**Call for Input: Decriminalization of Homelessness and Extreme Poverty**

*Special Rapporteur on the right to adequate housing, Balakrishnan Rajagopal*

*Special Rapporteur on extreme poverty and human rights, Olivier de Schutter*

***Submission by***

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* **Laws or regulations that prohibit begging, eating, sleeping, or performing personal hygienic activities in all or certain public places, including their texts and whether they are still in force and enforced.**
* **Laws or regulations that allow for petty offences the detention or imprisonment of individuals who are unable to pay the respective fine.**
* **Comments whether any of these laws and regulations may violate international human rights law.**
1. **Arbitrary arrest and detention under the Vagrants Ordinance and House of Detention Act**

***Legal Provisions***

* Section 3 of the Vagrants Ordinance (No 4. of 1841)states that:
1. (a) Every person being able to maintain himself by work or other means, but who shall willfully refuse or neglect so to do, and shall wander abroad or place himself in any public place, street, highway, court, or passage to beg or gather alms, or cause, or procure, or encourage any of his family to do so, excepting priests and pilgrims in performance of their religious vows, not being mendicants of the description mentioned in the paragraph (d) of the next succeeding section.

(b) every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner;

(c) every person wandering abroad or lodging in any verandah, outhouse, shed, or unoccupied building, or in any cart, vehicle, or other receptacle, without leave of the owner thereof, and not having any visible means of subsistence, and not giving a good account of himself;

(d) every person, without leave of the owner, defacing the side of any house or building or wall by fixing any placard or notice, or y any indecent or insulting writing or drawing thereon;

(e) every person who in or upon any wharf, jetty, street, road, walk, passage, verandah, or other place situated within any proclaimed area and used by or accessible to the public, persistently and without lawful excuse follows, accosts, or addresses by words or signs any person against his will and to his annoyance, shall be deemed an idle and disorderly person within the true intent and meaning of this Ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labour, for any term not exceeding fourteen days, or to a fine not exceeding ten rupees.

(2) A police officer may arrest without a warrant every person deemed to be an idle and disorderly person.

* Section 2 of the Houses of Detention Ordinance (No. 26 of 1955) states:

‘In this Ordinance the word “vagrant” means:

(a) any person found asking for alms;

(b) any person not being physically able to earn, or being unwilling to work for, his own livelihood and having no visible means of subsistence’

* Section 4 Houses of Detention Ordinance states:

‘(1) When any person has been convicted of any offence by a Magistrate’s Court under its summary jurisdiction, or when any person appears or is brought before such court under the provisions of section 10, if after due inquiry the Magistrate is of opinion that the person so convicted or appearing or brought before the court is a vagrant within the meaning of this Ordinance, he may, in addition to or in substitution for any punishment which he has power to inflict, order such person to be detained in a house of detention. Any such order shall declare that the person against whom it is made is a vagrant, and shall also, if practicable, state any prior date from which, in the opinion of the Magistrate, such person has been in Ceylon a vagrant as defined by this Ordinance. Such order shall be a sufficient authority to the police for keeping in custody such person on the way to the house of detention and to the superintendent for receiving and detaining him there.

(2) Every person detained in a house of detention under this section shall be detained until he avails himself of suitable employment found for him, or until he is removed or discharged as hereinafter mentioned.

***Analysis***

The Vagrants Ordinance and Houses of Detention Ordinance are archaic and discriminatory colonial era statutes that, *inter alia*, criminalize persons suffering extreme poverty and homelessness by empowering police officers to arrest persons who are ‘’deemed an idle and disorderly’’ and allow courts to imprison such persons or impose financial sanctions on them. 1140 offences of vagrancy were reported to the police in 2018 as outlined in the Department of Police Performance Report (updated statistics were not available).[[1]](#footnote-1) While data on the number of such arrests resulting in prosecutions is not available, the Vagrants Ordinance has been enabled arbitrary arrests, particularly against homeless persons and LGBTQI persons, further marginalizing already vulnerable groups, such as sex workers.[[2]](#footnote-2)

Detention under the Vagrants Ordinance and House of Detention Act has been documented in the findings of the Working Group of Arbitrary Detention (WGAD), during its visit to Sri Lanka in 2017. The WGAD report notes that women are detained at the state detention centre, Meth Sevana under the provisions of the Vagrants Ordinance and House of Detention Act. The report states that ‘if a woman pleads guilty to acts of vagrancy, she can be released upon payment of a fine of 100 rupees. However, most women who are found to have engaged in acts of vagrancy cannot afford to make such a payment, and would likely be detained again when found by the police to be loitering or committing other acts under the Vagrants Ordinance. Women who are unable to pay the fine or do not wish to plead guilty are placed in Meth Sevana by an order of the Magistrates’ Court. According to the testimony received, the women cannot afford a lawyer and have no access to legal assistance before or during their court hearing.’[[3]](#footnote-3)

