

2020

**THE NEED
FOR PRISON REFORMS
IN SRI LANKA**

**CENTRE FOR POLICY ALTERNATIVES
JUNE 2020**



CENTRE FOR POLICY ALTERNATIVES
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மாற்றுக் கொள்கைகளுக்கான நிலையம்

The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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Executive Summary

The COVID19 outbreak has disproportionate effects upon marginalised and vulnerable communities, and Sri Lankan prisons are at the forefront of this. While the first deaths at the outset of the virus outbreak in Sri Lanka were due to riots in the Anuradhapura prison, rather than due to viral infection, the riots were nonetheless caused by the increased restrictions placed on prisoners due to the pandemic and the resulting fear triggered in prisoners about becoming infected. This is a tragically relevant example that demonstrates the timely and urgent need to assess the condition of prisons and their long neglected systemic issues. This report highlights major issues regarding imprisonment in Sri Lanka with recommendations for reforms.

1. International Obligations and Standards

International human rights standards outline the rights that persons who undergo criminal punishment are entitled to, namely the right to life, right to a fair trial, right to equal protection of law, humane treatment during the period of deprivation of liberty, and rights to access education and employment. The right to work and just and fair conditions of work is an entitlement of prison staff as well. These obligations are supplemented by the UN Basic Principles for the Treatment of Prisoners and the UN Standard Minimum Rules for the Treatment of Prisoners, which lay out the specific standards to be adhered to with regards to prison facilities and the treatment of prisoners.

2. Sri Lankan Constitutional and Legal Framework

While the Constitution of Sri Lanka 1978 recognises the fundamental rights of the people in its Chapter III, the legislative framework for criminal punishment has not undergone any extensive reform. The Prisons Ordinance No. 16 of 1877, which lays down the institutional framework for imprisonment and treatment of prisoners is outdated and in dire need of reform to fulfil Sri Lanka's constitutional standards and the country's international obligations. The legislative frameworks on bail for remand prisoners and pardons are also observed in breach. Additionally, the death penalty continues to be legislatively recognised as a mode of criminal punishment even though it violates the right to life impliedly recognised by the Constitution and the freedom from torture, expressly recognised by Article 11 of the Constitution. While Sri Lanka has not carried out the death penalty since 1976, there have been repeated moves to reimplement it, most recently in 2019. These outdated laws must be replaced and implementation mechanisms must be reviewed to bridge the gap between the law and practice.

3. Judicial Process Relating to Criminal Sentencing and Appeal

The issues within the judicial process relating to criminal trials, sentencing and appeal affect the rights of persons who are imprisoned. Firstly, the Legal Aid Commission does not provide legal aid to persons

charged with criminal offences despite having the legislative capacity to do so. Secondly, the mechanism to bring the status of prisoners' mental health to the notice of the judiciary is not implemented consistently. Thirdly, the judiciary is not guided by a Sentencing Policy and an Advisory Council on Sentencing which monitors and sets standards on sentencing. Fourthly, while prisoners' appeals to the Court of Appeal are facilitated by Prison officials, they have no similar assistance afforded for appeals to the Supreme Court. Comprehensive administrative and policy reforms are required to remedy all these shortcomings.

4. Regulatory Framework relating to Prisons

The regulatory Framework on prisons deals with prison labour and remuneration, prison infrastructure and facilities, the classification of prisoners and specific policies for different types of prisoners (such as death row prisoners, female prisoners, juvenile prisoners and remand prisoners). The Prison Rules of 1938 and the Prison Departmental Standing Orders 1956 still govern the regulatory framework relating to prisons. These instruments are archaic and violate contemporary international standards on humane treatment of prisoners. As such, this framework needs to be repealed immediately and replaced by an updated regulatory framework.

5. Administrative Framework for the Prison Staff

Prison staff also faces harsh conditions of employment and meagre opportunities for career development due to severe staff shortages and a lack of facilities. There is an urgent need for improving the employment conditions of prison staff; strengthening staff training programmes; recruiting prison staff to facilitate the rehabilitation and reintegration of inmates; and increasing the medical staff available within the prisons.

1. Introduction

The need for prison reforms has been discussed for years in Sri Lanka with very little progress. The COVID19 pandemic has renewed attention to the issue in an urgent manner. Systemic issues within prisons in Sri Lanka expose inmates and staff to heightened risks due to both the contagiousness of the virus as well as the restrictions put in place to contain its spread within the country.

Agitation due to this vulnerability and the resulting riots at the Anuradhapura prison resulted in two deaths in March 2020.¹ Advocacy on the issue has resulted in the President appointing a committee to examine relevant issues and some small steps have been taken as of now.² Most recently, a Presidential Task Force was appointed with a mandate, among other functions, to “investigate and prevent any illegal and antisocial activities in and around prisons”.³ Notably, the Presidential Task Force comprises of present and former military, intelligence and law and order officials with no representation of officials having expertise and experience having worked in prisons or related issues. These recent developments highlights the importance of qualitative and quantitative research on prison conditions as well as the need to continue advocacy towards advancing the prisoners’ rights by the civil society.

Earlier in 2019, there was some discussion on prison reforms in the context of re-implementing the death penalty.⁴ While imposing the death penalty violates constitutionally recognised fundamental rights, the effective functioning of criminal justice and punishment is nevertheless crucial to uphold constitutional and human rights standards. Abolishing the death penalty will also create greater dependence on custodial sentences and therefore examining the status of prisons in Sri Lanka and the

¹ Ambika Satkunanathan, ‘Prisoners in a Pandemic’ (03.04.2020) < <https://www.himalmag.com/prisoners-in-a-pandemic-2020/>>; The New York Times, 2 Sri Lanka Inmates Killed in Riot over Virus Restrictions (22.03.2020) <<https://www.nytimes.com/aponline/2020/03/22/world/asia/ap-as-sri-lanka-prison-shooting.html>>

² Camelia Nathaniel, ‘Presidential Commission to look into relief for prisoners’ (24.03.2020) <<http://www.dailynews.lk/2020/03/24/local/215128/presidential-commission-look-relief-prisoners>>; President’s Media Division, ‘2961 prison inmates released on bail’ (04.04.2020) <<https://www.presidentsoffice.gov.lk/index.php/2020/04/04/2961-prison-inmates-released-on-bail/?lang=en>>

³ Gazette No 2178/18, 2 June 2020

⁴ As a result, there have been agitations to re-implement death penalty time and again. The most recent case was in June 2019 when the then President Sirisena announced his intention to re-implement death penalty as a measure of deterrence for narcotic traders. By February 2019 the Minister of Justice confirmed that 13 persons convicted of drug trafficking have been identified for execution and the President claimed that he signed the death warrants for four prisoners. The presidential decision was challenged before the Supreme Court and the court granted interim relief suspending its operation: Ruki Fernando, ‘Death Penalty: License for Judicial Killings’ (Groundviews, 28 Sep. 2019) <<https://groundviews.org/2019/06/28/death-penalty-license-for-judicial-killings/>>; ‘Sri Lanka to implement death penalty on drug traffickers’ (Daily Mirror Online, 10 July 2018) <http://www.dailymirror.lk/article/Sri-Lanka-to-implement-death-penalty-on-drug-traffickers-152493.html>; *Center for Policy Alternatives (Guarantee) Limited v. Attorney General*, SC/FR Application No. 273/2019; Sri Lanka court suspends execution until October 30’ (5 Jul. 2019) <<https://www.aljazeera.com/news/2019/07/sri-lanka-court-suspends-executions-october-30-190705132713291.html>>; Mario Gomez, ‘Death Penalty in Sri Lanka: Hanging by a Thread’ (I.CONnect, 08 Aug. 2019) <<http://www.iconnectblog.com/2019/08/the-death-penalty-in-sri-lanka-hanging-by-a-thread/>>.

relevant framework is greatly needed. The importance of this exercise has become even more important amidst the COVID19 outbreak.

This Report by the Centre for Policy Alternatives (CPA) assesses the domestic legal, regulatory and administrative framework relevant to imprisonment as criminal punishment. The Report further discusses the goals and conditions of imprisonment and the rights of prisoners in light of international legal obligations, constitutional provisions and comparative standards. Finally, it provides recommendations for policy makers. The Report, however, is not an exhaustive study on the conditions of prisons in Sri Lanka. CPA hopes that this Report will raise awareness on key legal and policy issues that require urgent attention and facilitate taking necessary action related to the state of prisons, which require urgent attention.

2. Methodology

This report maps out and assesses the legal and administrative framework of criminal punishment in Sri Lanka. It is based on interviews CPA conducted with professionals engaged in advocating for prisoners' rights and providing legal representation to the incarcerated to ascertain current practices relating to criminal punishment. CPA also interviewed persons who have engaged with the prison staff in various capacities. This method of primary research is in response to the scarcity of literature providing overviews of Sri Lanka's criminal punishment system and its practical dynamics.

The main focus of the report is on the custodial methods of criminal punishments provided for by the Penal Code. CPA notes that this report is not an exhaustive study based on the primary sources, but rather an attempt to flag pressing issues within the legal and administrative framework in light of stakeholder interviews and limited secondary sources.

3. International Legal Obligations and Standards

Sri Lanka has undertaken numerous international legal obligations applicable to incarcerated persons by ratifying a number of international human rights treaties.⁵ The International Covenant on Civil and Political Rights (ICCPR) specifically provides for the upholding of right to life and liberty, right to due process of law and a fair trial. This is complemented by the UN rules and principles on sentencing, prison conditions, treatment of prisoners and interests of special categories of prisoners.⁶ Some key issues and the relevant international provisions as relating to incarcerated persons are set out below.

3.1. Purpose of depriving liberty as a criminal punishment

Article 10(3) of the ICCPR provides that ‘the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.’ General Comment No. 21 on Article 10 (Humane treatment of persons deprived of their liberty) states that the State must take measures for ‘teaching, education and re-education, vocational guidance and training’ the inmates and report to the Human Rights Committee on these measures.⁷ Principle 10 of the UN Basic Principles for the Treatment of Prisoners (the Basic Principles for the Treatment of Prisoners) also states that prisons must be designed to facilitate ‘the reintegration of the ex-prisoner into the society under the best possible conditions.’⁸ According to the principle, this should be a participatory process that involves the community and social institutions and provide due consideration to the victims’ interests.

These international legal documents are complemented by the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),⁹ the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,¹⁰ and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,¹¹ focusing on upholding the rights of juvenile, female and death row prisoners respectively.

⁵ ‘Ratification Status for Sri Lanka’

<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN>

⁶ For example, the UN Basic Principles for the Treatment of Prisoners (1990) and Standard Minimum Rules for the Treatment of Prisoners (1955).

⁷ ‘General Comment No 21: Article 10 (Humane Treatment of persons deprived of their liberty)’ (1992)

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4731&Lang=en>

⁸ G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990).

⁹ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders [Bangkok Rules], reproduced in E.S.C. Res. 2010/16, Annex, U.N. Doc. E/RES/2010/16 (July 22, 2010) <<http://hrlibrary.umn.edu/instree/res2010-16.html>>

¹⁰ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990) <<http://hrlibrary.umn.edu/instree/j1unrjdl.htm>>.

¹¹ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984) <<http://hrlibrary.umn.edu/instree/i8sgpr.htm>>

3.2. Right to life, liberty and security of person

Article 3 of the Universal Declaration of Human Rights (UDHR) enshrines the sanctity of human life by affirming that everyone has a right to life, liberty and security of person.¹² Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR),¹³ which Sri Lanka has been a state party to since 1980, recognises ‘every human being has the right to life’ which shall be protected by law.

While Article 6(2) of the ICCPR permits the death penalty for the most serious crimes in countries where death penalty is still not abolished, Article 6(6) insists that ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’ More recently, this position was strongly reiterated by the United Nations Human Rights Committee in its General Comment 36, where it held that:

‘Article 6, paragraph 6 reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and the abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights. *It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate and extent in which they resort to the death penalty, or to reduce the number of pardons and commutations they grant.*’¹⁴

Sri Lanka has repeatedly voted in favour of a resolution on the “*Moratorium on the use of the death penalty*” at the UN General Assembly, including most recently in December 2018.¹⁵ The resumption of executions would, therefore, go against the position taken by Sri Lanka in international fora over the years.¹⁶

¹² Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)
< <https://www.un.org/en/universal-declaration-human-rights/>>

¹³ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976
<<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>

¹⁴ Human Rights Committee, General Comment 36 (Article 6 of the International Covenant on Civil and Political Rights, on the right to life), UN Doc. CCPR/C/GC/36, para. 50
<https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf>

¹⁵ Dinushika Dissanayake, ‘Keeping the death penalty alive’ (Himal South Asian, 28 September 2018)
<<https://himalmag.com/keeping-the-death-penalty-alive-sri-lanka-capital-punishment/>>; Disna Mudalige, ‘Lanka votes in favour of death penalty moratorium at UNGA’ (Daily News, 27 December 2018)
<http://www.dailynews.lk/2018/12/27/local/172455/lanka-votes-favour-death-penalty-moratorium-unga>>.

