

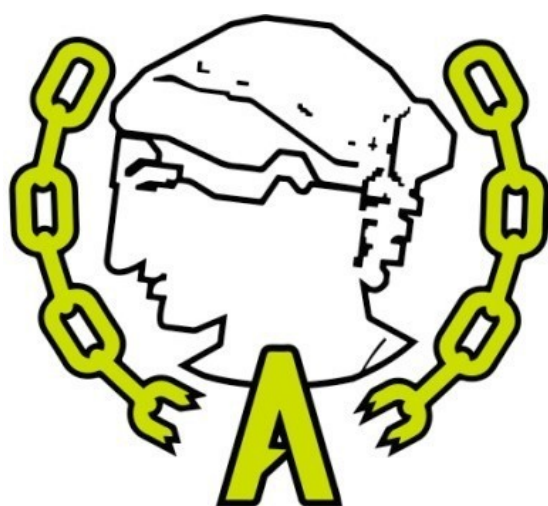
# ANTIGONE

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**Have prisons learnt from Covid-19?  
How the world has reacted to the pandemic  
behind bars**



ANTIGONE



**ANTIGONE**  
Per i diritti e le garanzie nel sistema penale



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## N. 1/2020 HAVE PRISONS LEARNT FROM COVID-19? HOW THE WORLD HAS REACTED TO THE PANDEMIC BEHIND BARS

edited by Susanna Marietti and Alessio Scandurra

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## Preface

*Susanna Marietti<sup>1</sup>, Alessio Scandurra<sup>2</sup>*

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At the beginning of 2020 the Covid-19 pandemic began to threaten penitentiary systems around the world, bringing another aspect of the challenge posed by this global emergency under the spotlight. Prisons suddenly became a problem and many governments from all over the planet had to take specific measures to contain health disasters that could also dramatically affect the outside community. This issue of the journal «Antigone» focuses precisely on this epochal challenge that will certainly stay in the memory of all of us for a long time.

The first part of this publication aims to provide an overview of the world situation and collects articles on many different countries. Most of them start with some hints at the situation of prisons on the eve of this pandemic. Overcrowding was, and remains, a common feature of several national prison systems, making social distancing in prison virtually impossible. Prisons are also often reported to be poorly ventilated and unhygienic, and it is not by chance that prisoners, if compared to the general population, present heightened and

unique vulnerabilities, higher prevalence of pre-existing health conditions, problematic drug use and mental health problems. In particular, everywhere in the world prisoners present a very high prevalence of infectious diseases, such as Hiv, tuberculosis or hepatitis C. Infectious diseases in prison have always been a major threat, and also because of this the challenge posed by Covid-19 was, and is, a frightening one.

The articles appearing in the first part describe the reactions to the pandemic by the prison community. A common feature of this reaction was the immediate concern expressed by significant sectors of civil society. Not only Ngos but also academia, workers' unions and representatives of the judicial and forensic professions in many countries immediately launched a cry of alarm and called for immediate measures to combat overcrowding and contagions.

The first reaction of prison systems around the world was a sudden and often radical closure: almost everywhere prison systems went - and in many cases they still are while

we are writing - into lockdown mode. Prison visits by relatives were severely restricted, when not entirely banned, almost everywhere, even though these restrictions were not always proportionate, timely or consistent with other measures adopted for the prevention of the contagion. Prison leaves were largely suspended, as in many cases also the transfer of prisoners from one facility to another. Access to prison by volunteers and professionals not employed by the prison administration was radically restricted, significantly limiting in most countries the often scarce resocialisation and recreational activities available in prisons. Finally, access of lawyers was also restricted, and forms of remote consultation were encouraged, in the end putting at risk the very effectiveness of the right to defence in these critical times.

In some countries this closure of prisons has been partly made up for by an opening up to new technologies, which have made it possible to somewhat mitigate the distance from the outside world. Incredibly, the pandemic has been in several cases necessary for the prison to come out of its cyber illiteracy and move closer to the technological life of the outside world.

The toll of the pandemic on the prison population around the world is huge: in most jurisdictions, prisoners are experiencing unprecedented levels of isolation and lack of significant interactions, in many cases they have not seen their loved ones for months, and despite all this the number of detainees and members of staff that tested positive to Covid-19 is, in some countries, extremely high if compared to the general population.

As already mentioned, one of the first and most common requests by civil society organisations and other actors to address this emergency was the adoption of specific legal provisions aiming at reducing the prison population. Some jurisdictions reacted very quickly, others were much slower, while in several countries nothing has been done at all up to this date. Where measures have been adopted, they differ significantly. In some cases, they were aimed at facilitating the early release of prisoners, usually at the very end of their sentence, often to be put in home detention, with or without some form of electronic tagging. Sometimes those measures were targeted to specific segments of the prison population, such as older detainees, detainees with pre-existing conditions or pregnant women. Other measures adopted were aimed at reducing the number of new prisoners that were entering prisons, either postponing the enforcement of their sentence or converting those sentences into some form of alternative to detention, usually in cases of minor offences or when the offender posed no threat to society.

In most cases a mix of these different approaches has been adopted but in some jurisdictions none of this has ever happened: the extraordinary circumstances we are living in and the threats they pose were not considered a sufficient reason to diverge from the ordinary criminal policies. So much for the idea of detention as *extrema ratio*.

The impact of the measures adopted around the world is quite difficult to assess. The more or less strict limitations imposed on our movements and activities during the pandemic also affected, among

other, crime rates, which in many countries decreased significantly reducing the number of people arrested and taken into custody, as evidenced by the fact that a reduction in the detained population has also been observed in countries where no specific measures were adopted to tackle prison overcrowding. Moreover, several jurisdictions have put some limitations on judicial activities and court hearings to prevent the diffusion of the virus. In some cases, these measures might have even been the cause of an increase in the prison population, such as for instance where pre-trial detention orders were automatically extended with no judicial overview. However, their overall impact in fact has contributed to the reduction of presences in prison.

The articles in the first part of this journal also describe the *new normality* in prison during this pandemic, a normality made up of extremely exceptional measures. But if it is true that the limitations imposed on prisoners were, and are, extraordinary, it is also true that it will take time to assess the impact of all this on inmates and staff. One of the most severe consequences of the pandemic is, indeed, a sudden lack of transparency of prison systems around the world, due to the immediate and radical reduction of contact with, and access to, prisons. We know for instance that the pandemic and the measures adopted to prevent the virus spreading significantly limited the access of prisoners to healthcare services, especially when this would have implied resorting to external facilities. But to what extent this circumstance impacted the wellbeing, and the right to health, of prisoners around the world is too early to say. The same goes for the protests sparked in prison in recent

months and for their management. In some cases, their extent and consequences were so significant that the echo reverberated well beyond prison walls. But this does not mean that all the stories have been told yet. Therefore, what we know about the impact of the new coronavirus on prisons is limited so far. The contributions collected in this issue of our magazine are only a preliminary first attempt to reconstruct this complex story.

What is certain is that two scenarios are possible for the more or less distant future of prison systems all over the world, as well as the whole of humanity and our common coexistence. It may happen that at the end of the pandemic, when we have overcome the feeling of fear in which we live today, we will resume the life before Covid-19 by repeating the mistakes of the past, first of all that of neglecting the protection of the rights of the most vulnerable categories of people. Countries around the world will continue to rely on mass incarceration under the illusion of solving social problems, and life in prisons will resume too often in violation of every international standard on human rights. Or it may happen that we will choose to learn from the tragedy we have experienced. As far as prisons are concerned, this will mean asking ourselves about the too many aspects that make imprisonment today an inhuman, irrational and ineffective punishment in too many places in the world.

Many and broad are the aspects of detention on which we would like to see worldwide reflection. We limit ourselves to suggesting some ideas on which it would be very important to open a dialogue as soon as possible:

- Detention as a measure of last resort: what does it mean? Is there a minimal, or healthy, prison rate for our societies? Should the recommendation to use prison as a last resort not be accompanied by a universal identification of the only values to be protected through the criminal justice system, leaving room for different policies, as well as of the only criminal circumstances to be addressed through prison, leaving room for alternatives to detention?
- Social resettlement, interaction with society and new technologies: new technologies have changed the lives of all of us and of humanity itself. The Internet is one of the deepest fractures that has ever occurred in the course of human history. The prison environment should reproduce external life as much as possible in order to profitably prepare prisoners to re-enter society. The lack of access to new technologies strongly contrasts with the objective of social reintegration. In addition, and without wanting to replace physical contact with remote contact, we should ask: how can a closed community, that should be the most obvious environment for distance learning or remote work, still be the place of the most extreme digital divide in our societies?
- Time served in prison as a standard currency: how can time served in prison have the same *value* regardless of where, when or how it is served? Time served during Covid-19 pandemic proved to be much more demanding than before. This should prompt us to reflect on the differences

between detention under varying conditions, in different countries or even in different prisons in the same country. How can we have, in each jurisdiction but also beyond national borders, so vague and ineffective standards for detention when we have very strict rules, in particular across Europe, for instance for agricultural or industrial production and distribution, or for professional activities?

The second part of the publication collects essays that propose reflections on specific issues concerning the relationship between prison and the pandemic. It opens with an article by Laure Baudrihay-Gérard, who presents a world overview of the impact of the pandemic on pre-trial detention. In many countries, pre-trial detention accounts for more than a third of detained people. Reducing its use is even more crucial in time of Covid-19. Baudrihay-Gérard offers a global scale view of how in recent months many states, including those that have taken measures to reduce the number of prison population, failed to consider pre-trial detainees for large-scale release, undermining efforts to contain spreading of the virus. She also accounts in detail for the restrictions imposed on pre-trial detainees' access to defence rights by Covid-19 measures, thus limiting the opportunities for release. Alarming, legislative changes introduced by many countries further restrict pre-trial prisoners' rights also in the long term, while on the contrary, as Baudrihay-Gérard shows, the current Covid-19 context constitutes an extraordinary opportunity for reform to address the excessive use of pre-trial detention.



In the following contribution, Isabella Cordua and Joseph Bangura focus on the necessity, dramatically highlighted by the spread of the virus, to decriminalise petty offences in many African countries. Petty offences disproportionately impact those, often women, who are already poor and marginalised. Prosecuting petty offences - under vague laws that give the police wide liberty to extort bribes and conduct arbitrary arrests of marginalised groups - means punishing poverty. Many African countries have even created new petty offences to punish the violation of Covid-19 restrictions. Unnecessary arrests contribute significantly to prison overcrowding in Africa, facilitating the spread of diseases.

Luigi Ferrajoli reflects on the need that the pandemic has brought to light for a global constitutionalism. The survival of humanity depends on a unitary strategy for the whole planet. Covid-19, with its daily death toll all over the world, has made what was already clear also in other areas (think, for example, of global warming) dramatically evident. The pandemic strongly emphasises the need for world institutions to guarantee the right to health and all the fundamental rights established in the many international charters. Ferrajoli also dwells on the concept of an emergency and the role of judges in this context, as well as on the lesson we can learn from the pandemic regarding the need to put an end to the centrality of prison in the system of penalties.

In March 2020, the Centre for crime and justice studies in collaboration with Antigone and the World health organization developed a survey to take stock of the incidence and spread of

Covid-19 in prisons in Europe and to assess the different policies and practices pursued. Matt Ford analyses the data collected with this survey by members of the European prison observatory in Austria, Bulgaria, Hungary, Italy, Portugal, Romania, Spain including Catalonia, and in the United Kingdom. Data have been collected and organised according to the factors that could potentially impact the diffusion and the effect of the virus, and according to the actual outcomes. In the article, patterns in each factor and outcome are explored by turn, before correlations between factors and outcomes are analysed.

In the following essay, Corina Giacomello starts from her field work in prisons and drug treatment centres in Mexico in order to argue that current drug policies promote violence against women and children and further impair gender equality beyond the Mexican experience. The world female prison population has been increasing at a faster pace than the global prison population also because of the enforcement of repressive drug policies. These policies create the conditions for women's exploitation in a context of patriarchal relations, and their further exclusion through imprisonment. Covid-19 should act as a prompter of the need to reduce women's deprivation of liberty, including compulsory treatment, a common practice in different parts of the world that has attracted too little attention during the pandemic.

Patrizio Gonnella tackles the theme of identitarian ideology, a virus as dangerous as Covid-19. The virus of identitarian ideology is based on social exclusion, inequality and ethnic discrimination. The pandemic has called into question the certainties of sovereignists that seemed to be granitic and winning. Are we facing the

revenge of those who believe in the cosmopolitanism of human rights and solidarity? Pope Francis proposes the theology of fraternity. Is the world ready to transform a tragedy into an opportunity to rebuild less violent social ties, not based on prisons or penal repression?