The WGAD findings published in 2018 echo the findings of the Human Rights Commission of Sri Lanka’s published in 2004[[4]](#footnote-4), illustrating the lack of any state action or progress in addressing the issues raised in fourteen years. The report referred to ‘’no-date’’ cases which referred to women who had been sent by magistrates for detention at Meth Sevana without specifying the next case dates, thereby resulting in women being at the centre indefinitely. The majority of women with ‘’no-date’’ cases were detained for offences of vagrancy. The WGAD report which was released in 2018 also mentions the phenomenon of ‘’no-date’’ cases and women being detained for indeterminate periods. According to the General Comment on Article 9 of the ICCPR, ‘aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.’[[5]](#footnote-5)

The HRCSL report further mentioned that many women detained for vagrancy offences were forced to resort to begging and engage in sex work upon being released from detention, and remained trapped in a cycle of poverty and persistent risk of further arrest and detention. Furthermore, according to the report, a number of women detained at Meth Sevana were suffering mental health illnesses and were held in poor conditions of detention without being provided access to the treatment and care they required. This is in contravention of the right of all persons to the enjoyment of the highest attainable standard of physical and mental health as affirmed by Article 12 of the International Covenant on Economic, Social and Cultural Rights.

The WGAD report notes that ‘poverty appears to be a major determinant of whether a person will be taken into custody throughout Sri Lanka, and how long he or she will be deprived of liberty’ and that ‘between 25 to 30 beggars, homeless and street people are reportedly being detained at Ridiyagama Detention Centre in Ambalantota each month. The Centre, which is maintained by the Social Affairs Division of the Southern Provincial Council, also houses anybody sent by court order who is defined as a vagrant under the Vagrants Ordinance. This includes female prostitutes, elderly people, and individuals who have psychosocial impairments or alcohol addiction. The Working Group was informed that a similar detention centre is located at Weerawila.’[[6]](#footnote-6) The WGAD report recommended the repeal of both the Vagrants Ordinance and House of Detention Act are because ‘acts of vagrancy are strongly associated with poverty, which is a social problem best addressed through the provision of support services that allow impoverished women to live with dignity and self-sufficiency’.

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right against arbitrary and unlawful deprivation of liberty. The General Comment on Article 9 further elaborates that ‘an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”[[7]](#footnote-7)

By providing for the arrest and sanction of persons who are underprivileged, marginalized and living in extreme poverty and homelessness, the aforementioned statutes provide for the further violation of the rights of these people and denies them dignity and security.

1. **Imprisonment for inability to pay fines**

***Legal provisions***

* Section 291 of the Code of Criminal Procedure Act (No. 15 of 1979) states:

‘(1) Where any fine is imposed under the authority of any law for the time being in force, then in the absence of any express provision relating to such fine in such law contained the provisions following shall apply, that is to say:-

1. where a sum is not expressed to which the fine may extend the amount to which the offender is liable is unlimited but shall not be excessive;
2. in every case of an offence punishable with imprisonment as well as fine in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing the sentence may in its discretion direct by the sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence :
3. notwithstanding the provisions of paragraph (b), where the fine to which the offender is sentenced does not exceed ten rupees, the court shall not impose a term of imprisonment in default of payment of the fine, but may make order as provided in section 15 (2);
4. the term for which the court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence if the offence be punishable with imprisonment as well as fine;
5. the imprisonment which the court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence; if the offence be punishable with fine only, the imprisonment shall be simple;
6. if the offence is not punishable with imprisonment the term for which the court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale, that is to say:-
7. for a term of seven days where the amount of the fine exceeds ten rupees but does not exceed twenty-five rupees;
8. for any term not exceeding fourteen days where the amount of the fine exceeds twenty-five rupees but does not exceed fifty rupees;
9. for any term not exceeding three months where the amount of the fine exceeds fifty rupees but does not exceed one hundred rupees;
10. for any term not exceeding six months where the amount of the fine exceeds one hundred rupees;
11. the imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or by process of law levied;
12. if before the expiration of the term of imprisonment fixed in default of payment such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate;
13. the fine or any part thereof which remains unpaid may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period than six years then at any time previous to the expiration of that period, and the death of the offender does not discharge from the liability any property which would after his death he legally liable for his debts.’