¹⁶ Amnesty International, ‘Sri Lanka: Halt preparation to resume executions’ (2019)
<<https://www.amnesty.org/download/Documents/ASA3700752019ENGLISH.pdf>>

3.3. Humane treatment of persons deprived of liberty

Article 10(1) of the ICCPR states that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ General Comment No. 21 elaborates this obligation as ‘a fundamental and universally applicable rule,’ and a minimum core obligation that should be fulfilled regardless of resource constraints.¹⁷ The paragraph also reiterates the importance of the applicability of this rule without any discrimination. Principle 1 of the Basic Principles for the Treatment of Prisoners also reiterates that ‘all prisoners shall be treated with the respect due to their inherent dignity and value as human beings.’¹⁸ Principle 5 emphasises that the prisoners are entitled to the human rights set out in the UDHR, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁹

Rules 9-14 of the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) delineate the standard accommodation that should be provided for the inmates.²⁰ Floor space, lighting, heating and ventilation of the cells must be planned to suit the climate of the locality. The rules require each prisoner to be allocated with one cell or room. Sharing of a cell is to be an exception due to temporary overcrowding, administered cautiously based on suitability of the prisoners associating with each other and subject to regular supervision, especially at night. According to Rules 67-69, the classification of prisoners must aim to separate the hard-core criminals who are likely to exert bad influence and to facilitate the social rehabilitation of prisoners. Each prisoner is to be assessed individually to ascertain the programme that he or she should be placed under based on ‘individual needs, capacities and dispositions.’²¹ Rules 15-21 set out the standards that the prisons must maintain with regard to the personal hygiene, clothing and bedding, food, medical treatment, exercise and sports. Prison accommodation must also provide the inmates with sanitary facilities.

3.4. Discipline within the prisons

Rule 35 and 36 of the Standard Minimum Rules call for ensuring that prisoners are aware of the internal rules of the prison and the complaint mechanisms available for them. Complaint mechanisms should be

¹⁷ ‘General Comment No 21: Article 10 (Humane Treatment of persons deprived of their liberty)’, para 4 (1992) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4731&Lang=en>

¹⁸ UN Basic Principles for the Treatment of Prisoners (n 7).

¹⁹ *ibid.*

²⁰ Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) <<http://hrlibrary.umn.edu/instreet/g1smr.htm>>

²¹ *ibid.*

available to the inspecting officers and the central prison administration and all complaints must be duly addressed. Rule 27 of Standard Minimum Rules provides that 'discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.'

Rule 28(1) states that no prisoner should be employed by the institution in a disciplinary capacity. Rule 28(2) elaborates that the above principle should not hinder the prisoners from engaging in self-government within the prisons and activities of self and group progress. Rule 30 provides that the prisoner must be informed of the offences he is charged with and be given a 'proper opportunity' to present his defence. Therefore, a prisoner must be entitled to proper procedures in an inquiry against him. Rule 31 prohibits administration of corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment upon prisoners. Rule 32 states that close confinement or dietary restrictions must be prescribed and carried out under the approval and supervision of the medical officer, in any case without prejudice to the principle of Rule 31.

According to Rule 33 of the Standard Minimum Rules, restraints must not be used as punishment, and further chains or irons must not be used as restraint. Moreover, the circumstances of applying such restraints are limited to transfer of prisoners and for medical reasons upon the direction of the medical officer. Rule 54 only permits use of arms for self-defence and in the event of an attempted escape. Even then, staff are not meant to carry arms during their daily routine unless a special need for such a step is required.

3.5. Education and employment for prisoners

Principle 6 of the Basic Principles for the Treatment of Prisoners and Rule 77 of Standard Minimum Principles provide for the education of the prisoners. Education of young prisoners and illiterate prisoners is to be compulsory. Principle 8 of the Basic Principles for the Treatment of Prisoners state that prisons must facilitate prisoners engaging in 'meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.' Rules 71-76 of the Standard Minimum Rules provide that prisoners must be ensured equitable remuneration, reasonable work hours, leisure, health and safety and compensation in the event of industrial injury. These standards are meant to be on par with the conditions of employment found in employment outside of prisons.

3.6. Employment conditions of the prison staff

According to Article 7 of the ICESCR, which Sri Lanka acceded to in June 1980, people are entitled to just and favourable conditions of work. Focusing specifically on prison staff, Rule 46 of the Standard Minimum Rules states that the employment conditions must be adequate to 'attract and retain' persons with 'integrity, humanity, professional capacity and personal suitability for the work.' Rule 47 provides for the training of prison staff upon entry to duty and in-service training. The rule envisages a comprehensive training upon assuming duties about the 'general and specific duties' and with a requirement 'to pass theoretical and practical tests' upon the completion of the training. Rule 46(2) emphasises that measures must be taken to educate the prison staff as well the public and that working in prisons is 'a social service of great importance.'

4. Constitutional and Legal Framework

Sri Lanka is a constitutional democracy and in accordance with Articles 3 and 4 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978 (hereafter the Constitution of Sri Lanka), the people are sovereign. People exercise their sovereignty through governmental powers, fundamental rights and the franchise. The 'people' who are sovereign according to these sections inevitably includes victims of crime, perpetrators of crime and people of the general public who are affected by crime and the criminal justice system. Therefore, it is crucial to accord each of these segments of the 'people' their due constitutional recognition when engaging in criminal justice.

Sri Lanka has an incarceration rate of 114.7 rate per 100,000 population.²² Prison Institutions of Sri Lanka consists of the Prison Headquarters, the Centre for Research and Training in Corrections, four closed prisons, 18 remand prisons, 10 work camps, 2 open prison camps, 1 training school and 2 Correctional Centres for Youth Offenders.²³ While the statistics do not provide how many prisoners are held in each of these institutions, it is common knowledge that prisons are severally overcrowded.²⁴ The UN Special Rapporteur on Torture, Inhumane, Degrading Treatment and Punishment in the Report of his 2016 Mission to Sri Lanka states that he observed 'extreme levels of overcrowding, with populations exceeding capacity by 200 or 300 per cent', such as in the Vavuniya remand prison. Detainees are forced to sleep back-to-back on concrete floors and staircases for lack of space.'²⁵ The most recent riots at the Anuradhapura prison, which resulted in the deaths of two inmates, was also due to the 'congested conditions and poor quality of meals' which were further aggravated by the visiting restrictions imposed to contain COVID19.²⁶ This evidences the extent to which prisoners are deprived of their rights in practice, despite their constitutional entitlements.

²² Statistics Division, Prison Headquarters, 'Prison Statistics of Sri Lanka 2019' (2019) 32.

²³ *ibid* 3.

²⁴ Based on the interview conducted on 04.11.2019.

²⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka (A/HRC/34/54/Add.2, 22.12.2016) 11. He further notes that 'the crumbling infrastructure of the larger prisons in Colombo, built in the nineteenth century, results in conditions that amount to cruel, inhuman and degrading treatment or punishment. The Government reported that Welikada prison, one of the worst, will be closed and a new prison, in Tangalle, is planned to be operational by the end of 2016.' Nevertheless, Welikada Prison continues to function.

²⁶ The New York Times (n 1).

4.1. Penal Code framework for criminal punishment

Sri Lankan Penal Code is an archaic piece of legislation enacted during British rule in 1883, which is closely modelled on the Indian Penal Code.²⁷ Section 52 of the Penal Code lists out the death penalty, simple imprisonment, rigorous imprisonment, whipping, fines and forfeiture of property as criminal punishments. (Whipping was removed as a punishment through Section 3 of the Corporeal Punishment (Repeal) Act, No. 23 of 2005.) The punishments of the Penal Code are complemented by Section 303 of the Code of Criminal Procedure Act 1979.²⁸ According to this provision, judges can substitute a sentence of imprisonment below two years with a suspended sentence. The Penal Code has to read with other legislation that introduce further punitive measures. The Probation Ordinance 42 of 1944, Section 3, also gives courts the option of ordering a release on probation taking into account the offence, age, gender and condition of the offender. However, probation is only applicable to children.²⁹ The Community Based Corrections Act No. 46 of 1999 also facilitates the imposition of community-based correction orders in place of imprisonment where the prescribed punishment does not include mandatory imprisonment or imprisonment exceeding two-years.

4.2. Legislation sanctioning the judicial imposition of the death penalty

Though the Constitution of Sri Lanka does not recognise an explicit right to life, the rights enumerated in Chapter III of the Constitution titled 'Fundamental Rights' are based on the right to life, as has now been judicially recognised.³⁰ Though successive governments of Sri Lanka have not implemented the death penalty since 1976, High Courts continue to impose the death penalty under several statutes which provide for it, including the Penal Code,³¹ the Poisons, Opium and Dangerous Drug Ordinance Act No 13 of 1984,³² and the Firearms Ordinance 33 of 1916.³³

²⁷ 'Indian Law' (Encyclopedia Britannica, 2020) <<https://www.britannica.com/topic/Indian-law#ref113113>>.

²⁸ The Community Based Corrections Act No. 46 of 1999 <<https://www.lawnet.gov.lk/1946/12/31/community-based-corrections-3/>>.

²⁹ Based on the interview conducted on 04.11.2019.

³⁰ *Shriyani Silva v Iddamalgoda* [2003] 2 SriLR 63; *Rathnayake Tharanga Lakmali v OIC, Embilipitiya* (17.12.2019) SC/FR Application 577/2010.

³¹ Section 52 of the Penal code (Ordinance No. 3 of 1883) <<https://www.lawnet.gov.lk/1948/12/31/penal-code-3/>>

³² Poisons, Opium and Dangerous Drugs (Amendment) Act of Sri Lanka No. 13 of 1984 <http://www.commonlii.org/lk/legis/num_act/poadda13o1984491/s5.html>

³³ Section 44A of the Firearms Ordinance <<https://www.lawnet.gov.lk/1947/12/31/firearms-4/>>

The offences for which the death penalty is applicable include:

Penal Code	Section 114 - Waging or attempting to wage war or abetting the waging of war against the state
	Section 129 - Abetment of mutiny, if mutiny is committed in consequences thereof
	Section 191 - Giving or fabricating false evidence with intent to procure conviction of a capital offence
	Section 296 – Murder
	Section 299 - Abetting the commission of suicide
Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No 13 of 1984	Drug-related offences, including trafficking, importing or exporting more than specified limit of the prohibited substance as contained in Section 54 A read with the third schedule of the Ordinance. ³⁴
Firearms Ordinance 33 of 1916	Any person who uses a gun in the commission of an offence specified in Schedule C' of the Ordinance

CPA notes that no charges have been brought under these sections for decades.³⁵ The possession or trafficking of over 2 grams of heroin under the Poisons, Opium and Dangerous Drug Ordinance attracts the largest number of death sentences in Sri Lanka.³⁶

More recently, Emergency Regulations issued consequent a State of Emergency being declared on the 24th of April following the terror attacks of 21st April 2019 introduced a wide array of offences, some of which were punishable with capital punishment.³⁷

CPA reiterates the position that legislative recognition of death penalty violates the Constitution of Sri Lanka and therefore, should be abolished with immediate effect.

4.3. Criminal Procedure Code framework for implementing death penalty

Section 285(1) of the Criminal Procedure Code provides that ‘when a person is sentenced to death the sentence shall direct that he be hanged by the neck till he is dead on a day and at a place, decided upon

³⁴ *ibid.*

³⁵ Saliya Pieirs, ‘To hang or not to hang?’ (Sunday Observer, 15 July 2018) <<http://www.sundayobserver.lk/2018/07/15/opinion/hang-or-not-hang>>

³⁶ *ibid.*

³⁷ See for more on the State of Emergency, CPA, ‘Understanding the Emergency: Easter Sunday Attacks 2019’ (CPA, 2019) available at <https://www.cpalanka.org/wp-content/uploads/2019/04/QA_SoE.pdf> This emergency period lapsed in August, 2019, Aljazeera

‘Sri Lanka ends emergency rule imposed after Easter bombings’ (23.08.2019) <<https://www.aljazeera.com/news/2019/08/sri-lanka-ends-emergency-rule-imposed-easter-bombings-190823134350525.html>>

by the President'.³⁸ According to reports, D.S. Siripala (alias Marusira), who was the last person to undergo this kind of judicial execution, had taken eighteen minutes to die.³⁹ Such a method of judicial execution involving prolonged suffering itself amounts to torture, inhumane degrading treatment and punishment. This is in direct violation of freedom from torture, degrading treatment and punishment, enshrined in Article 11 of the Constitution of Sri Lanka. Article 11 is a non-derogable right under the Constitution which cannot be restricted on any ground. Therefore, both imposing the death penalty as a punishment and the method of executing the death penalty can be seen as unconstitutional.

Below is the procedure provided by law for carrying out the execution by hanging:

Presence of officers during the execution	<p>Criminal Procedure Code, Section 286(e)(i): The Superintendent or a Jailor of the prison, a medical officer of the prison and other officers of prisons as named by the Superintendent or the jailor to be present for the execution. (The Prison Rule 264 of the Prison Regulations 1938,⁴⁰ reiterates this and requires the Jailor of the Prison where the execution takes place, as well as the Jailor who received the prisoner from the court to be present).</p> <p>Also permits the presence of any minister of religion in attendance at the prison, relations of the prisoner or any other persons that the Superintendent of the prison thinks proper to admit, if the execution is to happen within the prison premises.</p> <p>Departmental Standing Order 641⁴¹: the executioners are to report to the Jailor, and they are to remain within the prison until the execution is over.</p>
Preparation for the execution	<p>Departmental Standing Order 642: Jailor is to also to inspect on the day before the execution date that 'the scaffold and all necessary appliances are in good order, with the assistance of the executioner.</p>
Procedure of the execution	<p>Departmental Standing Order 642: Jailor is to weigh the condemned prisoner upon admittance and again in the presence of the Medical Officer the day before the execution. The Medical Officer is to examine the prisoner and provide a report on 'his age, his general condition of health and any defects or abnormalities in respect of the neck.' The Jailor and the Medical Officer are to provide the Executioner 'all the necessary information as to the height and weight of the prisoner, his age, general condition and</p>

³⁸ Code of Criminal Procedure Act No. 15 of 1979 <<https://www.lawnet.gov.lk/criminal-procedure-code/>>

³⁹ W. J. B. Seneviratne, 'Execution of Maru Sira generated a controversy' (Sunday Island) <<http://www.island.lk/2004/12/19/features8.html>>

⁴⁰ Published as Chapter 44 of the Subsidiary legislation of general application under the legislative enactments of Ceylon in force on the 30th of June 1938 (Printed by the government printer at the Ceylon Government Press, Colombo 1938). (hereinafter, Prison Rules).