Adriano Martufi illustrates the way European institutions have responded to Covid-19 in prisons during the early months of the pandemic, covering the initiatives adopted within the Council of Europe and the measures taken by the European union. The Council of Europe's bodies have confirmed their long-standing attitude to combine a normative approach based on human rights with evidence-based knowledge as a means to improve the treatment of prisoners. Institutions of the Eu, in turn, due to the lack of a clear legal basis to enact policy and legislation with regard to prisons, have been more reluctant to take action on this front. In both settings, however, the crisis has provided useful opportunities to expand their scope and the existing set of principles and norms.

As Aldo Morrone points out, Covid-19 has highlighted the inequalities among individuals, societies, nations and continents. It has never been true that in the face of illness we are all equal. We do not all run the same risks and do not have the same opportunities to be treated. Among the social groups most at risk, prisoners occupy an important position. Starting from the Italian situation, Morrone shows the health problems in prisons before and during the pandemic, indicating the path that medicine should take if it wants to take advantage of the lessons of Covid-19.

Starting from the awareness that the university institution has historically

shown little interest in the prison world, Iñaki Rivera Beiras retraces the history of some important exceptions and describes the work carried out in this respect at the University of Barcelona also during the pandemic. The health crisis has dramatically uncovered the critical aspects of mass incarceration systems all around the world. The university, as a place of production of critical knowledge, is today even more called upon to assume its role of research and civil commitment for the promotion of the fundamental rights of a category at risk such as people in the custody of public authority.

Gen Sanders illustrates how Covid-19 has not only placed a spotlight on the intersection between drug control, incarceration and prison health, but it has also cracked wide open the structural and systemic racism and discrimination that permeates the criminal justice system, and how all of these issues converge to create the perfect conditions for Covid-19 to thrive. In this dark and worrisome context, Sanders shows how in many cases the measures adopted around the world to curb the prison population failed to address, and in many cases explicitly excluded, people who committed drug offences. All this has contributed to increasing difficulties to provide essential health services to prisoners, including harm reduction measures.

Giving voice to the protagonists, Alice Sperti proposes a harsh account of what happened in the Us prisons and jails with the arrival of the Covid-19. However, as the author points out, in the United States mass incarceration was already a public health crisis long before the pandemic. During recent months, prisons have become vectors that have helped the virus to spread also in the surrounding communities. But the system's devotion to

harsh punishment at all costs won, and only a negligible number of people were let out of prison. Perhaps because a high number of releases, without a consequent high increase in crime, would have revealed the excessive and unnecessary use of imprisonment.

## Notes

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**PART ONE**  
**A PRISON WORLD OVERVIEW**

**with the contribution of the European Prison  
Observatory and the American Civil Liberties Union**





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# BELGIUM - So far, so good? Health and prisons in Belgium during Covid-19 pandemic

*Elena Gorgitano<sup>1</sup>, Adriano Martufi<sup>2</sup>*

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## 1. Introduction

The present contribution provides a summary of measures taken by Belgian authorities in response to Covid-19 pandemic in the prison system. The analysis encompasses the provisions adopted during the first months of the Covid-19 pandemic in Europe, March-October 2020. In Belgium, on 13 March 2020, by the time the *state of emergency* was officially declared at federal level, followed by a conferral of special powers to the Government with a law of 27 March 2020 (N. Bernard, 2020), the General direction of prisons (*Direction générale des Établissements pénitentiaires*, Dgepi, here with Gdp) issued the first instructions to face the crisis within Belgian prisons. From that moment on, prison rules and detention regime have mainly been managed by the Gdp through instructions or ministerial notices<sup>3</sup> which relied substantially on the role of prison directors. While under Belgian law prison directors can take all urgent measures required by the circumstances<sup>4</sup>, in the wake of the emergency they were given new powers to routinely implement

measures aimed at reducing prison population (par. 3).

The Belgian government, on the basis of law of 27 March 2020, issued royal decree 9 April 2020 n.3 (hereinafter Rd) on temporary<sup>5</sup> rules related to criminal proceedings and the enforcement of sentences. The decree provided some measures to reduce prison population but stopped short of regulating conditions within prisons. This left prisoners ineligible for release to experience a deterioration of their ordinary conditions due to Covid-19 (Y. Cartuyvels, O. Nederlandt, M. Nève, 2020; L. Teper, 2020; OipBelgian section, 2020a; Conseil central de surveillance pénitentiaire, 2020).

## 2. The prisoners' conditions within Belgian prisons

During this early phase of the emergency, detention conditions were mainly managed by the Gdp via the so-called *Coronavirus instructions*. These rules were communicated to prison staff across the country but not officially published<sup>6</sup>.

These instructions contained rules applicable to all prisoners, related to internal organisation and about the working conditions of the staff. With regard to prisoners, these instructions included several rules concerning medical and preventive measures such as the obligation of wearing masks, social distancing, preventive isolation of incoming prisoners and medical isolation of prisoners with symptoms (*suspected cases*).

In addition, the relations with the outside world had been significantly reduced to avoid the spread of disease in prisons coming from free society.

The Gdp originally suspended all visits, with exception of professional ones, from 14 March until the 3 April – but they officially resumed only as of 25 May (O. Nederlandt, 2020, p. 242); in addition, supervisory commissions and external support services for detainees suspended their entrances.

Thanks to the telephone credit given to prisoners *in exchange*, it became possible to contact families via telephone and as of the end of April also receive virtual visits via videoconference (by Webmax). Considering that the royal decree suspended all provisions granting prison leave, telephone and the videoconference represented the only way prisoners could maintain contacts with their family (see article 14 Rd).

Moreover, internal activities have necessarily been adapted to the rules of social distancing, except for the prayer which could already be carried out in small groups. In some prisons work activities would continue, but not in others. Yet a remarkable (albeit anecdotal) episode is

that prisoners working for an autonomous service of the Ministry (*Cellmade*) have produced protective masks (O. Nederlandt, 2020, p.229).

Finally, as of 25 May 2020 family visits resumed but in a considerably limited manner with regard to the number of visits, visitors and modalities: in particular prisoners could only see their relatives through a plexiglas and without any contact. Moreover, visits without surveillance could not take place (Oip Belgian section, 2020c). Therefore, these instructions brought to a significant limitation of personal relations, leading some Belgian Ngos to sign a *carte blanche* asking for the need to re-establish certain visiting methods (Oip Belgian section, 2020c).

### **3. The measures adopted to reduce prison population. Back door and front door policies**

#### **3.1. Iep-Covid-19 and the controversies surrounding its application**

Along with the instructions on the detention regime, Belgian authorities adopted measures to curb prison overcrowding primarily via a *back-door* strategy, i.e. increasing the number of prisoners released. As stated in the explanatory memorandum, royal decree 9 April 2020 n. 3 aimed at introducing “measures and modalities to ensure that pressure on prisons was reduced where possible by releasing (provisionally) sentenced prisoners who were already enjoying benefits or who are being closer to their release if they do not pose a threat for public safety”.

In particular the decree introduced two



new measures: the *interruption of the execution of punishment - coronavirus Covid-19* (Iep-Covid-19) and a special form of *early release*. Both could be granted if some specific requirements were fulfilled.

First of all, the Iep-Covid-19 measure allowed temporary leaves from prison for convicted prisoners having a fixed address, with the exception of certain categories of offenders and when the risk of re-offending could not be ruled out (articles 6-13 Rd). The measure represented a development of an existing scheme – though rarely granted in practice (O. Nederlandt, 2020) – governed by article 15 of law 17 May 2006 (regulating the alternatives to a prison sentence), allowing prisoners to leave prison for three months on serious grounds and exceptional family issues. According to the explanatory memorandum, the Iep-Covid-19 measure had to be granted discretionally by prison directors and could not be regarded as an individual right.

While the Iep-Covid-19 was designed to avoid contaminations for vulnerable prisoners and obtain rapid access to external cares, the legal prerequisite medicals described above made this scheme hardly applicable to its addressees.

To challenge these limits – in particular as regards the type of crime committed – a district court issued a reference to the Constitutional court to rule on the exclusion from the Iep-Covid-19 for prisoners belonging to risk category, under the meaning of persons vulnerable to develop the Covid-19. However, due to the lack laws confirming the royal decree the Court relinquished its jurisdiction and avoided to rule on this point<sup>7</sup>.

In any case, one of the biggest points of contention was the rule suspending the enforcement of sentences during periods the application of Iep-Covid-19: in other words, according to article 6.2 Rd, the period spent outside prison should have been considered as not served and therefore the end of the prison term postponed.

This provision was brought to the attention of the Supreme court (*Cour de cassation*). On 19 August 2020 the Supreme court annulled a decision by a lower court (a sentence implementation court, or *tribunal d'application des peines*). In particular, the issue examined by the Supremecourt was the absence of grounds for suspending the time course of a prison sentence during the application of Iep-Covid-19. Importantly, this rule is not foreseen for the *congé pénitentiaire* which is a different modality of execution and therefore does not suspend the sentence. The *Cour de cassation* ruled that the Iep-Covid-19 should be regarded as substantially akin to a *congé pénitentiaire*<sup>8</sup> under the terms of article 6 Law 17 May 2006. The Court based its decision on the principle of equality, by restating that all those in the same situation shall be treated equally unless there is objective and reasonable justification for a different treatment. In this connection, the Court held that the royal decree should have justified the adoption of a different rule on more specific grounds and observed that the need to deal with the pandemic could not justify a different regulation and, in particular, the rule suspending the time course of the sentence<sup>9</sup>.

This judgment was welcomed by experts and advocates (O. Nederlandt 2020, p. 229; Oip Belgian section 2020b) who had

already stressed this principle, claiming that the time spent during Iep-Covid-19 had to be considered as a period when the sentence was effectively served.

### **3.2. Early release and the postponement of new sentences**

As indicated, prison directors could also grant a special form of *early release* if the remainder of the sentence is not higher than six months (art. 15.1 Rd) and only for certain categories of offences. Further prerequisites impose the applicant to have an accommodation and sufficient means of subsistence to rely on.

This form of early release could also be granted to prisoners who had benefited of an Iep-Covid-19. Interestingly, in this case, in order to calculate the period yet to be served the director had to consider the time spent outside prison as part of the sentence served.

In a somewhat remarkable move, the Gdp sought to reduce the scope of application of both Iep-Covid-19 and early release, perhaps in a bid to tackle political concerns over an excessively wide implementation of these schemes. In a notice issued on 24 April 2020, the Gdp made clear that both measures were applicable only to prisoners sentenced to more than three years while others could not benefit of these measures (O. Nederlandt, D. Paci 2020, p. 345; O. Nederlandt 2020, p. 233). In addition, a few days earlier, a Gdp's clarification had stated that these measures were applicable only to those who were physically in prison, and not under electronic surveillance (O. Nederlandt 2020, p. 230).

Interestingly, Belgian government officials were quick to see the need for further

measures in order to reduce the inflow of prisoners. In this connection, the Minister of Justice requested the College of public prosecutors to issue specific instructions to allow the postponement of the enforcement of non-urgent sentences, thus flanking a *back-door* strategy with further *front-door* action.

On 26 March 2020 the College of public prosecutors approved a memo (*circulaire*) enabling the competent prosecutors to delay the enforcement of prison sentences until further notice for some categories of offences. As a result, the enforcement of new sentences could be postponed, bar for some main exceptions. The suspension would not apply to persons under arrest or subject to pre-trial detention. Further categories of individuals have been excluded by the College of public prosecutors. The order of enforcement may not be suspended if the sentence involves a term of imprisonment higher than 5 years. Further grounds to refuse suspension are the dangerousness of individuals concerned (as it emerges from the case file) and the nature of offences (such as serious offences involving the use of violence or terrorist offences).

### **4. The limited scope of the measures adopted and right to appeal**

The royal decree gave prison directors an essential role in granting or rejecting measures summarized above (see articles 7, 15 Rd). Directors could also revoke measures based on specific circumstances and their motivated rejection could not be appealed (articles 12, 15 Rd)<sup>10</sup>.

Importantly, the *right to complain* against a director's decision has only been in force as of 1 October 2020 (S. Berbuto, 2020, p.53), thus giving prisoners (and their

lawyers) extra opportunities to appeal.

Before this innovation, prisoners could only lodge their appeals with the President of local district courts *en voie de référé*, namely via an interlocutory proceeding under article 584 Judicial code (O. Nederlandt, D. Paci 2020, p.346). This judge, according to article 159 Constitution, could (and should) verify the compatibility of this decision with other higher constitutional principles, but only if it appeared that the situation was urgent and requiring immediate action (Y. Van Den Berghe, 2006, p.94). This aspect is of relevance in that until October 2020 a decision to reject a prisoner's claim to protect his or her *subjective rights* (including the right to health) could only be filed through this interlocutory proceeding, thus significantly restricting access to justice for prisoners (V. Eechaudt, J. Clayes, T. Vander Beken, 2019, p.13)<sup>11</sup>.