***Analysis***

As highlighted in the section above, under the Code of Criminal Procedure, when a person is unable to pay the fine imposed for certain offences, they are liable to be imprisoned for up to 6 months in lieu of the fine. These provisions effectively result in persons being deprived of liberty for non-violent, minor offences simply because they do not have the financial means to pay the fine. As highlighted in the prison statistics of the year 2020 issued by the Department of Prisons in Sri Lanka, 73.8% of all convicted persons were imprisoned due to the inability to pay fines.[[8]](#footnote-8)

The first National Study of Prisons in Sri Lanka (hereinafter referred to as prison study) conducted by the HRCSL, found that persons were held in prison for their inability to afford fines as little as Rs. 3,000 (USD 15)[[9]](#footnote-9). It was also found in a study on drug control in Sri Lanka, that persons convicted for minor offences of drug possession who can be discharged upon the payment of a fine are often imprisoned for up to six months for not being able to afford the fine.[[10]](#footnote-10) The report also notes that persons held in prison for drug-related offences are a vulnerable group because they may suffer withdrawal symptoms while being in prison, and denied the medical care and treatment they require. In such instances, prison officials often respond with violence and the use of disproportionate force to control such persons have resulted in deaths. [[11]](#footnote-11)

It must be highlighted that in cases where the person is imprisoned in lieu of payment of the fine, Section 291(4) of the Code of Criminal Procedure allows the court to:

* + Allow time for the payment of the said fine;
	+ Direct payment to be made of the said fine by instalments; or
	+ Direct that the person liable to pay the said fine shall be at liberty to give to the satisfaction of the court a bond, with or without a surety or sureties, for the payment of the said fine or any instalment thereof, and such bond may be given and enforced in a manner provided by this Code.

Despite this provision that allows persons who cannot afford the value of the fine to pay it in installments, as indicated by the prison statistics, such provisions are not utilized by the criminal justice system and persons are still imprisoned for their inability to pay fines. The prison study states that judges may be ‘disinclined to use the abovementioned provisions as that would result in the case file being kept open for longer, whereas imprisoning an offender in lieu of the fine would result in a swift conclusion of the case’[[12]](#footnote-12).

This approach effectively results in the criminalization of poverty, whereby persons are detained due to their socio-economic status. Such incarceration policies have wide-ranging consequences, including depriving the person of earning an income while in detention and adversely impacts on their familial relationships and exposes them to the social stigma of imprisonment. This in turn sustains a cycle of imprisonment and poverty for the most discriminated and vulnerable in society.

The Sri Lankan legal system also contains provisions that provide alternatives to imprisonment in the form of community-based correction orders. The Community Based Corrections (CBC) Act (No. 46 of 1999) states that CBC orders can be issued to persons convicted of any offence for which imprisonment is not a mandatory penalty and the penalty is less than two years imprisonment. Section 6 of the same Act outlines that the conditions of the order are stipulated based on the pre-sentence report of the person, which is prepared by the Department of CBC and submitted to the judge, which must include inter alia social history, background, details of dependents, educational/employment history and special needs of the person, and courses of programmes which s/he could attend and benefit from.

However, the prison study highlights that despite the existence of such provisions which can avoid persons from being imprisoned for minor offences, the Sri Lankan justice system is ‘’pro-incarceration” and judges and lawyers often have little awareness of the provisions of the CBC Act or may be reluctant to use them as the process of requiring a pre-sentence report and issuing a CBC order takes longer than the process of awarding imprisonment and closing the case[[13]](#footnote-13).

Persons from economically marginalized groups who are already victimized by an unequal and inequitable society are rendered more vulnerable when they are imprisoned. The prison system in Sri Lanka has been shown to be a violent system that robs persons of their dignity and disproportionately targets persons from marginalized groups. Imprisoning people for their inability to pay fines not only causes prisons to become overcrowded and impacts the health and wellbeing of detained persons, but also unnecessarily increases the negative social costs of imprisonment on the individual and the family of detained persons, as well as the wider society.

The United Nations System Common Position on Incarceration released in April 2021, recognizes that ‘incarceration therefore disproportionately affects and impacts the segments of society that are living in poverty or are marginalized. In some countries, people are imprisoned as a result of factors directly linked to poverty, such as homelessness or the inability to pay fines.’[[14]](#footnote-14)

* 1. **Pretrial detention for the inability to fulfil bail conditions**

***Legal provisions***

Section 7(1) of the Bail Act (No. 30 of 1997) lists the conditions upon which a person may be released on bail. This includes,

(a) on an undertaking given by him to appear when required;

(b) on his own recognizance;

(c) on his executing a bond with one or more sureties;

(d) on his depositing a reasonable sum of money as determined by court; or

(e) on his furnishing reasonable certified bail of the description ordered by court: provided that where the person has appeared before court on summons and is ordered to be released, he shall be enlarged on his own recognizance or on his giving an undertaking to appear when required, unless for reasons to be recorded, the court orders otherwise.