⁴¹ Departmental Standing Orders of the Department of Prisons and Probation Services, Printed at the Government Press of Ceylon 1956. (hereinafter Departmental Standing Orders).

whether he is likely to offer any resistance.’

Based on the information, the Executioner is to calculate the length of the drop ‘in accordance with the sanctioned Table of Drops.’⁴² The Jailor and the Medical Officer can recommend a departure from the standard calculation where necessary in particular cases.

The Medical Officer and the Executioner are further required to ‘finally check the length of the drop and satisfy themselves that all the arrangements are in order’ before signing a report to this effect.

Legislative abolition of the death penalty should be supplemented by the abolition of these procedural rules to implement death penalty.

4.4. Prisons Ordinance framework for imprisonment

Imprisonment in Sri Lanka is facilitated through the Prisons Ordinance, No. 16 of 1877 (Prisons Ordinance). Other than Amendment No. 6 of 1980 and No. 22 of 2005,⁴³ the Ordinance has not undergone substantial review since its introduction by the British. The Ordinance lays out a framework for sustenance of prisoners during the period of imprisonment by providing for their basic needs and hygiene. According to the Ordinance, a Commissioner-General of Prisons and a Commissioner of Prisons and their staff are in charge of the island-wide prison administration. The Ordinance also provides each prison to be in charge of a Superintendent and their staff, who are to co-ordinate with the Department of Prisons. As at end of 2018, the total prison workforce included prison staff of 5,334 uniformed staff, 263 non-uniformed staff, 96 officers from the combined services, 7 officers from other services and 34 officers posted from the other departments.⁴⁴ The current framework provides for mere incapacitation of offenders and lacks legislative and institutional capacity to effectively provide for their reintegration to the society. The Prison Ordinance requires extensive reforms in light of contemporary international standards and rights guaranteed to people under the Constitution of Sri Lanka.

4.5. Prisoners’ complaints

Section 35 of the Prisons Ordinance provides for Prison Visitors,⁴⁵ an independent mechanism appointed by the Minister to monitor the conditions of the prison.⁴⁶ Section 41 of the Prisons Ordinance

⁴² This is not defined in Prison Rules or Departmental Standing Orders.

⁴³ The Prisons (Amendment) Act, No. 6 of 1980 <<https://www.lawnet.gov.lk/1946/12/31/prisons-amendment-2/>>; The Prisons (Amendment) Act, No. 22 of 2005 <<https://www.lawnet.gov.lk/1946/12/31/prisons-amendment-3/>>.

⁴⁴ Statistics Division, Prison Headquarters (n 21) 10.

⁴⁵ According to the history of prisons provided in the official Departmental documents, the local prison visiting system was established between 1933-1936, Statistics Division, Prison Headquarters (n 21) 90.

provides that Prison Visitors can hear the complaints of the prisoners regarding the quality and quantity of the food they receive and regarding ill treatment. Where the Visitor finds that the complaint ‘appears to be frivolous or malicious,’ he or she is permitted to punish the prisoner with solitary confinement and dietary restrictions. If the complaint needs action, the Visitor is to report the case to the Commissioner-General of Prisons or the Attorney-General to take action according to the nature of the complaint. The Ordinance provides no mechanism to challenge such a decision and a consequent punishment imposed by a Visitor. Section 41(2) makes it mandatory for the jailor to comply with such order or direction.

Section 13(1)(l) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015, provides that the Authority must engage with and ensure that the range of institutions serving within the system of justice upholds codes of conduct, norms and best practices to protect the rights of victims and witnesses. This section specifically mentions the Prison Department.⁴⁷ However, research interviews confirm that prisoners continue to face disproportionate difficulties in proving their complaints against the prison administration.⁴⁸ The difficulty of prisoners to meet the evidentiary requirements due to intimidation was noted especially in relation to the case of violence at the Angunakolapalassa prison.⁴⁹ There is thus an urgent need to effectively implement the Assistance to and Protection of Victims of Crime and Witnesses Act to ensure that prisoners can safely file complaints.

4.6. Discipline within prisons

Section 78 of the Prisons Ordinance contains a list of offences against prison discipline. The subsequent sections provide for stringent actions to be taken against prisoners who commit such offences. Section 79 provides that the Superintendent or a Prison Visitor can confine a prisoner in a punishment cell for a period not exceeding 14 days and order close confinement and dietary restrictions for a period not exceeding three days for offences against prison discipline. This is contrary to the requirement of Rule 7 of the Basic Principles on the Treatment of Prisoners that solitary confinement as a means of punishment should be abolished or restricted.

⁴⁶ ACTION AGAINST TORTURE A PRACTICAL GUIDE TO THE ISTANBUL PROTOCOL FOR LAWYERS IN SRI LANKA (2004) <<https://redress.org/wp-content/uploads/2018/09/National-adaptation-Sri-Lanka-legal-material.pdf>>

⁴⁷ The Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015, Section 13(1) The duties and functions of the Authority shall be to – (l) promote and ensure the observance and application of codes of conduct and recognised norms and best practices relating to the protection of the rights and entitlements of victims of crime and witnesses, by Courts, Commissions, any other tribunals, public officers and employees of statutory bodies involved in the enforcement of the law, including officers of the Sri Lanka Police, *the Prisons Department*, government medical officers and officers of government social service institutions...’ (emphasis added)

⁴⁸ Based on the interview conducted on 25.11.2019.

⁴⁹ Piyumi Fonseka, ‘Behind the bars of Angunakolapelessa Super Prison (22 Jan 2019) <<http://www.dailymirror.lk/news-features/Behind-the-bars-of-Angunakolapelessa-Super-Prison/131-161374>>.

Section 81 of the Prisons Ordinance provides for the establishment of a tribunal for the purpose of trying prisoners who are guilty of specified serious offences named in the section.⁵⁰ According to Prison Rule 272, however, prisoners who are charged with such an offence are given only three hours prior notice of constituting the tribunal within the prison.⁵¹ Thus, prisoners only have a short period to call witnesses in their defense and even then, the prison authorities are in charge of producing these witnesses before the tribunal. Prisoners face immense difficulties in proving their case due to these unfair procedural rules.⁵²

Section 81(4) of the Prisons Ordinance empowers the tribunal to impose any of the punishments in Section 79, including confinement in a punishment cell for a period not exceeding one month. The tribunal can also impose imprisonment of either description up to five years for escaping the prison or attempting to escape the prison, and up to six months' imprisonment for any other offence. Such a prisoner can also be subject to additional penalties listed in Section 83: forfeiture of remission marks, classification and treatment as a prisoner who is starting out a sentence and imposition of distinctive clothing. Meanwhile Section 82 contains guidance on how punishments for the evasion of labour is to be aggregated to the initial punishment. Further, Section 84 states that no appeals can be made to the punishments meted out Section 79 and 81, which raises concerns of due process.

The current framework is excessively biased against prisoners and violates the right to a fair trial required by Article 14 of the ICCPR and the right to equality before the law guaranteed by Article 12 of the Constitution of Sri Lanka. Furthermore, the current framework violates Rule 30 of the Standard Minimum Rules on Treatment of Prisoners on procedural fairness required to be upheld when asserting discipline within the prisons. In practice, prisoners are further restrained by the power dynamics within the prison.⁵³ Therefore, urgent reforms are required to the Prisons Ordinance to conform to international and domestic human rights standards.

4.7. Usage of mechanical restraints and weapons by the prison staff

Section 88 of the Prison Ordinance does not allow for placing prisoners under mechanical restraints. However, Section 89 and 90 outline exceptions to this, including when the inmates are in an insecure place, outside the prison walls, and are in danger of damaging persons or property or causing

⁵⁰ Where a prisoner has committed an offence under the Penal Code, he or she can be tried under this tribunal or the ordinary courts, Prisons Ordinance, Section 85, 'Nothing contained in section 79, 81, 82, 83 and 84 shall be deemed to deprive any competent court in Sri Lanka, of its jurisdiction to hear and determine any charge in respect of any offence punishable under the Penal Code or any other written law: Provided, however, that no person shall be punished both under the aforesaid sections and by a court for the same offence.

⁵¹ Further rules on constituting a tribunal is set out in Rule 273 of the Prison Rules.

⁵² Based on the interview conducted on 25.11.2019.

⁵³ Based on the interview conducted on 25.11.2019.

disturbance of violence. The sections highlight that the aim of such restraints is to prevent violence, disturbance, mutinous conduct, escape or rescue. In such an event, the prisoners can be handcuffed, put under gang chains and wrist cuffs as a group or put on body-belts with side-cuffs. Further, Prison Rules 246-252C provide for the use of restraints in accordance with the Ordinance. These orders are to be imposed by an officer not below the rank of jailor. According to Section 91, the duration of such restraints must be limited to the necessity, and in case not last longer than 24 hours consecutively.

Section 77 of the Prisons Ordinance also only allows using weapons during an escape. The section also provides for procedural standards of usage of weapons to be the last resort; the need for the presence of senior staff or a Jailor or a Deputy Jailor; and for the shooting to not be fatal. Departmental Standing Orders 260 -282 provide for the maintenance of fire arms within prisons. Nevertheless, Section 11 of the Ordinance allows for prison officers to be provided with weapons such as batons, staves, arms, ammunition and accoutrements as necessary. This normalises the use of weapons within prisons and the intimidation of prisoners as staff engage with inmates on a daily basis. The Prisons Ordinance and the Departmental Standing Orders must be revised to strictly regulate the use of weapons and officers must receive training on restrictions to the usage of weapons.

4.8. Remand prisoners and bail

As of 2018, the Prison system holds 24,852 convicted prisoners and 108,263 unconvicted prisoners (about four times the number of convicted prisoners).⁵⁴ Although Sri Lanka does not recognise an explicit substantive right to liberty, Article 13 of the Constitution of Sri Lanka sets out a right to due process whenever a person is deprived of liberty. According to Article 13(2), a person who is detained, held in custody or otherwise deprived of liberty must be produced before the judge of the nearest competent court 'according to procedure established by law.' The Article emphasises that no person can be further detained, held in custody or otherwise deprived of liberty except when the judge orders so 'in accordance with procedure established by law.' Article 13(4) of the Constitution of Sri Lanka further clarifies that 'no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law' and that 'the arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.'

The process to be followed in this instance is contained in the Bail Act No 30 of 1997. Section 16 of the Bail Act states that no person should be detained over 12 months as calculated from the date of arrest, unless they are convicted for an offence. However, Section 17 provides an exception to this rule to

⁵⁴ Statistics Division, Prison Headquarters (n 21) 13, 25.

extend the period where an application has been made on behalf of the Attorney-General before a High Court or a Provincial High Court. Even then, the period of detention can only be extended up to three months at a time for an aggregate of 12 months. Further, Section 19 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 also excludes bail. Despite legal provisions, according to the Prison statistics 2019, 489 prisoners have been held in custody for 2 years, 523 prisoners have been kept in custody for a period of 18 months to two years and 890 prisoners have been held in custody for a period of 12 months to 18 months.⁵⁵ Hence, the law in this instance is often breached in practice.⁵⁶ There is therefore an urgent need to prioritise and expedite the hearing of these cases by the judiciary and to provide legal aid for prisoners in need.

4.9. Remissions and pardons

Section 58 of the Prisons Ordinance provides that prisoners who are undergoing imprisonment over a month are eligible to earn remission of their sentence through 'industry and good conduct.' Prison Rules 298-307, supplemented by the Departmental Standing Orders 436-451, provide for a detailed scheme for earning remissions.⁵⁷ When a prisoner has earned the required remission mark, they can be discharged by the Superintendent of the Prison, with the approval of the Commissioner General, provided that the sentence they were serving does not exceed one year.⁵⁸ If the sentence exceeds one year, the Commissioner General must recommend the discharge of the said prisoner to the Minister in charge.⁵⁹

Article 34 of the Constitution of Sri Lanka allows the President to grant free or conditional pardons to convicts, provide respites, substitute less severe sentences and to remit sentences. This provision ensures executive clemency in the event that retributive justice is assessed to be too harsh. One example of such is the case of *Pauline De Croos*,⁶⁰ where the accused was charged with murdering the eleven-year old son of the man she allegedly had an illicit relationship with.⁶¹ The jury sentenced the accused to death solely based on circumstantial evidence. Whether her guilt was proven beyond reasonable doubt

⁵⁵ *ibid.*

⁵⁶ Comment made during the interview held on 19.12.2019.

⁵⁷ A male prisoner can earn eight marks and a female prisoner nine marks, 'for steady hard work and the full performance of the task allotted to him or her.' Marks can be deducted due to misconduct. While a male prisoner can earn remission for one-fourth of his sentence, a female prisoner can remit one-third of her sentence through the marks (Rule 302).