In addition, the limited applicability of measures adopted to reduce (albeit temporarily) the prison population prompted many to consider other possible avenues to obtain a release during the pandemic. In a recent contribution Olivia Nederlandt and Delphine Paci suggested that vulnerable prisoners may be eligible for provisional release on health grounds (O. Nederlandt, D. Paci, 2020, p.346). While this measure allows only for temporary release, it may be granted to all those whose conditions are allegedly incompatible with their status as prisoners. Interestingly, some courts have followed this line of interpretation, arguing that this measure may be granted to prisoners with *pre-existing conditions* as promiscuity, lack of ventilation and poor hygiene in prisons may have a bearing on

an individual's health during Covid-19 pandemic<sup>12</sup>.

Arguably, even when prisoners were eligible for lep-Covid-19, some lawyers have requested the enforcement of punishment outside prison (e.g. via electronic monitoring or probation). In this sense, on some occasions the judiciary solicited by defence lawyers might have played an important role in releasing convicted prisoners for health reasons, granting non-custodial alternatives or, at the sentencing stage, pronouncing non-custodial sanctions. This might have played a role in reducing prison population during the early months of the pandemic<sup>13</sup>.

### **5. The doubtful effects of measures adopted and the persisting issue of overcrowding in Belgian prisons**

Measuring the effects of said measures is a challenging task. Uncertainty surrounds both data on the prison system as well the role of different criminal justice actors in the implementation of new provisions. The objective of reducing prison population has long been a political *hot potato* in Belgium. In 2014 the European court of human rights has issued a judgement condemning Belgian authorities for violating article 3 Echr (prohibition of inhuman and degrading treatment), taking note of the structural problems arising from prison overcrowding (along with unhygienic and dilapidated prison institutions) and recommending the adoption of general measures to guarantee adequate prison conditions<sup>14</sup>. While the Court did not explicitly lay down an obligation to reduce prison population it referred to need of restoring *conditions compatible with article 3*,

thus effectively triggering a debate as to the need of a new reductionist penal policy (C. Guillain, D. Scalia 2015, p.424).

More recently, the District court of Brussels has acknowledged the responsibility of the Belgian government for the lack of personal space in the prisons of Forest and Saint-Gilles (in the Brussels region) following a civil lawsuit filed by the Order of French- and German-speaking bar associations. In January 2019, this court urged the government to take appropriate measure to redress the situation within 6 months, ordering the State to pay periodic fines in case of failure to comply with this decision.

Despite the inertia of Belgian authorities (and a new European court of human rights's judgement condemning the government on grounds of poor prison conditions<sup>15</sup>), the early months of the emergency witnessed a significant (and somewhat unexpected) reduction of prison population (Ligue des droit humains, 2020). Some commentators have observed that between 12 March and the 1 May – the peak of the public health emergency – prison population plummeted by more than 1,300 units, almost 13% of the stock prior to the declaration of the state of emergency (O. Nederlandt, D. Paci 2020, p. 348). Yet frustratingly these statistics have not been made public, as Belgium's prison administration refused to take part in the SpaceI-Covid-19's questionnaire launched by the Council of Europe and the University of Lausanne in order to gather specific information about prison population in the Member states during the pandemic (M. Aebi, M. Thiago, 2020, p. 3).

Be that as it may, prison population seems to be picking up again. This is partially due to the expiry of Iep-Covid-19, whose beneficiaries were sent back to prison as of 16 June 2020. Yet as Olivia Nederlandt noted, one can observe a steady increase of prison population long before this measure would cease its effects (O. Nederlandt, 2020, p.247). Most notably, the number of prisoners was constantly on the rise all throughout May and until half-June as the measures described in this article (including Iep-Covid-19) were still in force. In essence, this upward trend brought prison population back to square one, with a registered number of prisoners on 1 July 2020 (10,368) almost equal to that recorded on 12 March 2020 (10,906) before the emergency broke out.

## 6. Conclusion

While it is impossible to ascertain what might have caused this new rise of prison population, one should recall that Belgium has started to ease its lockdown restrictions since the beginning of May (so called phase 1b, as of 11 May 2020). It could be argued that this effectively ended the emergency and inaugurated a timid return to normality. Further research is needed to investigate whether, and to what extent, this might have had an effect on prison gatekeepers (directors and prosecutors), thus nullifying the (already limited) effect of measures adopted to ease pressure on the prison system.



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## Notes

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<sup>3</sup> On 20 March 2020 the Minister of Justice adopted the notice n. 1820 introducing the *congé prolongé*.

<sup>4</sup> According to article 114 of Law 12 January 2005 in the case of a serious event that could threaten the security of the detainees, prison directors take all urgent measures required by the circumstances and shall inform the Minister by the quickest means possible.

<sup>5</sup> The royal decree established a time framework: from 18 March 2020 to 3 May 2020 that was then prorogated to 17 May by the royal decree 28 April 2020 and again to 17 June by the royal decree of 13 May 2020.

<sup>6</sup> Some of these instructions could be found on <https://www.europris.org/covid-19-prevention-measures-in-european-prisons/> (accessed 1 October 2020).

<sup>7</sup> Constitutional court, 4 June 2020, n. 83.

<sup>8</sup> Originally the draft decree included two

measures: a new one called *congé prolongé* (just included in the ministerial notice n. 1820 of 20 March 2020) and the interruption of punishment for more vulnerable prisoners in relation to Covid-19. Following an analysis of the draft decree by the Council of State, the final decree simply combined the *congé prolongé* and the interruption of punishment in the Iep-Covid-19 measure. See also (O. Nederlandt 2020, 231-232).

<sup>9</sup> Cass., 19 August 2020, n. P.20.0840.F.

<sup>10</sup> The collective letter n. 153 of 9 April 2020, which replaced the ministerial notice of 20 March 2020, underlined that a rejection provision should have been motivated (art. 1 c).

<sup>11</sup> Significantly, the European court of human rights found that this proceeding does not guarantee an effective remedy for the purposes of article 13 ECHR in that it often proves unable to *directly remedying the situation complained of* thus depriving applicants of reasonable prospect of success, see European court of human rights, 25 November 2014, *Vasilescu v. Belgium*, paras. 74-75.

<sup>12</sup> See Jap Bruxelles, 80e ch., 8 Avril 2020, Rgno 20/341/Lprm referenced in O. Nederlandt, D. Paci, 2020, 347.

<sup>13</sup> See the statements of the Minister of Justice, Koen Geens, who in April declared that during the first month of the Coronavirus emergency the prison population had experienced a reduction of 10%, see *Coronavirus: la population carcérale réduite à 10.000 détenus* in <https://www.dhn.et.be/actu/belgique/coronavirus-la-population-carcerale-reduite-a-10-000-detenus-5e8eb7ee9978e228415a5057> (accessed 1 October 2020).

<sup>14</sup> European court of human rights, 25 November 2014, *Vasilescu v. Belgium*, para. 128.

<sup>15</sup> European court of human rights, 4 June 2020, *Detry and others v. Belgium*, para. 10; see also, 28 May 2010 *Clasens v. Belgium*, paras. 33-39.

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# BRAZIL - Covid-19 and prisons in Brazil: conditions and challenges

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## 1. Introduction

The reality in Brazil's penitentiary system constitutes a real humanitarian emergency situation. Prison is one of the places, if not the main one, of greater violations of human rights in Brazil. Prison overcrowding, unhealthy environment, violence, death and lack of care for the most basic human needs are some of the key contributing factors that may impose suffering in incarcerated individuals.

The spread of Covid-19 has exacerbated the situation of total collapse in Brazil's prison system. The contemporary context of epidemiological crisis reflects the condition of the inhuman in the country's prisons, magnified by the situation of mortality and exposure to the risk of death of the prison inmates and staff. The current situation affects not only individual's rights (e.g. life and physical integrity), but also social rights (e.g. health services and healthy environment).

Therefore, the article aims at describing the impact of Covid-19 and ways to cope with

this pandemic based on the understanding of the reality of the Brazilian penitentiary system.

## 2. Covid-19 and the condition of the inhuman in the Brazilian penitentiary system

This pandemic has definitely aggravated a very critical situation that has been affecting several countries for a long time. This normality of the exception (B. de Sousa Santos, 2020) can be observed in the constant degradation of the country's prison conditions, intensified by prison overcrowding and prison population growth.

Over the last 30 years, the number of prisoners in the federal and state prisons increased from 90,000 to 886,333<sup>4</sup>. There is, however, a deficit of around 312 thousand vacancies, according to a survey carried out in December 2019, with an occupancy rate of 171%<sup>5</sup>. Severe overcrowding can also cause or exacerbate mental health problems and consequently increase deadly outbreaks of violence and deaths among inmates (L.A.B. Chies, B.R. Almeida, 2019).

The current moment of the punishment system is another milestone in the history of systematic human rights violations. According to the weekly bulletin of the National council of justice on Covid-19<sup>6</sup>, until September 14, 2020, there were 34,961 confirmed cases of coronavirus in prisons. Of this total, 73.2% of the cases were inmates and 26.8% prison staff. A total of 192 new virus-related deaths were reported (57.2% of inmates and 42.8% of prison staff). It is worth mentioning that 51,221 inmates and 40,128 prison staff were tested for Covid-19. The contamination rate among inmates and prison staff reached 50% and 23.2%, respectively. The bulletin also reported an increase of Covid-19-related cases and deaths among individuals deprived of freedom in different regions of the country. Prisoners in Brazil do not have adequate access to health care services. In addition, the continuous and out-of-control prison population growth aggravates violations and hampers the distribution of human resources and legal services. In the prison setting, incarcerated people, their family members, and staff are exposed to a higher risk of Covid-19.

### **3. Impact and negative effects of the pandemic**

The Covid-19 pandemic has directly affected the prison community which, according to Donald Clemmer (1940), consists of male and female inmates and public agents. The latter share their daily experiences within the prison secluded spaces, which makes them more vulnerable to infectious diseases, such as Covid-19, although incarcerated people are more likely to be infected.

The recommendations of the World

health organization (Who) on the importance of social distancing as a response to Covid-19 in prisons and jails are particularly challenging in Brazil, due to the confined conditions in which they live together for prolonged periods of time. As a result of the punitive culture, the prison capacity expansion (J.M. Silva Sanchez, 2013) that characterizes contemporary sociability, the worsening of already inhumane conditions in Brazilian prisons have become noticeable in recent decades due to lack of hygiene, inadequate ventilation, excessive heat, strong humidity and poor facilities.

The consequence of this scenario of human rights violation is the predominance of unhealthy spaces, which favor the spread of infectious diseases and others caused by insects and parasites.

The precarious structures of Brazilian prisons add to the state's daily omissions in providing basic provisions and health care to prisoners (provided for in the Criminal enforcement law N. 7.210/84), as was evident in the Adpf (*Arguição de descumprimento de preceito fundamental*, or Failure to comply with a fundamental precept) judgment 347/DF, which recognized the unconstitutional state of affairs of Brazil's prison system. Inadequate nutrition and no medical follow-up lead to poor health outcomes of most women and men deprived of liberty, making the prison community more vulnerable to Covid-19.

However, this vulnerability of male and female prisoners did not start in the spaces of punitive segregation, but preceded them, since mass incarceration (D. Garland, 2010) is a sociopolitical reality derived from the selective penal system,

sustained, above all, by the oppressions of race and class (J. Borges, 2018). Basically, the criminal state exerts pressures more upon peripheral and subaltern communities, made up of black men and with poor levels of education<sup>7</sup>, as can be confirmed by the data periodically released by the National penitentiary department (Depen) and the National council of justice (Cnj). Therefore, there is a high predominance of people with poor health due to preexisting diseases and malnutrition. Consequently, these factors can place individuals at higher risk of being infected by Covid-19.

The reality of the entire Brazilian prison system reveals a characteristic inherent to punitive practices that aggravate the vulnerability due to the structural and bio-political conditions of the prison setting: *power relations*. Such relations aim at silencing and making invisible those individuals who occupy punitive segregation environments, whether male or female prisoners or correction officers, usually in poor conditions, also putting them at greater risk of getting the virus. Far from external social control, the prison system is the scenario of many human rights violations on a daily basis, which are being intensified during the Covid-19 pandemic.

#### 4. Health crisis and challenges

Covid-19 has exacerbated an already chaotic situation of the Brazilian prison system. The pre-existing humanitarian and health emergency reflects the inhumanity in the country's prisons, the situation of mortality, and the exposure of prisoners and staff to the risk of death. Therefore, it is of utmost importance to propose emergency measures in defense of

human rights.