***Analysis***

According to the prison study conducted by HRCSL, persons were found in prolonged pretrial detention despite being awarded bail, due to the inability to satisfy onerous bail conditions. This was particularly so for persons from economically marginalized backgrounds who ‘most often were found to be unable to fulfill the monetary conditions of bail, thereby leading to the deprivation of their liberty being caused by their financial status rather than a reason established in law.’[[15]](#footnote-15)

The right of all persons to be equal before courts and tribunals as enshrined in Article 14 of the ICCPR is not fulfilled when persons from marginalized backgrounds find themselves in disadvantaged positions and risk being imprisoned due to their economic status. The Monitoring Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires that ‘the requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons in vulnerable groups, who are often in straitened economic circumstances, so as to prevent the requirement from leading to discrimination against such persons’.[[16]](#footnote-16)

**Annex**

Vagrants Ordinance:
<http://hrlibrary.umn.edu/research/srilanka/statutes/Vagrants_Ordinance.pdf>

Houses of Detention Ordinance:
<http://hrlibrary.umn.edu/research/srilanka/statutes/Houses_of_Detention_Ordinance.pdf>

Code of Criminal Procedure:
<http://www.commonlii.org/lk/legis/num_act/cocpa15o1979276/>

1. *Department of Police*, Annual Performance Report, 2018.

<https://www.parliament.lk/uploads/documents/paperspresented/performance-report-srilanka-police-2018.pdf>; [↑](#footnote-ref-1)
2. *Equal Ground,* Submission to the UN Universal Periodic Review regarding the protection of the rights of LGBTI

persons in Sri Lanka, March 2017. [↑](#footnote-ref-2)
3. *Working Group on Arbitrary Detention*, Preliminary findings from its visit to Sri lanka (4 to 15 December 2017). <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22541> [↑](#footnote-ref-3)
4. *Human Rights Commission of Sri Lanka* ‘Human Rights Report: Methsevena State House of Detention, Gangodawila’, 2004. http://www.janasansadaya.org/uploads/files/Methsevena.pdf. [↑](#footnote-ref-4)
5. *Human Rights Committee*, General Comment No.35 - Article 9: Liberty and Security of person, 2019. <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H1l5979OVGGB%2bWPAXhNI9e0rX3cJImWwe%2fGBLmVrGmT01On6KBQgqmxPNIjrLLdefuuQjjN19BgOr%2fS93rKPWbCbgoJ4dRgDoh%2fXgwn> [↑](#footnote-ref-5)
6. *Working Group on Arbitrary Detention*, Preliminary findings from its visit to Sri lanka (4 to 15 December 2017). <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22541> [↑](#footnote-ref-6)
7. *Human Rights Committee*, General Comment No. 35 - Article 9: Liberty and Security of person, 2019. <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H1l5979OVGGB%2bWPAXhNI9e0rX3cJImWwe%2fGBLmVrGmT01On6KBQgqmxPNIjrLLdefuuQjjN19BgOr%2fS93rKPWbCbgoJ4dRgDoh%2fXgwn> [↑](#footnote-ref-7)
8. *Department of Prisons*, Prison Statistics 2020,

<http://prisons.gov.lk/web/wp-content/uploads/2021/05/prison-statistics-2021.pdf> [↑](#footnote-ref-8)
9. *Human Rights Commission of Sri Lanka,* National Study of Prisons, 2020 – chapter: Legal and Judicial Proceedings. <https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf> [↑](#footnote-ref-9)
10. *Ambika Satkunanathan*, ‘A Broken System: Drug Control, Detention and Treatment of People Who Use Drugs in Sri Lanka’. 2021, Harm Reduction International <https://www.hri.global/files/2021/08/03/HRI_Report_-_Sri_Lanka_Drug_Control.pdf> [↑](#footnote-ref-10)
11. Ibid [↑](#footnote-ref-11)
12. *Human Rights Commission of Sri Lanka,* National Study of Prisons, 2020 – chapter: Legal and Judicial Proceedings.<https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf> [↑](#footnote-ref-12)
13. *Human Rights Commission of Sri Lanka,* National Study of Prisons, 2020 – chapter: Non-custodial Measures. <https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf> [↑](#footnote-ref-13)
14. United Nations System Common Position on Incarceration, 2021 <https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf> [↑](#footnote-ref-14)
15. *Human Rights Commission of Sri Lanka,* National Study of Prisons, 2020 – chapter: Legal and Judicial Proceedings. <https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf> [↑](#footnote-ref-15)
16. *UN Committee on the Elimination of Racial Discrimination (CERD)*, CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, 2005, para 26. [↑](#footnote-ref-16)