⁵⁸ Prison Rules, 303-307.

⁵⁹ *ibid.*

⁶⁰ *Pauline Ruth De Croos v The Queen* (1977) 8. C. 73/67 <<https://www.lawnet.gov.lk/1977/12/31/pauline-puth-de-croos-appellant-and-the-queen-respondent/>>

⁶¹ Jayantha Gunasekera, 'Death Sentence of Pauline De Croos – A Travesty of Justice (part 1)' (The Island, 11 June 2016) <http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=146762>, Tassie Seneviratne, 'Pauline De Croos: A grave miscarriage of justice' (The Sunday Times, 23 February 2014) <<http://www.sundaytimes.lk/140223/sunday-times-2/pauline-de-croos-a-grave-miscarriage-of-justice-86473.html>>, Kirthie Abeysekera, 'Pauline de-croos- a woman who was more sinned gainst than sinning' (2001, The Island) <<http://www.island.lk/2001/11/18/featur02.html>>.

was questionable as the jury judgement might have been prejudiced by prosecutorial statements about her character.⁶² She was subsequently pardoned by the Governor of Sri Lanka.⁶³

However, this provision has also been used by successive Presidents to pardon prisoners with political and personal linkages.⁶⁴ The proviso to Article 34 provides that in the case of pardoning a convict condemned to death, the president shall seek a report from the Judge who tried the case, advice of the Attorney-General and the recommendation of the Minister of Justice. The Presidential pardon, that of Shamantha Jayamaha who was convicted to death by the Court of Appeal in *Jayamaha v Attorney-General*,⁶⁵ is presently being challenged before the Supreme Court as is the most recent pardon of Sunil Ratnayake.⁶⁶

The President has further powers under Section 311 of the Criminal Procedure Code to suspend and remit sentences and under Section 312 to commute death sentences to life imprisonment or another sentence, and also to commute sentences of rigorous and simple imprisonment. According to the Ministry of Justice Progress Report 2017,⁶⁷ a Committee was appointed by the Hon. Minister of Justice for the commutation of death sentences to life imprisonment. Accordingly, cabinet approval had been granted on 8 February 2017 for the Committee to make recommendations to reduce the sentences of death penalty, life imprisonment and long-term imprisonment. The Progress Report records that during the period between 11.12.2015-04.02.2017, a total of 247 persons' death sentences were commuted to life imprisonment by the President under Article 34 of the Constitution of Sri Lanka.⁶⁸

Commuting death sentences, life sentences and long-term sentences exceeding 20 years is currently recommended internally and remitted by the president using his constitutional powers.⁶⁹ The sentences below 20 years of imprisonment are remitted through internal administrative process.⁷⁰ However, this mechanism is questioned for a lack of transparency and due process. A legislative mechanism should instead be enacted to commute sentences, ensuring transparency and based on proven merit of the prisoner in order to provide all inmates an opportunity for reintegration in a manner that minimises stigma and protects their dignity.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ 'A pardon with precedent' (30 May 2019) < <http://www.dailynews.lk/2019/05/30/features/186965/pardon-precedent>>.

⁶⁵ CA 303/2006.

⁶⁶ *Women & Media Collective v. the Attorney-General*, SC (FR) Application No. 446/2019; <https://www.cpalanka.org/fundamental-rights-applications-challenging-the-decision-to-pardon-sunil-ratnayake/>

⁶⁷ Ministry of Justice Progress Report (January – September 2017) <https://www.moj.gov.lk/web/images/pdf/progress_report/14.11.2017/English.pdf>.

⁶⁸ *ibid.*

⁶⁹ Based on the interview conducted on 25.11.2019.

⁷⁰ *ibid.*

5. Judicial Process on Criminal Trial, Sentencing and Appeals

Article 14 of the ICCPR upholds the right to a fair trial while the Article 13(3) of the Constitution of Sri Lanka enshrines the same. Article 13(5) provides for the presumption of innocence. It is imperative for judicial processes relating to criminal trial, sentencing and appeals to be in compliance with these international and domestic human rights standards. The Sri Lankan judicial process results in excessive delays which severely affects its goal of meting out effective justice.⁷¹ This section focuses upon certain specific issues within this system that severely curtail the rights of prisoners.

5.1. Provision of legal aid by the state

Article 13 (3) of the Constitution of Sri Lanka provides that ‘any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, at a fair trial by a competent court.’ Therefore, the courts directly assign criminal cases to lawyers in the event that such persons are unable to retain a lawyer. Criminal Procedure Code specifically enables the High Court and the Court of Appeal to uphold the rights of persons facing criminal trials for legal representation through assignment of lawyers.⁷² However, it was noted that this system lacked a mechanism to hold such lawyers accountable for their conduct during their assignments.⁷³

The Legal Aid Commission of Sri Lanka was established by the Legal Aid Commission Law No 27 of 1978 to provide ‘legal advice, funds to conduct legal and other proceedings, services of Attorneys-at-Law and other necessary assistance for the conduct of such proceedings’ to ‘deserving persons.’⁷⁴ According to Section 4(a), the Commission has the power to ‘ensure that legal aid is provided in the most effective, efficient and economical manner.’ While the Commission also has the power to ‘determine the matters or classes of matters in respect of which legal aid may be given,’⁷⁵ guidelines for the design and implementation of legal aid must take into consideration ‘the need for legal assistance to be readily available and easily accessible to deserving persons.’⁷⁶ During the course of the research, CPA was

⁷¹ Sarath Wijesinghe, Delays in Legal System, Rules of Law and Good Governance’ (23.08.2017) <<http://www.dailymirror.lk/article/DELAYS-IN-LEGAL-SYSTEM-RULES-OF-LAW-AND-GOOD-GOVERNANCE-135178.html>>

⁷² ‘The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions: A Mapping of Legal Aid Services in Sri Lanka’ (2009) 12 <<http://www.undp.org/content/dam/srilanka/docs/governance/Legal%20Aid%20Review2.pdf>>.

⁷³ Based on the interview conducted on 01.11.2019.

⁷⁴ Legal Aid Commission Law No 27 of 1978, Section 3.

⁷⁵ *ibid*, Section 4 (c).

⁷⁶ *ibid*, Section 4 (d) (iv).

informed that there are gaps in the provision of legal aid by the Legal Aid Commission for persons facing criminal trials, an issue that requires further investigation.⁷⁷

5.2. Judicial note of mental health condition of the accused

Section 338 of the Criminal Procedure Code allows the Court of Appeal to quash the sentence of the trial court and order to keep the convict in safe custody where it appears to the court that while the convict is guilty, they were of unsound mind at the time of commission of the offence. Departmental Standing Order 627 makes provisions for the Medical Officer to keep a record of the mental condition of the prisoners who are charged with a capital offence 'both prior to trial and subsequently if under sentence of death.' Whenever the Medical Officer 'observes anything unusual in the mental condition of such a prisoner', the Officer is required to follow the progress of the trial through the Fiscal of a Court.⁷⁸ The Medical Officer is also to inform the Attorney General's Department of any observed abnormality so that the Crown Counsel (i.e. the State Counsel in charge of the case) would also be briefed. The next steps to be taken are left to the discretion of the Attorney-General's Department.

While this procedure aims to diagnose and take into consideration any intellectual disability of an offender from the trial stage itself, CPA was informed that it is not implemented consistently.⁷⁹ Consequently, the accused persons could be deprived of the mitigatory sentences accorded to them by the judiciary taking note of their mental health. Therefore, the current procedure should be reformed to provide for remand prisoners and convicts to face psychiatric examinations upon arrival at the prison and thereafter when necessary. The report of the psychiatric examination must be sent to the Attorney-General's Department and produced before the Court to ensure that judge has the relevant information for the purposes of sentencing.

5.3. Absence of a mechanism to monitor sentencing trends and the need to set sentencing guidelines

Sri Lanka does not have a sentencing policy or sentencing guidelines for judges. Discussions since 2011 have examined ways to introduce a national policy on sentencing and to establish an advisory council on sentencing policies and trends.⁸⁰ The discussions calling for these innovations mention inconsistencies

⁷⁷ Based on the interview conducted on 21.11.2019.

⁷⁸ According to the Code of Criminal Procedure Act (n 38), Section 2, 'Fiscal' means the Fiscal of a Court and includes any person authorised either generally or specially by a Judge to exercise, perform or discharge any power, duty or function of the Fiscal under this Code.'

⁷⁹ Based on the interviews conducted on 01.11.2019 and 21.11.2019.

⁸⁰ Chandani Kirinde, 'Judges to get guidelines on sentencing' (Sri Lanka Brief, 11 Dec. 2011)

<<https://srilankabrief.org/2011/12/judges-to-get-guidelines-on-sentencing/>>; 'Advisory Council and guidelines for sentencing' (Daily news online, 23 Dec. 2019) <<http://www.dailymirror.lk/15659/advisory-council-and-guidelines-for-sentencing>>; Also based on the interview conducted on 19.11.2019.

in bail and sentencing policies as affecting judicial legitimacy and the rule of law.⁸¹ However, both these reforms have not materialised.⁸² A national policy on sentencing would provide guidance to judges in imposing sentences to ensure that they weigh aggravating and mitigating factors affecting the sentence in a uniform manner. Consequently, judges will be facilitated to engage in adjudication in a more impartial and objective manner. This is crucial to uphold Article 12 of the Constitution of Sri Lanka.

The objective of establishing an advisory council on sentencing is to engage in research relating to the sentencing trends, provide the necessary guidance for the judges to engage in informed sentencing. The Sentencing Advisory Council of Victoria, Australia and the Sentencing Council of England and Wales also engage in educating the public on sentencing policies.⁸³ Nevertheless, it is important for this process to be undertaken in a manner that does not undermine the independence of the judiciary but enhances its competence because a sentencing policy and an advisory council aim to guide judicial discretion. The Sentencing Council for England and Wales is established as an independent body appointed by the Lord Chief Justice, as one of the arms-length bodies of the Ministry of Justice.⁸⁴ Council members of the English Sentencing Council include senior members of the judiciary and issue guidelines that the lower courts have to follow according to the Coroners and Justice Act 2009. A similar mechanism is crucial to facilitate Sri Lankan judges to follow a standardised scheme of sentencing while ensuring the independence of the judiciary.

5.4. Appeals from criminal sentences

The Proviso to Section 331(1) of the Criminal Procedure Code states that a person in prison can lodge an appeal to the Jailor within a specified time indicating his desire to appeal and then it is the duty of the Jailor to lodge the appeal with the High Court which pronounced the conviction, sentence or the order to be appealed. Section 331(5) provides that stamp fees are not required when the appeal is from a sentence of death. These provisions have given rise to a practice of an automatic appeal from the High Court to the Court of Appeal.⁸⁵ This process is facilitated by the Prison Authorities, who file an appeal to the Court of Appeal on behalf of every condemned prisoner. This has been an efficient procedure for prisoners in filing their appeals.

However, there is no similar legal provisions for appeals from the Court of Appeal to the Supreme Court, as the prison authorities do not play a similar facilitation role at this point. Because the appeal to the

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ 'Sentencing Council' (2020) <<https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/>>; 'Sentencing Advisory Council: Research, statistics and education about sentencing in Victoria' (2020) <<https://www.sentencingcouncil.vic.gov.au/>>.

⁸⁴ Sentencing Council for England and Wales, 'About us' <<https://www.sentencingcouncil.org.uk/about-us/>>

⁸⁵ Based on the interviews conducted on 01.11.2019 and 19.12.2019.

Court of Appeal is facilitated by the respective Prison, there is a higher opportunity to access the provisions of Court-assigned lawyers, even though CPA was informed that the quality of representation and accountability is questionable.⁸⁶ Since counsel are appointed by the court, the prisoners are not required to pay for them, but questions remain as to whether this is carried out in practice.⁸⁷ However, an attorney needs to be retained to initiate and facilitate the process of appeal itself during an appeal from the Court of Appeal to the Supreme Court and this can be a challenge due to the above issue. CPA was informed that prison authorities see the appeal to the Supreme Court as a special remedy for which their assistance is not required and hence do not facilitate this appeal process.⁸⁸ Consequently, prisoners have to retain legal assistance for an appeal to the Supreme Court, which becomes a significant financial cost to them and their families and exacerbates their hardship. Therefore, the Prisons Department and the Legal Aid Commission should collaborate to facilitate the entire process of appeal for prisoners.

⁸⁶ Based on the interview conducted on 06.11.2019.

⁸⁷ Based on the interview conducted on 01.11.2019.

⁸⁸ Based on the interview conducted on 19.12.2019.