In Brazil, however, the measures were timid and inefficient. So far, the President of Brazil or the Senate have not taken any specific measures to protect incarcerated people from this infectious disease. The Cnj issued Recommendation N. 62 (March 17, 2020), with the purpose of guiding the adoption of preventive measures for the spread of infection by the Covid-19 within the scope of the criminal and socio-educational justice systems, such as non-custodial measures, early release and limitation of pre-trial detention. However, because of its non cogent character, the Recommendation did not produce the expected outcome. Even considering the great actual risk associated with Covid-19 in the Brazilian prison system, the Recommendation N. 62 was not well received by the judges, who resisted calls to release large groups of incarcerated people. The Brazilian Supreme court has denied more than 80% of the requests for freedom filed on the basis of this document (Pompeu Ana, 2020).

Subsequently, with the change in the composition of the Cnj, the Recommendation, which was ineffective, was emptied with the exclusion of its scope of incidence for people who have been convicted of certain crimes, even though they belong to groups at risk of the virus<sup>8</sup>.

Dealing with the Brazilian penitentiary issue, particularly after the health crisis triggered by the Covid-19 spread, will necessarily involve the implementation of at least two sets of public policies: health in prisons and effective incarceration. Currently, Brazil's prison system is not able to provide adequate health care for

prisoners. In addition, the growth in incarceration rates exacerbates violations and hinders the distribution of human resources and legal services. Clearly, these policies are directly related and without them it is almost impossible to reduce the death rates in the Brazilian prisons. The first set of public policy exists at the normative level. A new Interministerial ordinance number 1 was published on January 2, 2014. It established that Pnaisp (*Política nacional para atenção integral à saúde da pessoa privada de liberdade no sistema prisional*, or National policy for comprehensive health care for the persons in prison) would ensure the effective and systematic access of the incarcerated population to health care. It is an advanced and well-planned policy. However, it needs to be effective after more than six years of validity. Conversely, a legal policy of incarceration should also be planned and put into effect (G.I. Anitua, 2020, p. 213 *et seq.*) to eliminate or reduce prison overcrowding, and therefore protect the human lives that are most at risk. Such a policy, although necessary and urgent, is far from being addressed in the three branches of the Brazilian Federal government - legislative, executive and judicial - although it receives support from some society organizations fighting for human rights<sup>2</sup>.

## 5. Conclusion

The constant violations identified in the Brazilian prison system offend human dignity and the policies and practices such as those relating to the access to social rights that include health, education, work, protection of motherhood and childhood. The combination of the aforementioned violations and the alarmingly precarious conditions of the

prisons corroborates, in theory, the illegitimate imprisonment.

The challenge of the humanitarian crisis in Brazilian prisons, especially in fighting the Covid-19 pandemic, requires a radical change in the mass incarceration process experienced by the country in recent decades and the implementation of public policies guaranteeing fundamental rights in prisons. More specifically, the dignity of hundreds of thousands of individuals demands an urgent implementation of integrated public health policies in prisons as well as mass releases of people to reduce overcrowding.

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<sup>4</sup> Conselho nacional de justiça, *Portal do Banco de monitoramento de prisões* <https://portalbnmp.cnj.jus.br/> (accessed 18 September 2020).

<sup>5</sup> Statistical information system of the penitentiary system - InfoPen, *Levantamento de informações penitenciárias, 2019*, <http://antigo.depen.gov.br/DEPEN/>

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<sup>6</sup> Cnj, Justiça Presente, <https://www.cnj.jus.br/sistema-carcerario/justica-presente/> (accessed 18 September 2020).

<sup>7</sup> Statistical information system of the penitentiary system - InfoPen, *Levantamento de informações penitenciárias, 2019*, <http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen/infopen> (accessed 18 September 2020).

<sup>8</sup> Recommendation 78, September 15, 2020.

<sup>9</sup> In Brazil, the *Agenda nacional pelo desencarceramento* has been signed by the Pastoral carcerária/Cnbb and by numerous human rights organizations (Pastoral carcerária, 2020).



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## BULGARIA - Covid-19 and the prison system in Bulgaria

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According to the official information from the Chief directorate execution of punishments, the authority responsible for the management of all penitentiary institutions in Bulgaria, since the beginning of the global health crisis up to 18 August 2020 there has been only one prisoner infected with the coronavirus in Bulgaria. He is held in the Plovdiv prison. The total number of the penitentiary staff infected as of this date was 12. Most of them were from the Plovdiv region – 4 in the Plovdiv prison, 3 in the pre-trial detention arrest in Plovdiv. The Plovdiv cluster was formed in the beginning of July and the infection was brought to the prison by a member of the staff. The other cases include one staff member in each of the following penitentiary institutions: Smolyan open type prison; Bobov Dol prison; Sofia prison; Razdelna open type prison and one person from the Regional administration for the execution of punishments – Kyustendil (not directly involved with the prison service)<sup>2</sup>. This is an infection rate among prisoners of less than 150 per 1M, 17 times less than the infection rate among the total Bulgarian

population (2,603 per 1M according to the official statistics as of 15 September 2020). Thus, even if we take into account that the prison population is younger than the country's average and that there might have been cases of infection among prisoners which went unnoticed due to the lack of symptoms, the conclusion that as a whole the level of infection in the Bulgarian prisons has been low, is valid. What are the reasons?

Bulgaria was and continues to be among the European countries where the coronavirus is spread less. As of 17 September 2020, it occupied 81<sup>st</sup> place in the ranking of Worldometer by the general infection rate and 99<sup>th</sup> place by total cases per 1M of population, way below the European and the world average<sup>3</sup>. Despite the fluctuation of the infection rate, it maintained these low levels since March 2020. At the time of the European onset of the infection in February-March 2020, the Bulgarians had very little interaction with those centers where it spread initially. In addition, the schools and several other institutions (including social care homes) were subjected

to a flu quarantine with strict isolation already in February, and on 5 March a nation-wide flu epidemic was declared. This was three days before the first two Sars-CoV-2 infections were registered in Bulgaria on 8 March 2020.

The prison system took measures for monitoring the conditions of prisoners with possible symptoms of coronavirus already at the end of February. On 26 February 2020, the Deputy Minister of Justice issued a decree ordering a 14-day general monitoring of every newly arrived prisoner and of every staff member who had returned from any foreign country after the second half of January; daily monitoring of every patient with flu-like symptoms; temporary termination of all visits to the prisons and a variety of measures for maintaining hygiene, including daily disinfection of cells and working premises, wearing of masks for all persons with flu-like symptoms, distribution and use of disinfectants with at least 60% alcohol content. Doctors and other healthcare personnel in the prisons were obliged to work with masks and gloves. Prisoners with milder flu-like symptoms which do not correspond to Sars-CoV-2 were to be treated in the prisons' healthcare units and those with heavier symptoms were to be referred to hospitals outside of the prison system. A definition of the Sars-CoV-2 case is enclosed in the order<sup>4</sup>.

The initial response of the Bulgarian authorities to the outbreak of the coronavirus in general was very restrictive. Already on 8 March 2020 the Minister of Health issued an order prohibiting all cultural events, including cinema, and all sports events with public<sup>5</sup>. On 11 March 2020, all visits to social

institutions were prohibited by another order of the Minister of Health<sup>6</sup>. On 13 March 2020, with only 30 active coronavirus cases, the Parliament declared unanimously a state of emergency. On the same day, the Minister of Health issued an order providing for the closure of a number of businesses, obliging others to introduce teleworking and closing all schools and universities<sup>7</sup>. Ten days later, the Law on the Measures and Actions during the State of Emergency was passed authorizing the Minister of Health to order any restrictive measures provided for by any law<sup>8</sup>. No amendments in the legislation were made introducing safeguards against arbitrary use of executive power. The existing one contains inadequate safeguards. Thus, shortly after the beginning of the epidemic, the isolation period for the infected persons (amounting to a deprivation of liberty stricter than a house arrest) was fixed by an order of the Minister of Health at 28 days, with no possibility for intermediate Pcr testing, which may lead to earlier release from quarantine in a case of a negative result. The order provided that the imposition of quarantine could be appealed in the administrative court but it was not obliged to hear the case and to issue a decision while the person is under isolation. Moreover, there was an obligatory isolation for treatment for some categories of persons in hospitals and, upon release after a negative Pcr test, the person was compulsory isolated by an order of health authorities for another 28 days at home, even without any symptoms. The Parliament adopted severe criminal sanction for breach of isolation. These severe conditions aimed at relieving the authorities from regular monitoring

through Pcr testing (a relatively expensive procedure in Bulgaria) of the conditions of the infected persons and imposing on them in the first place the burden of protecting the rest of the population from infection. The measures were subsequently eased.

The first measures affecting the Bulgarian criminal justice system and prison conditions were introduced with a decision of the Judges' College of the Supreme judicial council (Sjc) on 16 March 2020. According to this decision, all criminal proceedings were to be temporarily suspended, with the exception of urgent ones, involving the imposition of and the judicial control on the remand measures, protection of victims, removal of the accused from office, placement of the accused in psychiatric institutions and securing of evidence<sup>9</sup>. As this decision had effects on the rights of the accused (e.g. on the right to a trial within reasonable time), its adoption without any delegation of law-making powers is of a questionable constitutionality. Perhaps mindful of the latter, the authorities introduced the above measures with the amendments to the Law on the Measures and Actions during the State of Emergency of 9 April 2020.

The above measures had the immediate effect of reducing the number of prisoners and allowing for more personal space in the Bulgarian prisons. No new prisoners were entering prisons while the process of releasing those who served their sentences continued. The pre-trial arrests however were adversely affected, as those detainees who otherwise would have been sentenced and would have entered the prisons remained there. These facilities in Bulgaria are with a much more restrictive regime and worse material conditions

than the prisons. On the other hand, the interaction between the detainees and the staff, as well as between the detainees, is minimal.

The initial restrictive measures relating to the prison conditions provoked concerns in the human rights community since the beginning. On 18 March 2020 the Bulgarian Helsinki Committee (Bhc) wrote to the Committee on Legal affairs of the Parliament with an opinion on the Draft Law on the Measures and Actions during the State of Emergency in advance of its adoption. There the Bhc expressed concerns, among other things, about the provision in the draft prohibiting all visits to the prisons and pre-trial arrest. It viewed the prohibition as overbroad and unconstitutional<sup>10</sup>.

On 20 March 2020 the Bhc addressed in a statement the suspension by the Judges' College of the Sjc of the proceedings related to challenging different types of isolation in the prisons, as well as to the preventive remedy against torture, inhuman and degrading treatment and punishment in the prisons and pre-trial arrests. The remedy in the form of accelerated proceedings before the administrative courts triggered by a complaint from a detainee was introduced in 2017 in response to the pilot judgment of the European court of human rights in the case of Neshkov and others v. Bulgaria of 2015<sup>11</sup>. In its statement the Bhc argued that all these proceedings concern a right, which is non-derogable during the state of emergency and therefore there can be no justification for the suspension of the proceedings allowing for the redress of the detainees' grievances<sup>12</sup>.

All of the above concerns were addressed

in the Law on the Measures and Actions during the State of Emergency. The blanket prohibition of the prison visits was removed in the final version of the law and the proceedings related to the prevention against torture, inhuman and degrading treatment in the prisons were not suspended.

The state of emergency in Bulgaria was prolonged by the Parliament once on 3 April 2020 and ended on 13 May 2020. A number of restrictive measures were eased by the Minister of Health already by its end, but many continued subsequently while the country remained under an *extraordinary epidemic situation*. According to the latest information from the Chief director for execution of punishments, the following anti-epidemic measures are in force in the Bulgarian prisons and pre-trial arrests:

- wearing of personal protective equipment by the medical staff while at work;
  - arrangements for treatment of Covid-19 patients at external medical facilities<sup>13</sup>.
- 14-day quarantine and monitoring for symptoms of all newly-arrived prisoners and detainees;
  - 14-day active monitoring for symptoms of all the staff who travelled to another country;
  - isolation of prisoners with symptoms;
  - maintaining of personal hygiene;
  - observance of the *respiratory etiquette*;
  - wearing of masks by the prisoners during transfers (but not inside the prison);
  - daily disinfection of all premises;
  - frequent ventilation of all premises;
  - training of medical staff on dealing with the coronavirus;



## Notes

<sup>1</sup> Krassimir Kanev: is the Chairperson of the Bulgarian Helsinki Committee.

<sup>2</sup> Information from Decision No. 1-3443 from 18 August 2020 of the Chief director for execution of punishments in response to a request for access to public information by the Bulgarian Helsinki Committee. Here and below, except in note 2, all the references are to documents and publications in Bulgarian.

<sup>3</sup> See: <https://www.worldometers.info/coronavirus/#countries> (accessed 17 September 2020).

<sup>4</sup> Ministry of Justice, Order No. JIC-04-102 from 26 February 2020.

<sup>5</sup> Minister of Health, Order No. ПД-01-117 from 8 March 2020.

<sup>6</sup> Minister of Health, Order No. ПД-01-122 from 11 March 2020.

