [vide regulation 3].

The schedule to the Regulations state '*The employment of work or labour required to perform any service for the collection, storing, refining, transporting and distributing of the essential consumer items such as paddy, rice and sugar required for the due maintenance of the day today life of the general public.*'

While the definition also refers to regulation 10, the said regulation does not appear to confer any additional power on the President to declare a service as essential. The section too requires that an essential service is one specified in the schedule.

Thus, a reading of these provisions together suggests that the regulations would only apply to essential services that fall within the categories in the schedule, i.e., for the collection, storing, refining, transporting and distributing of the specified essential consumer items, if they are declared as essential services. An attempt to declare an unrelated service as an essential service would thus be *ultra vires* the Regulations.

This is in contrast with the 2005 Regulations, where, by regulation 40, the President could declare any service to be an essential service for the purpose of the regulations, by way of Gazette. The present regulations thus appear to be narrower in application.

What is the effect of a service being declared an essential service under the Regulations?

There are two significant effects of a service being declared an essential service under the regulations.

The first applies to persons engaged in any duty or employed in any service in such essential service after the 30th August 2021.

If such persons *inter alia* fails or refuses to be present at work, fails to work or leaves their place of work, or does not perform their duties according to the terms and conditions of service or fails to work, [vide regulation 10(1)(a)] 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 organizational activity.

Additionally, the President can declare any essential service to be a 'specified service', where employees can be required to work outside normal working hours or on holidays, and if they fail to do so as directed, they too will face the same consequences [vide regulation 10(1)(b)].

The second is that any person who *inter alia* interrupts, obstructs, delays or prevents the maintenance of such service or a person going to their workplace, or persuades 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 [vide regulation 10(2)(a)]. This is even applicable when done the encouragement or persuasion is done by any act, speech or article [vide regulation 10(2)(b)].

It is unclear what the threshold for meeting the requirements of 'encouragement' or 'persuasion' 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.

Could the declaration of essential services have been done under other existing laws?

Considering Sri Lanka's past experience with emergency and the broad powers provided to the executive, questions must be posed as to why a state of emergency was declared and whether economic justifications are being used to suppress fundamental rights with implications for Sri Lanka's constitutional democracy. CPA also raises these questions in a context where Sri Lanka has existing laws that provide recourse in particular situations, without resorting to declaring a state of emergency and promulgating emergency regulations⁸.

In particular, Section 17 of the PSO provides for the declaration of services as essential services in certain circumstances. Noteworthy is that the President is able to exercise this power under the PSO without declaring a State of Emergency. The section bears many similarities to the Act though the provisions are not identical and the emergency regulations are wider in application. Four significant differences are that;

- i. Under the PSO, if the cessation of work was for a strike organized by a registered trade union relating to an industrial dispute it would not be deemed to be an offence,
- ii. While the regulations require that a person is 'persuaded' or 'encouraged', the PSO requires a higher standard as it must be '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',

⁸ CPA has previously commented on alternate laws that could have been used in responding to the Covid-19 pandemic. – 'Brief Guide II- Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', Centre for Policy Alternatives', April 2020. <https://www.cpalanka.org/wp-content/uploads/2020/04/FINAL-Presidential-Task-Force-on-COVID19-April-2020-copy.pdf>

- iii. The PSO expressly provides that it will be a defence for an employee to show that their absence was due to illness or a lack of transportation, and the regulations make no such provision,
- iv. The PSO does not contain a provision similar to the regulations for declaring an essential service a 'specified service' where standard working times and holidays do not apply.

Further, CPA also observes that while regulation 10 contains similar provisions as regulation 40 of the 2005 Emergency Regulations, it also bears significant similarity to the provisions of the [Essential Public Services Act No. 61 of 1979](#).⁹ Thus, it is pertinent to question whether the provisions of the Act could not have been used, as opposed to the promulgation of Emergency Regulations.

Conclusion

CPA emphasises the importance of ensuring that the extra ordinary powers arrogated to the executive through these emergency regulations have to be used purely for the specific purposes recognised by the regulations¹⁰. CPA also reiterates the point that emergency regulations must be recognised as a temporary conferral of extra ordinary power for the government during times of acute crisis. It should not be considered as a substitute for the "normal legal regime". As such the State of Emergency should be in force only for a limited period of time. Furthermore, the government has to ensure that legislation with adequate safeguards is put in place to prevent anti-competitive practices and the use of emergency regulations must not be a substitute for effective consumer protection framework nor any other steps that must be provided by law. Finally, it is incumbent on all citizens to scrutinize and democratically challenge any measures that stifle dissent, curtail civil liberties and threaten Sri Lanka's constitutional democracy.

⁹ One difference being that under the Act there is no provision to consider the employee as having resigned or their services being terminated

¹⁰ Namely to "to prevent the hiding, interrupting the distribution, charging high prices of especial food bulks including rice and sugar and causing market irregularities"