6. Regulatory Framework relating to Prisons

The Prisons Ordinance is supplemented by the Prison Rules and Departmental Standing Orders, which reaffirm the Ordinance's emphasis on basic sustenance. They put in place a strict regime to provide prisoners with their most basic needs and merely facilitate their incapacitation. Prisoners' opportunities for education, improving their employability and skills and personal progress are severely limited as per the above regulatory framework. While practices within prisons have advanced from formal regulations in certain instances, lack of their recognition has jeopardised the institutionalisation of improvements.⁸⁹

6.1. Prison labour and remuneration

According to Prison Rule 217, prisoners are subject to a strict daily schedule under which they are required to work nine hours per day, from 6:00 AM to 10:30 AM and 12:00 Noon to 4: 30 PM. Rule 218 states that the Commissioner-General can alter this schedule in writing for special reasons. But even then, the regular week's labour cannot be reduced to less than 48 hours. Prisoners are allowed breaks on Sundays and their religious holidays. Further, Rule 221 allows for the Commissioner-General to segregate prisoners to a 'Special Gang' on the grounds of violent behaviour or continued misconduct. Prisoners so segregated are to be employed for 'cellular labour' under the direction of the Commissioner-General.⁹⁰

Prisoners are generally required to engage in 'such hard labour as shall be ordered'⁹¹ but there is no explanation provided as to what this 'hard labour' entails. However, Rule 290 states that 'prisoners in the penal stage shall be employed within the prison wall at stone breaking or coconut husk beating,' unless the Commissioner-General provides otherwise. According to the Departmental Standing Orders 492-493, the Medical Officer can recommend the reduction of the task or assigning for lighter labour 'if in his opinion the man is so weak that he is not able to perform the full task.' When such a recommendation is approved by the Superintendent, the prisoner can access more 'favourable conditions,' without being subject to 'any loss of diet or marks of the substitution of a diet of less value than the one the man is getting.'

While this regulatory framework indicates harsh labour conditions that can violate the dignity and fundamental rights of prisoners, CPA was informed in interviews that the prison system does not engage

⁸⁹ HG Dharmadasa, 'A General Overview of the Prison System in Sri Lanka since Independence' <https://www.academia.edu/6073176/A_GENERAL_OVERVIEW_OF_THE_PRISON_SYSTEM_IN_SRI_LANKA_SINCE_INDEPENDENCE>.

⁹⁰ The Prison Rules do not provide a definition or an explanation on 'cellular labour.'

⁹¹ Rule 217.

the prisoners in productive labour at the present moment.⁹² Hard labour was abolished in the United Kingdom decades ago,⁹³ and while India still retains the criminal sentence of rigorous imprisonment, the prisoners rarely engage in hard labour due to lack of a demand for prison labour,⁹⁴ which is similar to the position in Sri Lanka. The distinction between rigorous and simple imprisonment therefore needs to be abolished. The Department of Prisons should instead design and implement programmes that enhance the employability of prisoners to facilitate their reintegration.

Former Commissioner General of Prisons Mr. H.G. Dharmasena states that prisoners initially worked mainly in metal breaking and husk beating and that ‘in most prisons prisoners were engaged in monotonous unproductive work such as mending mail bags and coir twisting.’⁹⁵ This affects the prisoners’ right to employment and right to just and favourable conditions of work guaranteed by Articles 6 and 7 of the ICESCR. Furthermore, Rule 71(4) of the Standard Minimum Rules for the Treatment of Prisoners recommends that the work that prisoners engage in should aim to facilitate their ability to earn ‘an honest living’ upon release.

Prisoners in Penal stages Classes III and IV are not eligible for any payment for their labour. Prisoners in Class II and I are eligible for payment for their work as set out in Prison Rules 291 and 292. Their employment conditions and pay entitlement is as follows:

Class	Employment conditions	Payment for first offenders and specially selected reconvicted criminals	Payment for reconvicted prisoners
Penal stage	Stone breaking or coconut husk breaking within prison walls	Not eligible	Not eligible
Class IV	Employment outside the prison walls	Not eligible	Not eligible
Class III	Employment outside the prison walls	Not eligible	Not eligible
Class II	Employment outside the prison walls	50 cents per month , provided that the Superintendent is satisfied with their conduct, industry and this entered the	50 cents a month If employed as artisans, sledgers or miners and if

⁹² Based on the interview conducted on 04.11.2019.

⁹³ Through Section 1(2) of the Criminal Justice Act 1948 for England and Wales, Section 1(2) of the Criminal Justice (Northern Ireland) Act 1953 and Section 16(2) of the Criminal Justice (Scotland) Act 1949.

⁹⁴ ‘How rigorous is rigorous imprisonment?’ (24 Jul. 2011) <<https://www.hindustantimes.com/delhi-news/how-rigorous-is-rigorous-imprisonment/story-il9IUQGLwcZsoGckulb31L.html>>

⁹⁵ HG Dharmadasa (n 61) 2.

		<p>prisoner records</p> <p>75 cents per month, after 6 months (plus one good conduct badge)</p>	<p>the Superintendent is satisfied with their conduct and industry</p> <p>a cent for each day on which they have earned full marks, if not employed in these capacities</p>
Class I	Employment outside the prison walls	<p>Two good conduct badges and pay at rate of Rs. 1 per month</p> <p>three good conduct badges and Rs. 1.25 per month after 6 months</p> <p>four good conduct badges and Rs. 1.50 per month after 1 year. Also eligible to work as hospital orderlies, outposts, night patrols in wards, provided that they are not previously convicted</p> <p>Rs. 1.75 per month, after 18 months</p> <p>Rs. 2 per month, after 2 years until release</p> <p>After serving 30 months with exemplary conduct and industry, may be specially selected for appointment as Disciplinary Prison Orderlies or as Instructors Grade II with a monthly payment of Rs. 2.50.</p>	<p>50 cents a month if employed as artisans, sledgers or miners and if the Superintendent is satisfied with their conduct and industry</p> <p>a cent for each day on which they have earned full marks, if not employed in these capacities</p>

While the payments can vary based on the employment of the prisoners, CPA was informed that this remains the default payment scheme for the prisoners.⁹⁶ These pay rates, outdated by more than a century, violate the ‘meaningful remunerated employment’ required by Principle 8 of the Basic Principles for the Treatment of Prisoners and the requirement of ‘equitable remuneration’ in Rule 76 of the Standards Minimum Rules for the Treatment of Prisoners. These meagre payments are in effect a state sanctioned form of slavery and servitude, which is forbidden under Article 8 of the ICCPR. Prison

⁹⁶ Based on the interviews conducted on 04.11.2019 and 25.11.2019.

Rules must be immediately updated in line with the National Minimum Wage of Workers Act No. 3 of 2016.⁹⁷

6.2. Prison infrastructure and facilities

Prison Rule 179 states that ‘so far as the number of cells in the prison shall permit, every male prisoner shall be locked up at night by himself in a separate cell, to be duly certified by the Inspector-General as sufficient for one prisoner. No cell shall be certified which contains less than 54 superficial feet of floor space and 540 cubic feet of space, and is not properly ventilated.’ However, Sri Lanka’s current prison infrastructure is drastically inadequate to hold the inmate population. Severe overcrowding continues to be a problem in prisons to the extent that the prisoners have to take turns to sleep.⁹⁸ CPA was informed that in some prisons, a space that was initially constructed to hold one prisoner is said to be shared by six or more prisoners.⁹⁹ Further, there is no supervision of how these prisoners treat each other, which perpetuates prisoner-to-prisoner violence.¹⁰⁰ Moreover, the treatment of inmates by the prison administration can also vary based on their socioeconomic affluence.¹⁰¹ As a result, the standards of prisons constrain inmates to conditions which are an affront to their human dignity. Such conditions further degrade their physical and psychological conditions,¹⁰² rather than developing their capacities for societal reintegration post-incarceration.

Clothing, food and basic hygiene to be provided for Sri Lankan inmates are governed by Prison Rules 222-226, 309-322 and Departmental Standing Orders 491-550. This framework was put in place in 1938 and 1956 has not been updated since then; as a result, prison administration is not bound by any rigorous standards to meet the basic needs of prisoners. CPA was informed that inmates receive only meagre meals that do not provide them with basic nutrition¹⁰³ but due to the poverty faced by some, even these prison meals are considered a luxury.¹⁰⁴ CPA was also informed that prisons provide special meals to meet the dietary needs of the prisoners with diabetes¹⁰⁵ but it is unclear how consistent these practices are. In addition to the consideration required with meals, CPA was also informed that prisons lack the most basic sanitary facilities¹⁰⁶ with severe shortages of washrooms affecting inmates’

⁹⁷ Section 3 (1) of this Act provides that ‘The national minimum monthly wage for all workers in any industry or service shall be ten thousand rupees and the national minimum daily wage of a worker shall be four hundred rupees.’

⁹⁸ H.G. Dharmadasa (n 61) 13; reaffirmed during the interview conducted on 04.11.2019. It was also mentioned that the prisoners even suffer from skin diseases and various other maladies as a result.

⁹⁹ Based on the interviews conducted on 04.11.2019 and 25.11.2019.

¹⁰⁰ Based on the interview conducted on 04.11.2019.

¹⁰¹ Based on the interviews conducted on 01.11.2019, 04.11.2019 and 25.11.2019.

¹⁰² Based on the interview conducted on 04.11.2019.

¹⁰³ Based on the interview conducted on 25.11.2019.

¹⁰⁴ Based on the interviews conducted on 04.11.2019 and 21.11.2019.

¹⁰⁵ *ibid.*

¹⁰⁶ Based on the interviews conducted on 04.11.2019, 21.11.2019 and 25.11.2019.

cleanliness and health.¹⁰⁷ These facilities are critical to ensure the health and safety of prisoners during the COVID19 outbreak.

Therefore, immediate action and financial allocation must be made to refurbish prisons. Simultaneously, cases of long-term remand prisoners must be expedited and convictions for default of fines must be revised.¹⁰⁸

6.3. Classification of prisoners

According to Prison Rules 290-297, every prisoner who enters prison must serve one calendar month at the penal stage. After serving at the penal stage, prisoners are eligible for promotion to Class IV, unless extended by provisions in Rule 259 or 297.¹⁰⁹ After serving 11 months as a Class IV prisoner, inmates are eligible for promotion to Class III.¹¹⁰ A year later they can be promoted to Class II and another year later to Class I.¹¹¹ Inmates remain as Class I prisoners for the rest of their imprisonment period. This classification of prisoners determines their diet, clothing, work while in prison and eligibility for remissions. While this classification affects the prisoner's status and treatment within the prison, it has no basis other than the length of the time spent in prison. An urgent revision of this arbitrary classification system is therefore required.

Australian States prioritise the security of prisoners in their classification,¹¹² but New South Wales also takes into account 'the sentence length, the prisoner's program and support needs, and on vacancies in different centres' and 'closeness to family.'¹¹³ Such a classification which also accommodates certain specific circumstances of the prisoners should be adopted for Sri Lanka as well.

6.4. Absence of a mechanism to vote

Article 89 of the Constitution of Sri Lanka only disqualifies from voting persons who have been convicted for an offence punishable with a sentence of not less than two years and who have served a term of less than six months imprisonment for such offence seven years prior to the election. However, there is no practical mechanism to enable the voting rights of unconvicted prisoners who are subject to the presumption of innocence under Article 13(5) as well as persons convicted for offences punishable

¹⁰⁷ Based on the interview conducted on 04.11.2019.

¹⁰⁸ Based on the interview conducted on 19.12.2019.

¹⁰⁹ Prison Rule 290.

¹¹⁰ Prison Rule 291.

¹¹¹ Prison Rules 292, 293.

¹¹² Ugur Nedim, 'How are Prison Inmates Classified?' (17.07.2015)

<https://www.sydneycriminallawyers.com.au/blog/how-are-prison-inmates-classified/> Caxton Legal Centre, The Queensland Law Handbook: The Prisoners' Security Classification < <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/prisons-and-prisoners/prisoners-security-classification/> >

¹¹³ NSW Department of Justice, Going to Prison – The Families Handbook (2009) 24

<https://www.justice.nsw.gov.au/Documents/Corrective%20Services/families-handbook_chapter%202.pdf>

with less than two years imprisonment. The Prison Rules and the Departmental Standing Orders are silent on the matter.

Centre for Monitoring Election Violence (CMEV) has over the years raised the issue of the need for a mechanism to provide for eligible prisoners to cast their ballot.¹¹⁴ CPA was also informed that the Committee for Protecting rights of Prisoners is currently pleading for a writ of mandamus before the Supreme Court since the Election Commission has not taken sufficient action to facilitate eligible prisoners to vote.¹¹⁵ The petitioners base their case on Articles 3 and 4(e) of the Constitution of Sri Lanka and further cite Article 14(1)(a) to assert that denying eligible prisoners the right to vote is a violation of their freedom of expression.¹¹⁶ They point out that inmates have a significant interest in voting for representatives of their choice because governmental policies affect the regulation of prisons, prison conditions and policies on sentence commutation. Others including the Human Rights Commission of Sri Lanka (HRCSL) have also called for the Election Commission to provide the necessary facilities for eligible prisoners to vote.¹¹⁷ CPA also supports the position that an effective mechanism must be put in place for prisoners to exercise their right to franchise.

6.5. Death row prisoners

Even though Sri Lanka had not carried out capital punishment since 1976, the country continues to maintain death row prisoners. Prison Rules 260-262 place death row prisoners under the strict supervision of prison staff and isolated from other prisoners. Rule 263 lists out the visitors that death row prisoners can meet and 266 provides for their diet. The HRCSL notes that even after 26 years of suspending executions, the death row prisoners are kept in preparation for imminent execution.¹¹⁸ Apart from the administrative and infrastructural cost of maintaining death row prisoners, the practice has also affected the health of the prisoners.¹¹⁹ CPA was also informed that as a result of the accumulation of death row prisoners, their living conditions are affected through overcrowding and a lack of adequate facilities.¹²⁰

Rule 229 allows every prisoner to send a petition to the President of Sri Lanka after their conviction and to send further petitions if special circumstances warranting attention arises. In addition, further petitions can be sent to the President annually. The prison administration must send these petitions to

¹¹⁴ Based on information shared by CMEV

¹¹⁵ *Committee for Protecting rights of Prisoners (guaranteed) limited v The Chairman, Elections Commission, SC/Writ 7/19.*

¹¹⁶ *Mediwaka v Dissanayake* [2001] 1 SriLR 176.