<sup>7</sup> Minister of Health, Order No. ПД-01-124 from 13 March 2020.

<sup>8</sup> National assembly, Law on Measures and Actions during the State of Emergency, 24 March 2020. As the law was finally adopted only on 24 March, many of the orders of the Minister of Health, which imposed such restrictions before that date, were with a questionable legality.

<sup>9</sup> Decision of the Judges' College of the Supreme judicial council on preventive measures for Covid-19 in the period 13 March – 13 April 2020.

<sup>10</sup> Opinion of the Bhc on the draft law on the measures during the state of emergency, at: <https://www.bghelsinki.org/bg/news/20200318-opinion-statement-emergancy-situation/> (accessed 20 September 2020).

<sup>11</sup> Law, Amending and supplementing the Execution of punishments and pre-trial detention act, adopted on 27 January 2017, effective from 7 February 2017. The law brought changes also to the Criminal code and the Criminal procedure code. The amendments were preceded by the enactment in 2016 of other smaller-scale amendments to the national penitentiary legislation.

<sup>12</sup> Bhc calls on the Sjcto renew the hearings of cases on complaints of prisoners, related to isolation, torture and cruel treatment, 20 March 2020, at: <https://prisonreform.bg/bhk-prizovava-bss-da-vuzobnovi-razglejda-neto-na-dela-po-jalbi-na-lisheni-ot-svoboda-svurzani-s-izolaciq-iztezaniq-i-jestoko-otnasqne/> (accessed 20 September 2020).

<sup>13</sup> Information from Decision No. 1-3443 from 18 August 2020 of the Chief director for execution of punishments in response to a request for access to public information by the Bulgarian Helsinki Committee.





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# FRANCE - The pandemic crisis and opportunities for lasting change in French prisons

Cécile Marcel<sup>1</sup>

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## 1. Late release measures

Inside and outside prisons, the outbreak of the health crisis in February took the authorities by surprise. One thing was certain even then: the state of French prisons did not allow them to face up to the situation. While France had just been condemned by the European court of human rights for the inhuman conditions in its prisons and chronic overcrowding, overcrowding in the country broke a new record, with 72,650 people detained. How could the rules of social distancing be respected when three or even four prisoners were locked up in nine-square-metre cells in pre-trial detention prisons, which had an average occupancy rate of 140 per cent? How could detainees protect themselves, clean, disinfect and ventilate the space when a large part of the infrastructure is crumbling and unhealthy? How to take care of the sick when health units suffer from a chronic lack of means and staff? Every prison is, indeed, a potential cluster. For years, the situation in the prison system has been deteriorating. The crisis has shed light on an already sick

system.

Given these circumstances, the need for action was urgent. However, the government's initial announcements were by no means up to the task ahead, focusing only on reducing movements and exchanges between the inside and the outside world. On 17 March, the Ministry of Justice decided to suspend family visits and all activities (work, training, socio-cultural and educational activities). Many voices spoke up asking to consider a different measure, the only appropriate one: reducing the numerical pressure on the detention system. The *Contrôle général des lieux de privation de liberté* (Cglpl, the French Npm) warned, in a press release, the administration that "it will fail to comply with its obligation to protect the people in its custody if it does not take the necessary measures as a matter of urgency". The *Contrôle* recommended at the time that the detained population should be reduced by "proposing, adopting or urging all measures to promote exits from prison and reduce entries". In the wake of this, various professional associations and

organisations urged the authorities to “allow as many people as possible to leave prison immediately”. At the same time, more than a thousand lawyers, magistrates and health workers called for an urgent and significant reduction in the number of prisoners and the release of the most vulnerable ones for health reasons. “Not tomorrow. Not next week. Today”, stressed the signatories of an appeal published in *Le Monde*. Prisoners, driven by anxiety, also mobilised. In a text that circulated in various institutions, it was written: “We, the prisoners, accuse the justice and prison system of endangering our lives and demand that all prisons be immediately alleviated of the overcrowding that characterises them”. However, for the Ministry of Justice to change its position, the recommendations of international bodies, which called for the use of alternatives to deprivation of liberty, were necessary. While at first the Ministry of Justice had stated that it was “not at all of the idea” to release the less dangerous prisoners, the government announced on 23 March that it would authorise the release of 5,000 prisoners close to ending their sentence. On 25 March, an order issued during the state of health emergency set the conditions for the release of some detainees. A correct but late step, that was considered insufficient both by observers and by some magistrates who, in some territories, decided to act on their own initiative. On the other hand, the order included a deeply liberticidal measure, which contradicted the objective of reducing the detained population: the automatic extension of pre-trial detention orders with no debate. This measure was then repealed by the Court of Cassation.

## 2. Meanwhile, in prison

While probation magistrates, prosecutors, prison administrators and health workers worked side by side to have as many prisoners as possible released from prison, the administration tried to limit the spread of the virus in prison as much as possible: two-week quarantine for newly-arrived inmates, tests to identify infected people, isolation of symptomatic cases, limitation of contacts within detention places as much as possible. Concerning preventive measures, the administration followed the attempts of the government. It took on board its inconsistencies, particularly on the issue of face masks, initially banned in prison and still very difficult to obtain for prisoners at the beginning of June. The - sometimes absurd - securitarian logic opposed the necessities of prevention policies, with the risk of endangering prisoners. Thus, for example, hydroalcoholic gel was banned, because alcohol is forbidden in prison. “While promiscuity is normal and access to water, particularly during outside walks, is very limited, prisoners are deprived of a product that is important as a preventive measure”; these the words expressed with indignation in an appeal signed by various actors who operate in the field of risk prevention, together with the Oip. During the open-air time, collective showers or when accessing telephone booths, interactions are numerous, and preventive measures are sometimes impossible to respect.

In prison, prisoners were very concerned. “Here social distancing is not respected at all”, said one of them in a call to the Oip on 25 March. “Showers are in common areas and there is no disinfection. They send three or four people at a time. The

question of hygiene scares me a lot, with the coronavirus. There is not even plastic film on the meat; the dishes are still served in open stainless-steel bowls. And the bowl goes from hand to hand, we don't know who has touched it. I haven't eaten for three days". Another prisoner was panicking: "I'm afraid of dying in here". To the fear was added isolation, reinforced by the suspension of family visits. It is true that the Ministry of Justice had planned an additional telephone credit of 40 euros per month to maintain ties with family members, but some ran out of credit quickly. And in the many institutions that do not have phones in cells, there is another problem: "There is only one working phone booth, and it is located in the walkway. No hygienic measures are taken, the phone is not disinfected after each call, the virus will circulate very quickly, it will be a disaster", explained a person detained in Avignon. For fear of being infected, some inmates abandoned their ties with their loved ones. With the suspension of activities and confinement in their cells, some were exasperated. On the phone with the Oip, a woman collapsed: "I can't take it anymore, I'm at the end of my tether. There is nothing here, there are no more activities, we don't meet the Cpip (penitentiary advisor for insertion and probation) anymore, I can't talk to anyone anymore". The situation was difficult for the inmates, but also their relatives, confined outside. "It has been four weeks since I last saw my partner - and for those who have children it is even more difficult - and it will last another month: it is hard", said a prisoner's partner in mid-April. She also shared with us her material difficulties: "I have just been told to work on a part-time basis, I wonder if I can continue to send him the money that I

send him every month". The effects of the crisis are likely to be felt, in prison and outside, for a long time to come.

#### **4. Keep the best after avoiding the worst**

It may take time, for prisons as for the rest of society, to learn the lessons on how to manage this crisis. However, one thing must be acknowledged and welcomed: the worst has been averted. While it is true that prisons have been more affected than the rest of society, the virus has not spread as widely within them as might have been expected - even though two people died after contracting the disease, one a prisoner and one an officer. Some will see this as the result of the prison administration's policy, others as a good deal of luck, given the various management shortcomings. However, it is important to underline the progress and hopes born from the crisis.

Indeed, during the emergency everyone had to invent solutions to prevent the situation from deteriorating further. So, while prisoners' movements were multiplying all over the country, the management of the institutions showed initiative and ingenuity, reducing tensions and preventing the situation from exploding. They made use of article 29 of the Penitentiary law, which states that "prisoners must be consulted by the prison administration on the activities proposed to them", setting up spaces for discussion with prisoners on the devices provided to deal with the Covid-19 health emergency. Although all forms of collective expression are still prohibited in prison, this is a first step towards the creation of spaces for dialogue and consultation with prisoners, and towards the application of the

principle of *dynamic surveillance* advocated by the Council of Europe, which recommends the restoration of order through dialogue and negotiation, rather than through the use of force. To allow the preservation of ties with the outside world, which have been severely put to the test by the suspension of visits, a system was introduced (and must be maintained) to allow families to leave a message for their loved ones. Other countries have gone even further, for example by allowing video conferencing. It is in this direction that we must look, in particular by allowing the use of the internet.

The associations and organisations that work in prisons have not been unimaginative, keeping channels of communication with prisoners open and breaking their isolation. The establishment of freephone numbers by the various ministers of religion and a dedicated line by the Ombudsman, the opening of telephone lines by associations that deal with legal assistance, the establishment of correspondence... These dynamics were often encouraged by prison managements, although some associations regretted the reticence of the central administration to go further in terms of innovation. The importance and abundance of these initiatives are, however, guarantees of the vitality of a civil society on which we will have to rely in the future to strengthen the links between inside and outside. One of the initiatives taken is particularly noteworthy: the partnership established between the association *Lire pour en sortir* (Read to get out) and *La Chaîne parlementaire* (the Parliament's television channel) for the creation of the television

programme *Dé- con-fi-nés* (Un-confined). Born from the observation that not only does “nobody talk about prisoners”, but that “nobody talks to them”, the partnership proposed a programme to the prisoners during the period of lockdown: for example, the families were invited to send messages to their detained relatives that were then broadcast on air. But above all, it opened a window on the prison for the general public, at a time when “we feel what it means not to be able to get out, not to be free to move”, as the presenter, Maïtena Biraben, explained in an interview, in which she added: “I hope that we will realise that we are facing a serious problem”. Has she been heard? Paradoxically, while inside the prisons the prisoners had the impression of being particularly abandoned when they were *confined to prison*, their situation was the subject of great media coverage.

### **5. Against the return of prison inflation**

But the major transformation is the one we least expected. Thanks to the combined effect of the policy of early release of prisoners at the end of their sentences, the reduction of judicial activity and the drop in crime during the lockdown, on 24 May prisons were hosting 13,649 fewer prisoners than at the beginning of the crisis. Of course, this figure hides considerable disparities and some of the pre-trial prisons remained dangerously overcrowded. However, if France has experienced continuous inflation of the prison population over the last twenty years, this unprecedented situation shows that another way is possible. For the better. Staff unions have welcomed the improvement in working conditions for prison officers and the



reduction of tensions in prison. The huge number of exits has not brought the country to its knees. Concerning prosecutors, the experience of recent months has raised questions about their practices. "Should a prison sentence continue to have the centrality that it has had?" one prosecutor asks. He adds: "What made me think is that, during this period, it has been said: this one we release, this one we don't. With a stroke of a pen, we changed everything. If we don't understand this, we don't understand anything!"

Already on 20 April, the national union of prison directors warned: "The epidemic that is hitting us so hard has swept away various obstacles and fears: it will no longer be possible to say that individual detention is an unattainable goal" (in French prison law it is a right to be detained in a single-occupancy cell). On 3 June, more than a thousand people, including politicians, artists, prison directors, prison administration officials, legal practitioners, academics, associations and trade union leaders sent an open letter to Emmanuel Macron. For the first time united, they gave voice to the *crazy hope* that this situation was giving origin to. They called for "the management of the emergency to be replaced by a real policy of prison deflation, able to guarantee detention in individual cells and decent conditions".

While for the Minister of Justice, detention in single cells is an objective *to be toned down* - an absurdity, being a right provided for since 1875, ratified by the 2009 prison law and constantly violated - the Ministry of Justice now relies on the effects of the reform of the judicial system, which came into force on 24 March, to

prevent the number of detainees from rising. This position does not convince the actors and observers of the penitentiary world, who are certainly not short of ideas and proposals. Some suggest an amnesty for minor convictions, to eliminate the many convictions that have not yet been served, freeing the judicial machine. Several professional organisations are calling for a *numerus clausus*, with the introduction of "an exit mechanism when the number of prisoners exceeds the number of available places". For its part, the Cglpl is calling for the introduction of a system of numerical regulation of the detained population into the law: "It is a question of establishing in each jurisdiction a periodic and frequent review of the different personal situations, in order to manage in an individualised way the detention programme and alternative measures while ensuring that the occupancy rate of an institution never exceeds 100%". It is up to the executive and legislative authorities to examine all these alternatives; if they do not do so, they will be guilty of failing to seize a historic opportunity. But it will not be enough. To reverse the trend, it will be necessary to review the criminal policies that have led to the explosion of the detained population over the last twenty years and rethink budgetary priorities. As the country prepares to enter an unprecedented phase of economic recession, the time has come to abandon pharaonic plans to build new prisons and invest heavily in alternatives to detention.

## 6. The second pandemic wave

On 1 October 2020, the prison population reached 61,102 units. 2,400 more than three months earlier. French prisons have once again reached a prison population



rate of over 100%, which is almost 115% in pre-trial prisons. Already after the summer, the number of incarcerations had risen again.

At a time when the country is in the midst of the second wave of the epidemic, there is once again an urgent need for action to halt the phenomenon of prison overcrowding and limit the spread of the virus in prisons. The number of confirmed cases among prisoners is multiplying: from 47 on 5 October to 88 on 14 October, then from 117 on 20 October to 178 on 4 November.

The Minister of Justice, on 23 October, called on the public prosecutor's office to request alternative measures, either at the review hearing or when sentences were applied. A worthy but insufficient initiative.

The urgent need to take action in connection with the health crisis comes after France was condemned by the European court of human rights last January for the undignified conditions in its prisons. On that occasion, France was called upon to reduce its prison population. The country's highest courts, for their part, have learned the lesson: after the Court of Cassation, in July, the Constitutional court, in a recent decision, also reaffirmed the principle that a person cannot be remanded in custody in undignified conditions. It gave the legislator until 1 March 2021 to introduce the possibility of an appeal that would make this principle applicable. The scope of this decision is immense. One day, thousands of people detained in overcrowded, old and unhealthy institutions could file an application to be released. If the government wants to avoid

being in an unmanageable situation, it has no choice but to implement solutions to permanently curb overcrowding.

## Notes

<sup>1</sup> **Cécile Marcel:** Director at the French section of the Observatoire International des Prisons (OIP).





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# GERMANY - Covid-19 shows substantial problems in the German prison system

*Melanie Schorsch<sup>1</sup>, Christine Graebisch<sup>2</sup>*

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## 1. Introduction

In recent months, a variety of measures have been introduced in the German federal states to prevent and contain the outbreak of Covid-19 in prisons. These include, among others, the suspension of substitute penalties for failure to pay fines and longer prison sentences as well as the suspension of the execution of sentences under various conditions. However, tracking these developments as well as the infection rates of prisoners and staff seems almost impossible, as the justice ministries of the federal states publish statistics and news only sporadically and independently. This is usually done in the form of FAQs on the respective web pages.

In this article, the focus will be on two federal states and the following areas: prevention measures, restrictions on activities within the prisons and the restrictions on relaxation and preparations for release. The data will be partly drawn from letters of prisoners, describing the recent changes. The article will describe two

problems that have been highlighted during the *Corona-crisis* but have been in existence long before: the medical service in prisons as well as the preparations for release.

## 2. Materials and methods

Official information on the measures within the prisons was obtained through press releases and information on the web pages.

In addition, questionnaires on measures and the infection rates were sent to all 16 federal states as part of an international *ad hoc* research project. The feedback was more than reserved, and participation in the study was refused with the response that insufficient resources were available. Nevertheless, results from this survey will be included in this article.

In cooperation with the prisoners' journal *Lichtblick* the Prison archive (*Stafvollzugsarchiv*) published an announcement with the following questions:

- What experiences have you had with Corona protection measures in prison?

- Which measures (relaxation, visits, etc.) were cancelled and what alternative measures are available?
- What changes in the medical service do you notice?
- Has Corona changed the prison climate?
- To what extent are preparations for release being carried out?

The Prison archive received 26 answers from 25 different institutions and 12 different federal states. The answers arrived at the Prison archive in July and August 2020. This survey is by no means representative; however, it offers an insight into German prisons.

### **3. Official statements regarding Covid-19-measures**

Initially, the official description of the Ministries of Justice will be examined. In the context of this article, two selected federal states will be described, which have been given the titles A and B.

In general, prisoners and staff are required to respect the regulations regarding physical distancing and hygiene. To protect the prison population, measures have been taken to avoid larger groups in closed areas. New prisoners are accommodated in a separate reception unit for the first 14 days, separated from the other prisoners. All newly admitted persons are supposed to be examined for infection by throat swab within a few days. After the 14 days and negative test results, they are transferred to other areas of the prison.

According to the Ministry of Justice in federal state B, there is access to necessary preventive, protective equipment for staff.

Other preventive measures include staff training on Covid-19 and prevention measures. Prisoners were also provided with crucial information on prevention and symptoms.

Infected prisoners and prisoners who are suspected of being infected are immediately placed in quarantine areas and reported to the local public health department. Prisoners will be accommodated in their detention room or a quarantine unit. There, staff will provide, amongst others, medical care. In federal state A, joint accommodation will be introduced in the event of an accumulation of infection cases. Quarantine stations have been set up as a precautionary measure. If necessary, a transfer to the prison hospital will be arranged. In federal state A, places are available for the inpatient admission and care of acutely ill Covid-19 patients. In federal state B, persons with severe conditions and in need of intensive medical treatment have to be transferred to an external hospital.

In federal state A, the majority of workplaces were operating during the past months. According to the Ministry of Justice, treatment measures and programmes for prisoners seem to continue. However, according to its statement, the scope varies due to different requirements in the prisons. In federal state B, some workplaces have been closed. In these cases prisoners received minimal compensation for the loss of wages. Workplaces in certain prisons have been converted so prisoners can produce protective (face)masks.

In federal state A, measures outside of prisons – like prison leave – were initially

not granted. According to the Ministry of Justice, an exception was made for measures to prepare for prison release or employment outside the prison walls. The scope varied from prison to prison. According to public statements, the restrictions were further relaxed. As of June 2020, accompanied measures and leaves without prison personnel are permitted again. In federal state B, the responsible health authority is supposed to be informed when a prisoner is released while still in quarantine. It does not seem clear whether the quarantine can be maintained, through the control of the authorities or medical facilities.

Even though release preparation should be possible, the Ministry of Justice of federal state B stated that there had been delays due to Covid-19. B is certainly not an isolated case.

#### **4. A closer look**

##### **4.1. The medical service**

Interestingly, the Ministry of Justice of federal state B has indicated that unfair treatment, exposure to a high risk of infection and contact restrictions have been identified as significant concerns in prisoners' complaints. In the following, the experiences and assessments of the prisoners in federal states A and B will be described in more detail<sup>3</sup>.

Stable health is one of the cornerstones of a successful life after prison. However, the continued existence of a parallel health system in German prisons prevents continuity in the treatment of prisoners, both inside and outside of prison (W. Lesting, 2017, para 3f.). The highly over-represented accumulation of infectious diseases and addictions as well

as mental illness is particularly concerning (W. Lesting, 2017, para 7). Therefore, it is crucial to take a look at the medical system in prisons during a pandemic.

Prisoners report that preventive measures were implemented in prison with a delay as compared to the outside. Moreover, many staff members seem to underestimate the situation, according to the prisoners: masks are rarely used, and the behaviour of staff members triggers fear of an increased risk of infection amongst the prisoners. The survey participants have the feeling that a mere *recommendation* to wear the mask is not taken seriously and that substantive discussions with the officers were not possible.

Although treatment programmes were restricted to comply with physical distance requirements, a prisoner reports that they had to share showers with others or work closely together at the same time.

"The measures seem to me to be very unprofessional and massively burdensome. Unprofessional because in the initial phase, safety notices were hung up, but these instructions could not be followed due to a lack of soap or paper towels. Officers and staff are allowed to leave and enter the prison every day without face masks etc., while visits to the prisoners have been severely restricted" (A15).

Disinfectants do not seem to be available. Furthermore, masks were not distributed to prisoners in federal state B until June 2020.

To the question "What changes in medical services do you notice?" respondent B1 answers: "None. Medical consultation are rather reduced" (B1).

One respondent reports general problems as a person with a chronic illness and the difficulties of getting vaccinations (e.g. against influenza).

There are also reports of postponed external medical appointments as well as a lack of agreement between the prison administration and medical services regarding quarantine measures after a hospital stay.

Preventive measures also seem to be disregarded by some medical staff:“(…), the doctor comes from outside and never wears a face mask, so he is a great danger for us” (B16).

Another prisoner reports on the limited medical services that existed before Covid-19: “(…) Since Jan. 2019 provisional care by only 1 today 2 retired doctors. Med. service wears face mask” (A3).

Survey participant 15 also reports that the medical services in federal state A have remained unchanged: “From my personal point of view, medical care has not changed. However, a quarantine unit has been set up, of which I have only heard very negative things so far” (A15).

Although the health care system in prisons has to comply with the requirements of the public health insurance regulations and has to guarantee comparable services to those outside prisons, the medical services provided to prisoners still does not reach the level provided in freedom. Prisoners are not allowed to choose their doctor and, thus, the prison doctor becomes a compulsory partner. Furthermore, the doctors are not only responsible for the treatment of their patients but are also part of the prison hierarchy and therefore have certain

control functions. They operate in a field between patient-oriented action and prison regulations. Thus, prison doctors are expected to intervene in the daily routine of the prison in a resource-saving and efficient manner (W. Lesting, 2017, para 3). This is particularly evident in drug substitution treatment (W. Lesting, 2017, para 4). Furthermore, prisons are faced with the problem of finding qualified medical staff and vacancies remain vacant (e.g. in federal state A).

This article can only provide an introduction to the medical service within the prison system. This is mainly due to the unregular and incomprehensive collection and publishing of (statistical data by the Ministries of Justice. For example, in federal state B, there seems to be no central registration of how many prisoners consult the medical service or how many health care professionals (except doctors) are employed full-time in prisons. The average waiting time for appointments is also not recorded. According to Lesting, there is a lack of overview and control by external and independent experts, institutionalised quality management as well as control authorities, professional associations and medical ethics commissions (W. Lesting, 2017, para 6).

The medical service in prisons shows its weaknesses particularly during release. Prisoners must be reinstated in a health insurance scheme after their imprisonment. Health insurance companies often refuse to examine admission before release, as the application can only be made after release from prison because of the availability of health care in prisons (W. Lesting, 2017, para 4).



With the pandemic and the increased responsibility of the medical service that this crisis entails, it would be expected that the service provided has changed and transformed. However, looking at the prisoners' answers, this does not seem to be the case. The medical service is still described as inadequate, and the staff ignores the general hygiene measures. Disappointment, scepticism and resignation towards medical service seem to be common feelings amongst prisoners.

#### 4.2. Prison release

The management of the transition between prison and freedom is designed to facilitate the release from prison and to provide support for prisoners through cooperation between judicial authorities, offender support agencies and other third parties (E. Bahl, H. Pollähne, 2017b, para 16). The obligation to prepare for release skillfully conceals the fact that imprisonment can be part of social exclusion, fostering this process even after imprisonment (E. Bahl, H. Pollähne, 2017b, para 5). Prisons are therefore obliged to help prisoners to put their personal, economic and social affairs in order before release and thus prepare them for the demands of life after release (E. Bahl, H. Pollähne 2017a, para 4-5). Hence, an examination of prisoners' experiences and perceptions regarding the release preparation should give an insight into the recent developments during Covid-19 but also a general assessment of the measures at hand.

Prisoners in federal state B report that (purpose-related) escorted prison leaves have been reinstated. Other prisoners from the same federal state report a lack of preparation, even though the release is

perceived as imminent: "Release preparations do not take place in the prison (name)! I personally will be released in 10 months after more than 14 years in prison and nothing is done" (B18).

Another survey participant reports on a fellow prisoner who had only limited German language skills and no place to stay shortly before his release.

From federal state A, it is reported that preparations for release did not take place even before the pandemic: "Release preparation has not been available in the prison (name) for years" (A3).

"In more than two years, I have seen a number of prisoners *leave*, but I have never experienced anyone reporting positively or at all about a preparation for release. On the contrary, I currently have a fellow inmate from the ward who is likely to be released into homelessness in 3 weeks, and actually does not receive any help - although he has asked for it several times" (A15).

Respondent A15 also adds that the institutions have a lot of discretionary power in the organisation of the release preparations. That this discretion does not always seem to be used in favour of the prisoners.

Imprisonment implies multiple exclusion mechanisms such as being excluded from the pension and health insurance system, from minimum wages for work in prisons and from the housing market (E. Bahl, H. Pollähne, 2017b, para 7 *et seq.*). Imprisonment often leads to the loss of the accommodation because the earned income is lacking, and welfare benefits are discontinued. Often those affected by short prison sentences are not aware of



the possibilities of securing their home by welfare benefits for up to six months. Especially in highly competitive housing markets, the access barriers for former prisoners are very high and renting as well as initial equipment often involves considerable costs (V. Busch-Geertsema *et al.* 2019, p. 211).