¹¹⁷ 'Voting Rights sought for prisoners at the next polls' (The Sunday Morning 29 Jan. 2020)

<<http://www.themorning.lk/voting-rights-sought-for-prisoners-at-next-polls/>>

¹¹⁸ Human Rights Commission of Sri Lanka, 'Review on the Death Penalty by the Human Rights Commission of Sri Lanka' (2014) 16 <<http://www.hrcsl.lk/PFF/Death%20Penelty%20English-2014.pdf>>.

¹¹⁹ *ibid.*

¹²⁰ Based on the interviews conducted on 01.11.2019 and 04.11.2019.

the Office of the Commissioner to be delivered to the Presidential Secretariat. The petitions written by death row prisoners are to be marked as 'Urgent' and delivered as soon as possible to the Office of the Commissioner according to Standing Order 269. However, CPA was informed that many prisoners are not aware of these administrative processes available to them.¹²¹ They also have minimal access to documentation relating to their cases.¹²² CPA was also informed of difficulties to trace documentation in the event that prisoners or their families cannot recall their case number.¹²³ Such a situation exacerbates problems where such information is needed urgently, for example, for the purpose of filing fundamental rights applications against a presidential decision to re-implement death penalty. Therefore, the Prison Department should upgrade their documentation mechanisms to provide efficient access to the information required by prisoners and their lawyers.

According to Prison Departmental Standing Order 625, prison officers are required to be alert and 'bring to the immediate notice of the Medical Officer and the Superintendent any symptoms of insanity e.g., epileptic fits or peculiarities of behaviour, speech or expression or any physical or mental abnormality which any such prisoner may exhibit while in prison.' The Standing Order requires such information to be filed in the prisoners' Prison Record. However, no provision is made for any prisoner who is so identified to receive due healthcare and a review of the sentence in light of their disability. The Departmental Standing Orders must be revised for specific actions to be taken in the health interests of prisoners in such instances. The Prison Department should collaborate with the Ministry of Health and the Ministry of Justice to provide the prisoners with required medical assistance and review of sentences.

6.6. Female prisoners

The Prisons Ordinance provides that female prisoners must be separated from the male prisoners as a matter of discipline. The matron of the prison is in charge of female prisoners.¹²⁴ Prison Rules 182-188 specifically relate to prison staff who are to be in charge of the female prisoners, their visitors, employment and health care. They are to be provided with food, clothing and facilities similar to the male prisoners. There is general a lack of sanitary items and washroom facilities that affect the hygiene of female prisoners.¹²⁵

Prison Rule 183 requires the classification of female prisoners to be similar to male prisoners and isolation of the 'known prostitutes' 'in a separate ward by themselves.' However, CPA was informed that

¹²¹ Based on the interview conducted on 01.11.2019.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ Prisons Ordinance, section 32.

¹²⁵ *ibid.*

this rule is not followed in practice.¹²⁶ CPA was also informed of the children of female prisoners who grow up within the prison until the age of five at a separate unit within the Welikada Prison premises.¹²⁷ However, concern was raised regarding the guardianship of these children where they have no family to take them in after they pass the age of five.¹²⁸

Reports indicate that 32 women were sentenced to death from 2014-2018. This amounts to 3.5% of the people sentenced to death during that period. Prison Rule 265 states that an execution of a female prisoner is to be suspended whenever the Medical Officer certifies that she is pregnant. This fact is to be immediately communicated to the Governor, the President in the current context, to receive his or her orders. While the President holds the power to consider a pardon for such a prisoner in such an instance, there is no procedure, guidelines or criteria on eligibility for a presidential pardon. CPA was informed that no pregnant prisoners have been executed.¹²⁹ However, there is also no mechanism to identify pregnancy within the prison, recognise them through the databases and provide them with necessary facilities.¹³⁰

These issues denote how gender-specific needs of women are neglected within prisons and as such, their fundamental rights to not be discriminated based on gender and to be treated equally in accordance with Article 12(1) and 12(2) of the Constitution of Sri Lanka are being violated. As a party to the Convention on the Elimination of All Forms of Discrimination Against Women, Sri Lanka also has an international obligation to ensure women's access to justice and to 'pay special attention to the situation of women prisoners and apply international guidance and standards on the treatment of women in detention.'¹³¹

6.7. Young prisoners

The Children and Young Persons Ordinance No. 49 of 1939 deals with juvenile justice in Sri Lanka. However, the definition of child in Section 88 of this Ordinance to be below the age of fourteen is not in alignment of the definition of child in Article 1 of the Convention on the Rights of the Child (CRC).¹³² According to the Ordinance, the Magistrates throughout the country have jurisdiction to hear juvenile

¹²⁶ Based on the interview conducted on 04.11.2019.

¹²⁷ Based on the interviews conducted on 04.11.2019 and 25.11.2019.

¹²⁸ Based on the interviews conducted on 04.11.2019.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ Committee on the Elimination of Discrimination Against Women, The General Recommendation 33 on Women's Access to Justice (2015) further recommends reference to 'the Bangkok Rules and also the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, adopted by the Economic and Social Council in its resolution 2005/20.'

¹³² The CRC, Article 1, 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

cases.¹³³ This Ordinance also provides establishment of a Juvenile court.¹³⁴ Nevertheless, there are only two Juvenile Courts in the country situated in Battaramulla and Jaffna.¹³⁵ This raises issues regarding geographical access to justice and interconnected economic concerns.

The Children and Young Persons Ordinance provides for the separation of children from adult prisoners during arrest, remand, transportation and trial as well as delineating special procedures during trial and conviction.¹³⁶ However, existing research identifies numerous gaps in their implementation.¹³⁷ The Ordinance also provides for a range of punishments to the juvenile prisoners, such as detention, substitution of custody in a remand home, sending to an approved or certified school, commit to the care of probation officer or parent, fine the parents, admonition and remission.¹³⁸ However, the sentencing continues to be focused on imprisonment.¹³⁹ Therefore, it is important that the sentencing guidelines focus specifically upon the sentencing of young prisoners, also taking into account the best interest and rights of the child provided in the Convention on the Rights of the Child (CRC).¹⁴⁰

The Prisons Ordinance requires that juveniles must be separated from the adults.¹⁴¹ Further, Prison Standing Orders 557 makes it compulsory for young prisoners to attend educational classes from 2.30 PM to 4.00 PM. The same Standing Order gives a broad discretion to the Superintendent to decide whether to exclude such a prisoner from classes on the basis of failure to 'profit' from the sessions or if the presence of such prisoner in the class is deemed to be 'undesirable.' According to Standing Order 558, the Superintendent can allow young prisoners to take afternoon classes with adults where separate facilities cannot be provided.¹⁴² These Orders are outdated and do not reflect the current practice within the prison system. Therefore, these sections must be reviewed immediately upholding the rights of the child enshrined in the CRC.¹⁴³

¹³³ *ibid*, Sections 3, 4.

¹³⁴ The Children and Young Persons Ordinance No. 49 of 1939, Sections 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

¹³⁵ Daily News, 'Juvenile Justice System in Sri Lanka' <<http://archives.dailynews.lk/2010/09/24/fea40.asp>>; Sunday Times, 'Finally child friendly courts' (28.03.2010) <http://www.sundaytimes.lk/100328/Plus/plus_10.html>

¹³⁶ Sections 13 - 23.

¹³⁷ Verite Research, 'A Legal and Institutional Assessment of Sri Lanka's Justice System for Children' (2017) 19 – 33 <<https://www.veriteresearch.org/wp-content/uploads/2017/08/Verit%C3%A9-Research-A-Legal-and-Institutional-Assessment-of-Sri-Lankas-Justice-System-for-Children.pdf>>.

¹³⁸ Section 24, 25, 26, 27, 28,

¹³⁹ Based on the interview conducted on 04.11.2019; Jeeva Niriella, 'Rehabilitation and Reintegration of Juvenile Offenders in Sri Lanka' (2011) 8 US – China Law Review 499, 507.

¹⁴⁰ Specifically, Committee on the Rights of the Child, 'General comment No. 24 on children's rights in the child justice system (2019).

¹⁴¹ Section 48 (b).

¹⁴² Standing Order 553 states that the 'Superintendents will endeavor to organise evening educational classes in each prisons' with the cooperation of the Education Department or a voluntary organisation.

¹⁴³ Specifically, Committee on the Rights of the Child, 'General comment No. 24 on children's rights in the child justice system (2019).

In *P.D. Nilanka v the AG*, the Supreme Court interpreted Section 53 of the Penal Code as qualifying a person for an exemption from death penalty if he or she was below eighteen years at the time ‘the sentence is pronounced’, as opposed to at the time of committing the crime. This in effect negates the relief allowed by Section 53 in a system of excessive judicial delays. Therefore, the legislative reforms are required to clarify the position with regards to juvenile prisoners

In 2014, the first prison school named Homagama Suneetha Vidyalaya was established in Watarake prison premises under the purview of the Ministry of Education.¹⁴⁴ This school had the ambitious goal of upholding the right to education of inmates, with most not having had education up to GCE Ordinary Level standard.¹⁴⁵ The school was initially to provide education up to Ordinary Levels,¹⁴⁶ but now also offers Advanced Levels classes in the Arts Stream. The school is reported to accommodate students between the ages of 16-30 and provides informal education to inmates who have not had prior exposure to formal education.¹⁴⁷ Vocational training programmes reportedly include sewing, carpentry, electrical courses and plumbing.¹⁴⁸

According to Prison Statistics 2019, the daily average population at the Training School for Youthful Offenders in Wataraka as at 2018 is 30, while 28 inmates were admitted to the Training School in 2018.¹⁴⁹ All these inmates categorised as ‘youth’ are male.¹⁵⁰ CPA was informed that the implicit understanding of prison administration was that the female prisoners are not categorised as youth. This is said to be a misconception arising from assessing the adulthood of female prisoners based on their sexual and reproductive activeness rather than their age.¹⁵¹ As a result, female juvenile prisoners are denied the rights and opportunities that they are entitled to in prison as a youth, especially their access to education and vocational training.

The school faces unique challenges in its attempts to fulfil the right to education of young offenders because students have complicated family backgrounds, psychosocial concerns and comparatively weak exposure and interest towards education.¹⁵² Moreover, tensions were noted between the teaching staff of the school, who are governed by the Ministry of Education, and the prison officers, who function

¹⁴⁴ Ministry of Education, ‘The first prison school in Sri Lanka is opened’ (2014) <http://www.moe.gov.lk/english/index.php?option=com_content&view=article&id=1149:the-first-prison-school-in-sri-lanka-is-opened&catid=344&Itemid=771>.

¹⁴⁵ *ibid*; reaffirmed during the interview conducted on 04.11.2019.

¹⁴⁶ ‘This Prison’s no bar to a useful, gainful future within society’ (Sunday Times, 13 Jul. 2014) <<https://www.pressreader.com/sri-lanka/sunday-times-sri-lanka/20140713/283012577850967>>

¹⁴⁷ *ibid*.

¹⁴⁸ *ibid*.

¹⁴⁹ Statistics Division, Prison Headquarters (n 21) 48.

¹⁵⁰ *ibid* 47; also see Prison Rule 178.

¹⁵¹ Based on the interview conducted on 04.11.2019.

¹⁵² *ibid*.

under the Department of Prisons within the purview of Ministry of Justice.¹⁵³ They have two approaches to dealing with the students and inmates within their respective fields.¹⁵⁴ CPA was also informed that the school is further constrained by a lack of staff and a lack of facilities to adopt the school environment to meet the needs of young offenders.¹⁵⁵ Moreover, even those students who succeed in completing their education within the Suneetha Vidyalaya find it difficult to integrate to the mainstream education system to pursue further opportunities as a result of stigma within the general population.¹⁵⁶ Inmates who received vocational training also face difficulties in accessing the job market and finding employment that will sustain their lives. As a result, they face a higher risk of becoming recidivists.¹⁵⁷ Therefore, the Department of Prisons should collaborate with the Ministry of Education to improve the education it provides to young prisoners, and to ensure that young prisoners are integrated to mainstream education when they fulfil the necessary requirements.

6.8. Remand prisoners

Remand prisoners, prisoners committed to trial and civil prisoners are subject to less stringent conditions of custody than convicted prisoners. Prison Rules 189 to 211 allow for them to provide themselves with their own food, clothing and ‘a suitable room or a cell specially fitted for such prisoner’ subject to approval of the Superintendent.¹⁵⁸ They are also to be allowed to engage in their normal course of employment as much as possible.¹⁵⁹ Prison Rule 198 also permits such prisoners to receive visits from their usual medical practitioner when permitted by the Superintendent. Prison Rules further provide for such prisoners to communicate with friends, legal representatives, and country representatives where they are a foreigner.¹⁶⁰ The Rules are not updated to facilitate and regulate the use of newer forms of communication. However, this has not prevented inmates receiving access to mobile phones in prisons through illegal means and informal usage of mobile phones within prisons. Selectively condoning these illegal practices have paved the way for prison staff to maintain their power dynamics as well. Therefore, it is important for the Prisons Department to establish a common and transparent procedure for the treatment of all prisoners and for prisoners to be provided with access to efficient means of communication with their legal representatives and families.

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ Prison Rule 196.

¹⁵⁹ Prison Rule 199.

¹⁶⁰ Prison Rules 200-203: While the prisoners’ communications with his legal representative cannot be examined by the Superintendent, all the other communications are subject to such supervision.

7. Administrative Framework for the Prison Staff

Prisons are governed by the Department of Prisons with the purview of the Ministry of Justice. The Prisons Ordinance provides for a Commissioner-General of Prisons and a Commissioner of Prisons and their staff to head the Department of Prisons and be in charge of island-wide prison administration. As of 2018, there are 4 closed prisons, 18 remand prisons, 10 work camps, 2 open prison camps, 1 training school, 2 Correctional Centres for Youthful Offenders and 23 lock-ups island wide.¹⁶¹ These prisons are operated by 5,734 staff consisting of uniformed staff, non-uniformed staff, officers in the combined services, officers from the other services and officers posted from other departments.¹⁶² Accordingly, there is only one uniformed staff member for about 25 prisoners, just based on the number of prisoners admitted in 2018.¹⁶³

7.1. Employment conditions of prison staff

While prison staff may seek employment in prisons because it is a government job with pension benefits, they face unjust employment conditions and receive unsatisfactory salaries. Prison staff face heavy strain in their job duties due to the existing cadre in each category of staff identified by the Prison Department falling short of the required cadre numbers.¹⁶⁴ For instance, CPA was informed that due to the shortage of staff, staff are said to be on duty for several days in the same uniform.¹⁶⁵ Furthermore, staff also sleep on shift due to excessive workloads and due to the lack of infrastructure facilities available for them to rest.¹⁶⁶ These conditions affect the physical and psychological wellbeing of prison staff, which inevitably affects their approach towards prisoners.¹⁶⁷ Therefore, the Prison Department should hire an adequate number of staff, ensure them just and favourable conditions of work and make the necessary financial allocations for this purpose.

¹⁶¹ Statistics Division, Prison Headquarters (n 21) 3-5.

¹⁶² *ibid* 10-11.

¹⁶³ Statistics Division, Prison Headquarters (n 21) xv, 10: This calculation was reached by dividing the total number of unconvicted prisoners (108,263) and convicted prisoners (24,852) admitted in 2018 by the number of uniformed staff (5,334). However, it is to be noted that uniform staff includes a wide range of positions including the Commissioner General of Prisons.

¹⁶⁴ Department of Prisons, Performance Report - 2018

<<https://www.parliament.lk/uploads/documents/paperspresented/performance-report-department-of-prison-2018.pdf>>

¹⁶⁵ Based on the interview conducted on 04.11.2019.

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid*.

7.2. Staff training

According to the Prison Department's recruitment procedures, prison guards are required to possess specified educational qualifications and are selected through a competitive exam.¹⁶⁸ Upon selection, the candidates are meant to go through a three month residential training at the Centre for Research and Training in Corrections and a nine month practical training conducted by the Centre for Research and Training in Corrections.¹⁶⁹ According to the recruitment procedures of prison guards as amended in 2019, the candidates must be unmarried and should remain unmarried for the duration of the training.¹⁷⁰ Upon completion of the training they will receive a certificate to that effect and be assigned to offices based on vacancies. Other staff, including labourers and watchmen, can apply for promotions when they complete a satisfactory service for a specified number of years.¹⁷¹

However, the duration and substance of the pre-service training for prison staff raises concerns.¹⁷² CPA was informed that due to shortages of staff, trainees are assigned to work as soon as possible, even if their training is not complete.¹⁷³ Further, the in-service training of these officers depends upon the will of the administration of the Centre for Research and Training in Corrections but difficulties are faced in getting staff released for in-service training due to the perpetual shortage of staff.¹⁷⁴ Consequently, it is difficult to ensure the quality and effectiveness of the in-service training received by prison staff. However, it is crucial for a comprehensive training to be institutionalised with the necessary personnel and resources, and for financial allocations to be made for this purpose.

7.3. Lack of capacity of the executioners to carry out capital punishment

The legislative requirements for carrying out the death penalty as discussed above constitute a complex procedure that requires special training and experience for all officers involved. An assessment of the mental and physical capacity by the National Hospital, as provided for by the Prison Department's

¹⁶⁸ Office of the Public Service Commission, 'Recruitment Procedure' (22 Feb. 2019)
<<http://www.prisons.gov.lk/Recruitments/RECRUITMENTPROCEDURE/guardnew2019.pdf>>

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ Department of Prisons, 'Recruitment Procedure' (13 Jul. 2013)
<<http://www.prisons.gov.lk/Recruitments/RECRUITMENTPROCEDURE/labour.pdf>>

¹⁷² H.G. Dharmadasa (n 61) 9; Based on the interview conducted on 04.11.2019.

¹⁷³ Based on the interview conducted on 04.11.2019.

¹⁷⁴ HG Dharmadasa (n 61) 9; Based on the interview conducted on 04.11.2019.

recruiting guidelines,¹⁷⁵ is not a sufficient qualification to carry out an execution.¹⁷⁶ Albert Pierrepoint, an executioner for the Britain from 1931 to 1956, records in his autobiography the extensive training he went through before carrying out an execution.¹⁷⁷ He was required to practice dummy executions and serve nine years as an assistant executioner for about 40 executions to subsequently lead an execution.¹⁷⁸ His writings highlight that the Table of Drops, a method to calculate the length of the hanging rope based on the weight of the prisoner, is merely a guide.¹⁷⁹ The execution involves exercise of independent discretion by the executioner for each execution which is acquired through practice.¹⁸⁰ In such a context, in the event the death penalty is reinstated, Sri Lankan prison authorities will be carrying out executions without proper training and prior experience for executioners. This would result in significant consequences including the persons subject to execution undergoing torture, inhumane and degrading treatment. This reaffirms CPA's position that legislative recognition of death penalty should be abolished in Sri Lanka.

7.4. Services aimed at rehabilitation and reintegration

Prison Standing Order 553 states that the Superintendent is to endeavour to organise evening educational classes in each prison' collaborating with the Ministry of Education or a voluntary organisation. While rehabilitation officers are present within prisons as non-uniformed staff, rehabilitation is not institutionally mainstreamed as a responsibility of all prison staff.¹⁸¹ The current separation of jailors and prison guards as uniformed staff and rehabilitation officers as non-uniformed staff has led to tensions among the two categories with rehabilitation becoming limited to the purview of one category of staff.¹⁸² Moreover, the recruitment of additional staff of social workers, teachers and trade instructors as suggested by the Standard Minimum Rules is currently neglected within the prison cadre.¹⁸³ Prison Rules and Departmental Standing Orders must be revised to incorporate these international standards.

¹⁷⁵ Department of Prisons (n 111).

¹⁷⁶ Based on the interview conducted on 01.11.2019.

¹⁷⁷ Suriya Wickremasinghe, 'Death Penalty – The Constitutional Hurdle' (unpublished).

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ Based on the interview conducted on 04.11.2019.

¹⁸² Based on the interview conducted on 04.11.2019.

¹⁸³ Based on the interview conducted on 04.11.2019. Also evident through statistics on existing carcer provided in Statistics Division, Prison Headquarters (n 21) 10-11.

7.5. Medical staff

Prison Rules 41-81 provide that the medical officer and their team is to regularly examine prisoners and maintain records. According to Prison Statistics, 19 medical officers, 11 medical practitioners and 1 medical lab technician are presently employed nationally for the entire prison population.¹⁸⁴ CPA notes the inadequacy of these medical staff as well as healthcare infrastructure to meet the health needs of inmates. CPA was also informed of instances where some medical staff questioned prisoners convicted under the Prevention of Terrorism Act about offences they committed in a manner that violates their privacy.¹⁸⁵ Such questions also jeopardise professionalism and impartiality of the medical service.

Meanwhile, the current legislative framework for treating mental illness is solely dependent upon prison administration which is of concern as there is no requirement for staff to be qualified in psychiatry and psychology. According to Section 66 of the Prisons Ordinance, assessing whether the prisoners appear to be out of health 'in mind' is the duty of the jailor. Accordingly, a jailor can report his suspicions to the medical officer, or the prisoners can request to see the medical officer on their own initiative. In the event that the prison does not have adequate facilities to treat mentally unsound prisoners, the Commissioner General can transfer such prisoners to an institution recognised under the Mental Diseases Ordinance, by warrant under his hand, for a statutorily specified period of time (Section 69 (2)).¹⁸⁶ Considering the present facilities and context, CPA recommends the need to employ an in-house psychiatrist and a psychologist or establishing a mechanism for such specialists to pay regular visits to prisons. The procedure for assigning mental health professionals to prisoners in need also cannot be left up to the discretion of the Commissioner General. Similarly, the authorities must ensure the necessary resources are available to have medical staff and facilities to address the needs of prisoners and prison staff.

¹⁸⁴ Statistics Division, Prison Headquarters (n 21) 11.

¹⁸⁵ Based on the interview conducted on 25.11.2019.

¹⁸⁶ Prison Ordinance, Section 69 (2) 'Where any prisoner is suspected to be of unsound mind or to be suffering from any mental disease, and adequate facilities for keeping him under observation or for diagnosing the disease are not provided in the prison in which the prisoner is detained, the Commissioner-General may, by a warrant of transfer under his hand, direct the removal of the prisoner to any place of observation or mental hospital appointed or maintained for the purposes of the Mental Diseases Ordinance, and such warrant shall be sufficient authority for the detention of the prisoner in such place or hospital for any period not exceeding fourteen days in the first instance ; and where any further observation is required, the Commissioner-General may authorise in writing the detention of the prisoner for such further period as may be necessary, but so that the aggregate period of detention in such place or hospital shall not exceed twenty-eight days in any case.'

8. Conclusion

The report has assessed the constitutional, legal and regulatory framework relating to criminal punishment in Sri Lanka. The research makes it evident that the statutory provisions as well as the regulatory structure relating to criminal punishment is outdated and requires urgent attention. As a result, all prisoners undergo additional punishment exceeding the sentence imposed by the judiciary for the respective offences they committed and face additional consequences which negatively affect their physical and mental wellbeing; the justice they can receive for their cases and for any problems arising during their sentences; and their prospects for life after prison. Remand prisoners also spend long periods in custody due to judicial delays and a lack of legal aid, despite the constitutional presumption of innocence.

As the report highlights, there is also an urgent need to address the framework and conditions faced by prison staff. While the present report is not an exhaustive study, it raises key issues that require attention in an area that is often forgotten and ignored. This is even more urgent in the context of recent political manoeuvres to reinstate the death penalty which would place possible further strain on an already overstretched prison system. While CPA urges authorities, policy makers and others to focus on the need for legislative and policy reforms, change cannot be done merely by changing individual provisions. Nor can it be done by the appointment of task forces comprising of former and present military, intelligence and law and order officials with no inclusion of officials with expertise on the subject matter at hand. CPA reiterates that reforms require a multi-pronged effort coupled with the will to change attitudes and prioritise the rights of some of the most vulnerable persons in society, from both within and outside the criminal justice system.

9. Recommendations

This section focuses on the legislative and policy reforms to address the practical issues that CPA came across during this research. This is not an exhaustive list of recommendations but an attempt to highlight possible avenues of redress to some of the above discussed issues.

9.1. Legislative reforms

1. Abolish the death penalty and downgrade the sentences of prisoners the death row.¹⁸⁷
2. Amend the Prisons Ordinance and reform the institutional structure of prisons and the roles of prison officers and the scope of their work, prioritising the reintegration of prison inmates.¹⁸⁸
3. Abolish the distinction between simple and rigorous imprisonment to prioritise vocational training and employment for all eligible prisoners.¹⁸⁹
4. Establish a Sentencing Council to monitor sentencing trends.¹⁹⁰
5. Enact a statutory mechanism and criteria for commuting sentences¹⁹¹
6. Amend the Children and Young Persons Ordinance No. 49 of 1939 in line with the CRC.¹⁹²
7. Enact legislation to introduce non-custodial measures of sentencing dispositions,¹⁹³ such as verbal sanctions, conditional discharge, status penalties, expropriation orders, compensation orders, referral to an attendance centre, house arrest and other modes of non-institutional treatment.¹⁹⁴
8. Enact legislation to introduce and institutionalise post-sentencing dispositions, such as furlough and half-way houses, work or education release and parole.¹⁹⁵

9.2. Policy reforms

1. Introduce a National Policy on Sentencing through the collaboration of the Judiciary and the Ministry of Justice, to provide sentencing guidelines to judges. Guidelines must be on assessing aggravating and mitigating factors in sentencing the persons found guilty and limiting

¹⁸⁷ Based on the discussions in *supra* sections 3.1., 4.1., 4.2., 4.3., 6.5. and 7.3.

¹⁸⁸ Based on the discussion in *supra* section 3.2., 3.3., 3.5., 4.4. Also refer to Annexure I for comparative examples. For the international framework on designing and implementation of restorative justice programmes, refer to, the Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000) <<http://hrlibrary.umn.edu/instate/ECOSOCres2000-14.html>>.

¹⁸⁹ Based on the discussions in *supra* section 3.2., 3.5., 4.1. and 6.1.

¹⁹⁰ Based on the discussions in *supra* section 5.3.

¹⁹¹ Based on the discussions in *supra* section 4.9.

¹⁹² Based on the discussions in *supra* section 6.7.

¹⁹³ Based on the discussions in *supra* section 4.1.

¹⁹⁴ United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), Rule 8.