While the exact measures for release preparation are not clearly defined, referral to supporting organisations and other authorities seems to be a fundamental part of the preparation (E. Bahl, H. Pollähne, 2017a, para 4-5). This referral involves more than just passing on addresses but aims at establishing contact between prisoners and support organisations and authorities (E. Bahl, H. Pollähne, 2017a, para 21).

Preparations for release also include relaxations of the prison regime, such as unaccompanied leave as well as long-term leave (E. Bahl, H. Pollähne, 2017a, para 49). These relaxations are necessary for prisoners to be able to find work and accommodation in advance, to strengthen their social ties, and for people with longer prison sentences to become accustomed to living in freedom. The development of new contacts and participation in education and other measures are also elementary objectives (E. Bahl, H. Pollähne, 2017a, para 27).

According to Bahl and Pollähne, however, releases without preparation are not uncommon (E. Bahl, H. Pollähne, 2017b, para 13). The mandate to support prisoners is at the discretion of the prison. This discretion is necessary in order to design the measures according to the prisoners' needs; however, it also gives the prison considerable flexibility in the actual

implementation (E. Bahl, H. Pollähne, 2017a, para 23). Moreover, even before Covid-19, the organisational structures and staffing of many prisons often prevented a holistic support (E. Bahl, H. Pollähne, 2017a, para 23). Due to the restrictive prevention measures to contain Covid-19, the relaxations have been completely removed. However, prisoners' comments indicate that these measures have been disregarded by the prisons before. During the past months essential aspects of the prisoners' reintegration, such as relaxations, visits, and preparation for release, were reduced considerably. In addition, pre-existing deficits have become more apparent and intensified. Covid-19 measures allowed a certain formalisation of this lack of support.

## Notes

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<sup>3</sup> The quotations are translated from German to English by the authors.

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## GREECE - Isolation for protection. Facing the Covid-19 pandemic in Greek prisons

*Ioanna Drosou<sup>1</sup>, Nikolaos Koulouris<sup>2</sup>, Theodora Pantelidou<sup>3</sup>, Sophia Spyrea<sup>4</sup>*

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“Covid-19 has forced millions of people around the globe into self-isolation and quarantine; however, millions were already living in isolation. People detained in Greek prisons are among those who must now face the pandemic with limited or no access to protective means, while living conditions in prisons have always been hygienically decadent” (E. Krithari, 2020).

### **1. Covid-19 and prisons in context**

Prisoners belong to vulnerable populations who present higher Covid-19 infection and death rates compared to the rest of the population. Many states’ ability to confront the pandemic has been challenged (according to hitherto 216 countries are reported with Covid-19 cases). The almost impossible social distancing behind bars forced countries worldwide to develop and implement two main penitentiary policies to halt Covid-19 spread:

a) preventive measures in prisons (such as sanitary measures, personal protection measures, physical distancing measures, access restrictions and movement limitations

etc.), and

b) rapid decarceration measures resulting in prison populations’ reduction (*compassionate releases*).

The latter, with the necessary prioritization, is of major importance especially as regards older people, in prisons and other closed institutions. On the other hand, preventive measures raised serious concerns over a possible circumvention and imperilment of prisoners’ rights. The Council of Europe Committee for the prevention of torture issued a statement on the 20<sup>th</sup> of March where attention is paid to the risk of inhuman or degrading treatment entailed in such measures (Cpt, 2020). This was further established as an international priority through the joint statement of the Unodc, Who, Unaid and Ohchr regarding prisons and other closed settings, stating the need to reduce overcrowding, ensure health, safety and human dignity, access to continued health services, respect of human rights, adherence to United nations rules and guidance.

## 2. Covid-19 and Greek prisons

During the pandemic, Greek prisons were in a state of suffocation, with 11,245 people being held in custodial institutions with capacity for 10,055 detainees, while in 23 out of 34 prisons overcrowding ranged from 102.38% to 252.83%. While half of the 736 Greek cases pending before the European court of human rights are related to detention conditions (G. Livitsanos, 2020), and despite the Cpt statement that the introduction of measures to tackle the pandemic should be in line with the prohibition of torture and inhuman or degrading treatment, the General secretariat for crime policy introduced measures which amplified the social isolation of prisoners, putting their human rights in question. Prison leaves were prohibited, as well as all kinds of open (family and children) visits. Closed visits were reduced and visitors were not allowed to deliver food, clothes, blankets and other goods to their imprisoned relatives. A policy of prison decongestion, (electronically supervised) release measures for vulnerable prisoners and for prisoners having served most of their sentence, suggested by the Hellenic league for human rights, the Greek ombudsman, the Athens bar association, the Initiative for prisoners rights, Amnesty international etc., although initially considered, was finally abandoned. Prisoners' complaints, some proposing to contribute to the efforts to prevent the spread of the virus offering community service, were not heard. Simultaneously, prisoners alleged that antiseptics and masks were not distributed, transfers to hospitals were allowed only in emergencies, leaving primary care inaccessible and violating the prisoners'

right to health (E. Triantafyllou, 2020). The only measure taken to counterbalance the social quarantine of prisons and maintain prisoners' contacts with the outside world is the expansion of the so-called e-visits scheme, launched in 2017 with an official document issued on 13 April 2020 by the General secretary for crime policy.

Restrictive measures lasted until 18 May. They were put in place again on 13 August and they are still in force, in a period of further increase of the prison population to 11,522. The second imposition of the same set of measures was not combined with other initiatives to improve detention conditions and health infrastructures (D. Kiskira-Bartsoka, 2020). Prisoners point out that "the measures are more repressive than substantial" and propose the continuation of court hearings, the restart of social visits and prison leaves and measures for prison decongestion. Restrictive measures, though, still apply, showing that prisoners are exempted from protection measures which are deemed necessary for other people.

## 3. Supportive voluntary initiatives

A number of voluntary social campaigns and events that aimed at the protection of health and safety of prisoners in several custodial institutions took place, organized by either the private sector or local authorities. Moreover, the Ship-owners' association donated 11,500 bed mattresses to the Ministry of citizens' protection for prisoners, a very welcomed initiative from state officials, who were criticized for the lack of an overall plan to improve conditions. Active groups of prisoners took also some initiatives. Prisoners

attending school collaborated with their educators designed and printed 3-D medical face-masks and donated their products to organization caring for other vulnerable groups, such as homeless unattended children and deaf people.

#### **4. Long-standing weaknesses besetting custodial institutions during the pandemic crisis**

Long-standing deficiencies of the prison system such as prison overcrowding, understaffing, lack of medical staff and inadequate health care services, took the lions' share in the discussion of prison issues during the pandemic. As personal space for prisoners determining certified accommodation has been set at 4 square meters, physical distancing is unfeasible in crowded prisons. Insufficient space, combined with the above mentioned restrictive measures, resulted in prisoners' distress, isolation and depression.

A tacit agreement for prisoners to bear the costs for running tests for Covid-19 detection when returning from their leave is reported (D. Kiskira-Bartsoka, 2020), replicating known practices which pass on prisoners the burden of prison deficiencies (i.e. paying to buy or asking their visitors to provide food, clothing and personal hygiene items etc). The sudden transfer of an infected prisoner to a custodial institution without first ensuring that facilities for his proper accommodation were available caused reactions and criticisms. Opposition parties criticized the authorities' intention to use rapid tests for Covid-19 detection in prisons, doubting that they could substitute molecular tests and expressing concerns as regards the involvements of the private sector. Other issues raised by critics of the

competent authorities was the assignment of prison establishments disinfection to private companies with no previous experience in the field, and the resignation of four doctors offering their services at a health care unit of the prison system, claiming that they were working unpaid for months in unacceptable sanitary conditions (G. Tessi, 2020).

Last but not least prison employees unions repeatedly expressed their concerns as regards the sufficiency of measures taken for their protection, asking the Ministries of health and citizens' protection and regional and local authorities to support them in their effort to avoid the expansion of the virus in their workplace. The Prison officers union characterized the new set of measures contradictory because prisoners are still transferred to courts and other authorities and return to prison. The Prison perimeter security staff union referred that existing protocols are not observed due to lack of sufficient tests and staff training. Recently a violation of prison employees' rights has been reported after the guidance sent by the General secretary for crime policy to prison directors to reject employees applications asking for legislated special-purpose leaves during the pandemic.

#### **5. Reaffirming the prison, neglecting human rights?**

The measures applied to prevent Covid-19 expansion in prisons make them social spaces of segregation in additional quarantine, increasing the distance between prisoners and the outside world. Up to mid October the numbers of infected prisoners and prison employees were very low (there are four detected cases, one prisoner and three officers), this

effectiveness has been achieved at the expense of prisoners' rights. A couple of weeks was sufficient to destructure the success story told for months, as 208 suspected or confirmed infections spread in 14 (of the totally 34) custodial institutions were reported by the competent deputy Minister at the Parliament on 13 November 2020 (K. Kosmatos, 2020), and two of the infected prisoners have lost their lives up to 21 November. Additional sanitary and health care measures (regular tests, two special units in National health service hospitals for prisoners, medical staff) to shield prisons from further dispersal of the virus announced by the General secretariat for crime policy on 11 November 2020, but the wide picture does not change; prisons now look more like the closed, total institutions of the past and less like the normalized places of the European and international standards of the 21<sup>st</sup> century (European prison observatory, 2020).



## Notes

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## HUNGARY - Much ado about nothing. Banning visitations did not prevent the virus spreading into Hungarian penitentiaries

*Zsófia Moldova<sup>1</sup>*

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Visitation in Hungarian penitentiaries has been suspended since March 2020. Based on new law adopted on 27 October 2020, visitation at Hungarian penitentiaries will be banned until July 2021. The overall ban did not prevent outbreaks of Covid-19 in Hungarian prisons. The virus still got into the institutions despite 17,000 detainees have been deprived of personal contact with their loved ones for more than 7 months.

Furthermore, the already extremely restrictive Hungarian penitentiaries became even more difficult to access and less transparent to the public than they were before the Covid-19 outbreak.

After two decades of cooperation and countless monitoring visits by the Hungarian Helsinki committee (Hhc), the Hungarian Prison service terminated its cooperation agreement with the Ngo in 2017 and denied them access to prisons. Consequently, no Ngos have any access to prisons and their detainees anymore.

Due to inadequate resources and lack of funding, Government regulatory institutions

such as the National preventive mechanism do not have the capacity to visit a sufficient number of prisons either. It has conducted only 12 monitoring visits to prisons in the past five years. Although the Prosecution service, which supervises the legality of penal institution operations, conducted regular weekly visits during the first wave of the pandemic in most institutions, the effectiveness of their oversight has always been questionable.

In March 2020, the warden of the Budapest-based Metropolitan penitentiary institution informed the Budapest Bar association about new measures taking effect regarding attorney visits. Attorneys have been allowed to enter penitentiaries for consultation after their temperature is taken by prison staff and after they answer a series of questions about potential exposure to Covid-19. Based on the results, prison staff may deny entry to attorneys. Communication between attorneys and clients is done by phone through a Plexiglas barrier. Consultation rooms are regularly disinfected. Attorneys are asked to refrain

from handing over documents to the detainees, and are encouraged to consult their clients via phone or Skype rather than in person. According to the Hhc's information, this is the general practice nationwide. Attorneys have told Hhc that Skype consultation is now ensured at all institutions; however, institutions must discuss and agree on the exact date and time of the call in advance. Worryingly, the Hhc has received complaints from detainees that calls can only be initiated by the attorney, meaning that detainees cannot consult their lawyer on urgent matters.

In March 2020 the Hungarian Prison service called upon the relatives of detainees to "minimise the number of visits". Until the end of May, visitation in general was still allowed if the family members were separated from the detainee by a Plexiglas screen. Physical separation during prison visits is nothing new. Irrespective of the epidemic, all penitentiaries had already been equipped with such barriers in April 2019 as a general rule; not allowing physical contact, kisses or hugs, without any differentiation with regard to the security concerns posed by a given detainee. This has previously been heavily criticized by Ngos. Also, the number of visitors was reduced to two per visit, and the Hungarian Prison service proposed that detainees avoid initiating visits with their elderly or very young relatives. Everyone was allowed limited phone calls and Skype calls. According to complaints received from relatives and attorneys, partially due to the lack of sufficient financial or technical resources, not all families could avail themselves of this opportunity. On March 9, the Hungarian Prison service announced the

suspension of temporary leave for prisoners at all facilities<sup>2</sup>.

Most institutions suspended visitation referring to the curfew restriction Hungary introduced on 27 March 2020. The curfew rules allowed people to leave their homes for work or for *essential* activities such as buying food. Under the new rules, visiting family members in prison was not one approved reasons for leaving home, however, going to a hairdresser was somehow considered essential.