¹⁹⁵ *ibid*, Rule 9; License scheme, work release and home leave, under which 167, 547 and 378 prisoners were respectively released in 2018, are not provided legislatively and continue to be administrative practices at the discretion of the prison authorities, Statistics Division, Prison Headquarters (n 21) 67.

imprisonment for defaulting on fines due to indigence. Specific guidelines should be made for different categories of prisoners.¹⁹⁶

2. The Ministry of Justice and the Department of Prisons should collaborate to design a National Policy on prison conditions and the treatment of prisoners. This Policy should be informed by the UN Basic Principles and Minimum Rules for the Treatment of Prisoners.¹⁹⁷
3. Allocate adequate budgetary funding to improve infrastructure and facilities within prisons to ensure effective rehabilitation and reintegration of the prisoners.¹⁹⁸
4. This affects guaranteed by Articles 6 and 7 of the ICESCR. Furthermore, Rule 71(4) of the Standard Minimum Rules for the Treatment of Prisoners recommends that the work that prisoners engage in should aim to facilitate their ability to earn 'an honest living' upon release.

9.3. Regulatory reforms

1. Update the Prison Rules and Departmental Standing Orders to ensure that they uphold the rights of the prisoners and facilitate their rehabilitation and reintegration.¹⁹⁹
2. Update the classification of prisoners to be based on the programme of rehabilitation and reintegration that they are allocated to.²⁰⁰
3. Update the Prison Rules so that work in prisons is meaningful and of value for prisoners after prison; enables prisoners' rights to employment and to just and favourable conditions of work; and is remunerated in line with the National Minimum Wage of Workers Act No. 3 of 2016 and to ensure the
4. Set up a practical method to uphold the right to franchise of the prisoners who are eligible to vote.²⁰¹
5. The Prison Department should establish transparent and efficient mechanisms for prisoners to make complaints. These procedures, information on their disciplinary requirements, and medical and employment facilities available for them, must be informed to them upon entry into prisons.²⁰²
6. The Ministry of Justice and the Prison Department should establish transparent and efficient mechanisms for prisoners, their families and their lawyers to access information about their cases as well as about appeals, pardons and other relief measures available to them.²⁰³

¹⁹⁶ Based on the discussion in *supra* sections 5.3, 6.6. and 6.7

¹⁹⁷ Based on the discussions in *supra* section 3 and 6.

¹⁹⁸ Based on the discussion in *supra* section 6.2.

¹⁹⁹ Based on the discussion in *supra* section 6.

²⁰⁰ Based on the discussion in *supra* section 6.3.

²⁰¹ Based on the discussion in *supra* section 6.4.

²⁰² Based on the discussion in *supra* sections 4.5., 4.6. and 6.5.

²⁰³ Based on the discussion in *supra* section 6.5.

7. Separate young female prisoners from adult female prisoners and recognised as a specific category of prisoners to ensure them rights and opportunities as youth.²⁰⁴
8. Provide a separate facility for female prisoners with young children away from the prison environment. Incarcerated mothers should be allowed to take care of their children for the duration of their imprisonment where there is no other family capable of taking care of the child.²⁰⁵
9. Implement the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 within prisons to protect inmates who make complains and appear as witnesses, based on the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.²⁰⁶

9.4. Administrative reforms

1. The Legal Aid Commission should prioritise providing legal aid to remand prisoners who are deprived of their liberty for excessive periods in violation of their constitutional rights.²⁰⁷ The Commission should collaborate with governmental and non-governmental bodies who engage in providing legal aid for such prisoners.²⁰⁸
2. The Legal Aid Commission should design and implement a system to facilitate judicial assignment of cases. The Commission must collaborate with the Bar Association of Sri Lanka to require all members to take up pro bono litigation.²⁰⁹
3. The Legal Aid Commission should provide quality legal aid to persons who are accused of crime and convicts who are appealing against their sentences.²¹⁰
4. Departmental Standing Orders should be re-enacted, stating the role of prison staff and the conditions of employment that they are entitled to in accordance with international standards.²¹¹
5. Staff training programmes should be institutionalised to ensure that they are adequately equipped to provide a professional service.²¹²
6. The Prison cadre should be redesigned prioritising the rehabilitation and reintegration of inmates.²¹³
7. The use of force by the prison staff must be strictly regulated and monitored.²¹⁴

²⁰⁴ Based on the discussion in *supra* section 6.7.

²⁰⁵ Based on the interviews conducted on 04.11.2019 and 25.11.2019.

²⁰⁶ G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985) <<http://hrlibrary.umn.edu/instree/i9dbpjv.htm>>.

²⁰⁷ Based on the discussions in *supra* section 4.8. and 6.8.

²⁰⁸ For instance, Legal Aid Unit at the Faculty of Law of the University of Colombo; Lawyers for Human Rights & Development <<https://lhrdsl.wordpress.com/prisons-program/>>.

²⁰⁹ Recommendation made during the interview held on 19.12.2019.

²¹⁰ Based on the discussion in *supra* section 5.1.

²¹¹ Based on the discussions in *supra* section 3.6. and 7.1.

²¹² Based on the discussion in *supra* section 7.2.

²¹³ Based on the discussions in *supra* section 7.4 and 6.7.

8. The Capacities of the Centre for Research and Training in Corrections should be strengthened to introduce innovations that suit the Sri Lankan context.²¹⁵

9.5. Departmental and Ministerial level collaboration

1. The Ministry of Health should collaborate with the Department of Prisons to improve health facilities. Each prison must be provided with sufficient medical staff, medicine and equipment to meet the regular and emergency health care needs of the prisoners. Promoting physical and mental health of the prisoners must be given equal priority.²¹⁶
2. The Ministry of Education should collaborate with the Department of Prisons to improve educational facilities. Educational facilities must be of a quality to ensure prisoners' integration into mainstream education and must enhance their employability and economic independence.²¹⁷
3. The Ministry of Women & Child Affairs and Social Security should collaborate with the Ministry of Justice and the Department of Prisons to ensure that the female inmates are provided with the specific facilities they require and also ensure their effective reintegration to the society.²¹⁸
4. The Ministry of Women & Child Affairs and Social Security should collaborate with the Ministry of Justice and the Department of Prisons to design a mechanism for the protection of children whose parents are incarcerated. This mechanism must be specially designed to ensure that these children do not resort to criminal activities.²¹⁹ Similar collaboration is required for the rehabilitation and reintegration of juvenile offenders.²²⁰

²¹⁴ Based on the discussions in *supra* section 3.3., 4.6. and 4.7.

²¹⁵ Based on the discussion in *supra* section 8.

²¹⁶ Based on the discussions in *supra* section 5.3. and 7.5.

²¹⁷ Based on the discussion in *supra* section 6.7.

²¹⁸ Based on the discussion in *supra* section 6.6.

²¹⁹ Based on the discussion in *supra* section 6.6.

²²⁰ Based on the discussion in *supra* section 6.7.

Annexure I: Comparative experiences

This section analyses in brief how a number of different jurisdictions have reassessed their legal and policy frameworks on criminal punishment and the resulting reforms. While Sri Lanka needs to evaluate criminal punishment based on the contextual factors, the processes followed by these countries could be of guidance. The Centre for Research and Training in Corrections is best placed to initiate such innovations. However, must be noted that the school currently has minimal capacity towards engaging in research.²²¹

I. Scandinavian countries

Sweden, Denmark, Norway and Finland report the lowest rates of incarceration in the world.²²² Key characteristics of prisons in these countries include:

- Facilitating inmates with access to their human rights, such as the right to vote, right to education, health care and access to families.²²³
- Legislative reform of criminal sentences and expansion of non-custodial alternatives to imprisonment, as exemplified through the sentencing reforms in Finland.²²⁴
- Role of prison authorities being perceived as facilitating rehabilitation and reintegration, because the punishment is considered to be confined to the sentence of imprisonment and deprivation of liberty.²²⁵ For instance, the Norwegian Correctional Service was reformed from a punitive approach in their employment to focus on rehabilitation.²²⁶ Prison Officers in addition undergo two to three years of training.

While such high standards are achieved due to these countries' economic prosperity and welfare state model, the process by which these countries reviewed the rationales for criminal punishment and reformed their systems accordingly is still an important point to consider.

²²¹ Based on the interview conducted on 04.11.2019.

²²² 'Prison Life in Scandinavia' (30 May 2016) <<https://www.dailyscandinavian.com/prison-life-in-scandinavia/>>

²²³ 'How Norway turns criminals into good neighbours' (BBC News, 7 Jul. 2019) <<https://www.bbc.com/news/stories-48885846>>

²²⁴ See, Bruce Zagaris, 'The Finnish Penal System Recent Reforms' (1976-1977) 3 New Eng. J. on Prison L. 437.

²²⁵ Erwin James, 'Prison is not for Punishment in Sweden. We get people into better shape' (The Guardian, 26 Nov/ 2014) <<https://www.theguardian.com/society/2014/nov/26/prison-sweden-not-punishment-nils-oberg>>; Keramet Reiter, Lori Sexton, Jennifer Sumner, 'Denmark doesn't treat its prisoners like prisoners — and it's good for everyone' (The Washington Post, 2 Feb 2016)

<<https://www.washingtonpost.com/posteverything/wp/2016/02/02/denmark-doesnt-treat-its-prisoners-like-prisoners-and-its-good-for-everyone/>>

²²⁶ 'How Norway turns criminals into good neighbours' (n 122).

II. Singapore

Singapore continues to have an incarceration rate of 222 per 100,000 inhabitants.²²⁷ Nevertheless, the Singapore Prison Service has restructured its approach to view their prison system as *a school for life*. This transformation was initiated through meetings with prison staff allowing them to redesign the prison system in accordance with goals the staff identified themselves. They thus reframed the work of prison officers as ‘Captains of Lives’ who work under the tagline ‘Rehab, Renew, Restart.’²²⁸ The reforms were put into practice through pilot projects and thematic projects with the collaboration of prison staff, inmates, the media and wider society. The Singaporean prison reforms were a process that included all stakeholders which was further executed through constant evaluations and research. As a result, the recidivism rate in Singapore has declined while the employment conditions of staff, staff-inmate interactions and societal acceptance towards ex-convicts have improved.²²⁹

III. Nigeria

Nigerian prisons are constrained by severe overcrowding, neglect and a lack of facilities for the effective rehabilitation and reintegration of prisoners.²³⁰ In response, the Nigerian civil society movement for prison reform is a bottom up approach, where research and advocacy details and agitates for reforms over many years.²³¹ The National Correctional Services Bill was enacted in September 2019 after being in the pipeline for eleven years.²³² This legislation was enacted following administrative increases in resource allocations to improve the standards of the prisons.²³³

Key reforms introduced by the legislation include:

- relabelling the Nigerian Prison Service as the Nigerian Corrections Service.
- attempting to mainstream rehabilitation and reduce overcrowding within prisons i.e. correctional centres

While the achievement of legislative reforms is a milestone in the prison reform process, advocates of prison reform have insisted that the name change of the institution would not bring about the intended

²²⁷ Prison insider, ‘Singapore’ (2017) <<https://www.prison-insider.com/countryprofile/prisons-singapore>>.

²²⁸ Singapore Prison Service ‘Organization’ (2020) <<https://www.sps.gov.sg/who-we-are/organisation>>.

²²⁹ See, JF Helliwell, ‘Institutions as enablers of wellbeing: The Singapore prison case study’ (2011) 1 International Journal of Wellbeing 255-26.

²³⁰ Glory Ozuru, PRISONERS’ RIGHTS: SETTING A GLOBAL STANDARD FOR NIGERIAN INMATES (2019) 10 NAUJILJ <<https://www.ajol.info/index.php/naujilj/article/view/183690>>

²³¹ Prisoners’ Rights Advocacy Initiative, ‘Correctional Service Act: Cure or Placebo?’ (2019) <<http://prai.org.ng/2019/09/16/correctional-service-act-cure-or-placebo/>>

²³² *ibid.*

²³³ ‘New Prisons reform, unprecedented in Nigeria’s history -NCS’ (16 Aug. 2019) <<https://www.pulse.ng/news/local/new-prisons-reform-unprecedented-in-nigerias-history-ncs/w7ceq1e>>.

transformations if the government does not invest and engage in systemic institutional changes.²³⁴ They also raise concerns regarding lack of transparency and accountability on parties who provide contractual services to the prisons, for instance through providing food for the inmates.²³⁵ The first national workshop under the Act was held on 25th November 2019.²³⁶

These three comparative examples, among others, could be of guidance to Sri Lanka in enacting legislative reforms and approaching comprehensive institutional and administrative reform of the prison system.

²³⁴ Onyedika Agbedo and Sereba Agiobu-Kemmer, Reforming Nigeria's Prisons Beyond Name Change (The Guardian, 7 Sep. 2019) <<https://guardian.ng/saturday-magazine/cover/reforming-nigeria-prisons-beyond-name-change/>>

²³⁵ Chika Oduah, 'Nigeria's Prisons Set to Undergo Long-Awaited Reforms' (VOA, 24 Aug. 2019) <<https://www.voanews.com/africa/nigerias-prisons-set-undergo-long-awaited-reforms>>.

²³⁶ Sunday Ejike Abuje, 'Correctional Services Act Will Help In Decongesting Prisons – Malami' (Nigerian Tribune, 25 Nov. 2019) <<https://tribuneonlineng.com/correctional-service-act-will-help-in-decongesting-prisons-%E2%80%95-malami/>>