On 5 April 2020, a Government Decree introduced tighter measures for prisons, for example:

- Until the end of the state of emergency, detainees will not be permitted to leave the institutions to meet their authorised contacts;
- Family visits in prisons can be restricted by the warden or by the Director general of the Hungarian Prison service;
- New detainees must be isolated for two weeks;
- New detainees with any Covid-19 symptoms will be transferred to hospitals; and
- Temporary leave from the institution shall not be authorised even if a close relative is dying or to attend a funeral<sup>3</sup>.

In April, the Hungarian Helsinki committee also received information that all training and educational activities have been suspended in the prisons. Hhc was also told that the daily routine, including the one-hour outdoor walk (the only

out-of-cell activity the institution shall ensure) might be changed. In order to compensate for the restrictions, free use of the gym and television by each of the cells was authorised and provided. Furthermore, the Hungarian Prison service introduced some other supportive measures, like providing regular information to detainees, and the provision of protective equipment.

The Hungarian Helsinki committee called on the Government to consider early release for some detainees such as elderly and sick offenders who are particularly vulnerable to Covid-19, and to suspend the sentence of all petty offenders.

Even though the state of emergency was lifted on 18 June 2020 and everything seemed to return to normal. However, according to our information, while detainees could restart working outside the institutions, visitation in prisons remained banned. The National Prison service did not inform the detainees or their families of any changes to the rules regarding visitation.

In September, the National Prison service stated that the measures are necessary to defend the prison staff and prison population from the virus. It claimed that visitations will be banned as long as the threat of Covid-19 persists. It is to be noted that at that time, all other institutions (including nursing homes) reopened and no major restrictions were any longer in effect in the country.

This raises numerous questions, such as:

- When, and under what circumstances can visitation be allowed?
- Is there a time in the near future

when visitation will not pose any risk?

- How will the decision be made? What data and intelligence serves as the basis of a potential reopening?
- Why is visitation behind Plexiglas considered a greater risk than the prison staff that leave the institution daily, or the detainees who work outside the penitentiary?
- How will detainees be compensated for the restrictions?
- How will the Hungarian Prison service ensure that detainees can maintain ties with their families without personal contact?

The Hhc has been urging the National Prison service to deliver a decision on banning personal visits based on clear and publicly available criteria.

To ensure that the detainees can remain in contact with their families the following measures were taken:

- Prisoners received additional phone minutes. 15 extra minutes/week phone time was permitted, but inmates must pay for the extra time themselves. It must be noted that phone call tariffs in prisons are much higher than the average tariffs outside prison;
- In March, the prison administration established an information call centre for prisoners and their relatives. The purpose of the call centre is to provide information about the



health situation inside the institutions and about the restrictive measures concerning contact between prisoners and their relatives;

- Prisoners are allowed to contact their relatives by Skype and postal mail correspondence<sup>4</sup>. The prison administration provides paper, envelopes and stamps free of charge to prisoners if necessary<sup>5</sup>; and
- Prisoners' vetted contact people are allowed to send them two packages per month. Orders must be made from the prisons' web-shop.

The Hhc interviewed 25 family members in October and gathered further information from attorneys. Family members complained about not being able to meet their loved ones since February or March. The Hhc received numerous complaints from desperate mothers of infants who could not show their child to the father for 7 months.

In April, there was still no publicly available information on how the Hungarian Prison service sought to prevent the virus spreading into or within Hungarian prisons. Based on publicly available information, temperature testing and health assessments at point of entry were ordered in all institutions. However, the key would have been the regular testing of prison staff and providing them with the necessary protective health equipment. From the data provided by the Hungarian Prison service<sup>6</sup>, all facilities were provided with a sufficient number of masks and disinfectants. Nevertheless, Hhc did not receive information about the distribution and use of these items. We

gained information from inmates' family members that inmates in some facilities regular disinfect cells and common areas, and that they wear masks in some cases when they leave their cells and might come into personal contact with others.

In September 2020, Covid-19 cases in prisons across Hungary soared parallel to the rapidly increasing overall daily infection rate in Hungary. While there is some information available in the media, there is no publicly available comprehensive data on Covid-19 in Hungarian prisons.

- On September 22, a total of 38 prisoners were recorded to have been infected with Covid-19 in the Nagyfa facility of the Szeged Strict and medium regime prison. According to the media, they became infected in their workplace outside the institution<sup>7</sup>;
- On September 28, 48 detainees were relocated to Tököl, the Prison service Central hospital. 50 staff members were reported as being infected<sup>8</sup>; and
- On October 20, 6 detainees and 5 staff members were reported infected in the Győr-Moson-Sopron Countyprison<sup>9</sup>.

The Hhc believes that the Hungarian Prison service needs to get serious about stopping the spread of Covid-19 in penitentiaries, and that includes ensuring that there is clear, comprehensive, up-to-date and publicly-available information on Covid-19 in the prison system.

## Notes

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<sup>2</sup> <https://hungarytoday.hu/coronavirus-hungarian-prisons/> (accessed 20 October 2020).

<sup>3</sup> <https://www.helsinki.hu/en/the-situation-in-hungarian-prisons-in-light-of-covid-19/> (accessed 20 October 2020).

<sup>4</sup> According to the Hhc's earlier statistics, many detainees and their family members come from underprivileged groups, and are illiterate. This is the main reason why the number of letters did not significantly increase during the pandemic.

<sup>5</sup> <https://www.euopris.org/hungarian-prison-service-hu/> (accessed 20 October 2020).

<sup>6</sup> Reply to the Hhc's Freedom of Information request.

<sup>7</sup> [https://rtl.hu/rtlklub/hirek/38-fogvatartott-kapta-el-a-koronavirust-a-szegedi-bortonben?utm\\_source=Facebook&utm\\_medium=Hirado&utm\\_campaign=post](https://rtl.hu/rtlklub/hirek/38-fogvatartott-kapta-el-a-koronavirust-a-szegedi-bortonben?utm_source=Facebook&utm_medium=Hirado&utm_campaign=post) (accessed 20 October 2020).

<sup>8</sup> <https://www.vg.hu/kozelet/egeszsegug-kozelet/csaknem-szaz-fertozott-van-a-bortonokban-2-3104857/> (accessed 20 October 2020).

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## ISRAEL - A matter of absence: the Ministry of Health and Covid-19 in Israel's prisons

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When the Covid-19 outbreak first arrived in Israel in March 2020, the Israel Prison service (Ips) prevented infection through strict policies, including broad restrictions on the rights of the incarcerated. These included preventing visits, banning therapeutic and leisure activities, and cancelling non-urgent medical treatment by medical specialists. As such, until the beginning of June, there were no infections among inmates. However, as Israel entered its second wave, the number of infected prisoners began to rise and, as to the latest announcement of the Ips Spokesperson's office (October 8), amounts to 64. The number of prisoners held in separation wings because of suspected infection is unclear, as is the number of infected Ips staff.

The health system within Israeli prisons is solely under the responsibility of the Ips, not under the Ministry of health (Moh). As such, it operates without oversight or clear definitions of the services it is required to provide, and without the same standards of the Israeli public healthcare system, leading

to inferior health services for prisoners (N. Michaeli, 2020). During the pandemic, this structural challenge had significant impact: the Moh, which does not see itself as responsible for prison healthcare, did not publish a Covid-19 containment strategy for prison facilities, and barely published any information on developments in prison facilities - a stark contrast to its transparency, including in other closed facilities, such as nursing homes. This lack of public involvement initially raised concerns among civil society organizations regarding the amount of its actual input in setting policy in prison facilities, especially as the Moh did not respond to the request of Physicians for human rights Israel (Phri) — the Israeli human right organization where both authors work — to provide such information. The Ips also operated without transparency, raising concerns of possible disproportionality in the restrictive measures it took and limiting the ability of civil society organizations to respond to concerns about potential violations of prisoners' rights.

### 1. Severe infringement on rights, little alternatives offered

At the outset of the Covid-19 outbreak, the Ips published very few of the measures it had taken to prevent infection among Israel's 14,000 prisoners, including 5,000 Palestinian prisoners, termed *security prisoners*. These measures were discovered *post-facto*, after a Phri petition to Israel's Supreme court. The Ips's steps became more drastic as the number of Covid-19 patients in Israel rose.

Aside from various measures to maintain hygiene, quarantine wings were prepared for inmates suspected of infection and those found positive with Covid-19. New inmates entering the Ips system were to remain in a separate holding wing for 14 days (Ips Spokesperson's office, April 2) - even though often they were placed together with ones that had arrived earlier, depriving them of effective quarantine. It is unclear whether the Ips carried out regular tests on new inmates prior to their entry into regular wings. Meanwhile, the conditions of quarantine were unclear and civil society organizations received complaints from individual prisoners that access to phones in the wings prepared for Covid-19 patients was limited. According to the prisoners reaching out to Phri, some cells in prison facilities in the South that were to hold confirmed cases lacked air conditioning, particularly problematic during the Israeli summer. Meanwhile, activities which give structure and even purpose to life behind bars, and even provide a meagre income, were cancelled, such as education, rehabilitation, therapy meetings, employment, and religious activities. During this time, however, Phri also received complaints from prisoners

that the various official Ips guidelines for maintaining hygiene, such as wearing masks, weren't implemented by prison staff.

Prisoner releases were few, even if these would have potentially reduced the risk of infection, especially in Israel's prisons, where each person is allocated roughly 3 square meters (Association for civil rights in Israel, 2019), with an overcrowding which renders the Moh's guidelines regarding maintaining distance null and void. In March, the Minister of public security ordered that inmates accused of non-violent crimes who only had a month left until the end of their prison sentence would be released on special leave under condition of complete house arrest. As of May 31, 694 criminal prisoners had been released on leave by virtue of this decision (Ips Spokesperson's office, May 31). However - as emerged in conversations with attorneys who represented prisoners - individual requests filed by defense attorneys to release on temporary leave inmates defined as at high health risk under the Government's Emergency regulations, and to temporarily release on parole inmates for medical reasons, were denied almost without exception, with the Ips claiming that as there have not been cases of infection in prisons there was no health risk.

Among the central steps taken by the Ips was preventing contact with people on the outside. Initially, conjugal visits were cancelled. Following the Emergency regulations, family and lawyer visits to prisons were forbidden, extensions of detention were to be held via videoconference and detainees were to hold consultations with their attorneys by phone. By the end of March, the Ips placed

restrictions on prison visits by official visitors and Red cross representatives (Ips, 2020a), including prior coordination and time limitations, potentially denuding prisoners of critical safeguards.

From the information provided to Phri, it seems as though the alternative solutions provided to prisoners for maintaining family connections during this time of increased anxiety and isolation were insufficient. On April 7, the Ips announced that each inmate (not including Palestinians defined as *security prisoners*) who was eligible for visits would receive a five-minute video call with their immediate family members, in accordance with their visitation rights: once a week for detainees, once a month for convicted prisoners (Ips Spokesperson's office, April 7). Female prisoners, who number only 200, and minors, who number around 70, had already begun receiving video calls two weeks earlier. It was not clear why the frequency of video calls was determined by the minimum visitation rights in the Commissioner's Directive — once a month — and not, at the very least, by the frequency of visits which took place in practice prior to the pandemic, which was often once every two weeks for prisoners (Ips 2020b). Despite the rising anxiety and the increased need for these calls, according to individual prisoners reaching out to Phri, they were significantly shorter than the 30-60 minutes previously provided for face to face visits, and some inmates did not receive any video calls at all.

Meanwhile, Palestinians termed *security prisoners*, for whom phone use is largely forbidden, had even greater need for video calls or other alternatives to face-to-face meetings with lawyers and families (A.

Litvin, N. Michaeli, G. Zelikovitz, 2008). These prisoners were only allowed to connect with their lawyers by phone prior to a Court hearing or after a discussion, which does not allow for reporting violations in real time (Israeli government, 2020). Bi-monthly phone calls by minors to family members were only provided following petitions to the Supreme court by various human rights organizations, including Phri (O. Ziv, 2020). In late May, following the aforementioned petitions, the Ips announced that it allowed Palestinian women and sick Palestinian prisoners to make calls, though their frequency wasn't mentioned. According to the Ips, phone calls were also permitted for individual prisoners prior to the Muslim holiday of Ramadan (Ips Spokesperson's office, April 7).

Following the initial nation-wide containment of Covid-19, prisoner visits gradually resumed at the end of June, with greater restrictions than previously. For Palestinian prisoners, these were to be held according to the opening of border crossings, and coordinated by the Red cross (Ips Spokesperson's office, May 31). These visits, however, did not take place in a continuous manner, after suspected and confirmed cases of infection appeared, and as Israel headed into a second lockdown.

## **2. Medical services during Covid-19: limited availability and mixed messages**

There are no specialists within Ips facilities and services are provided by general practitioners and paramedics employed directly by the Ips, most of whom have only basic training. Secondary



healthcare is provided by specialists in public hospitals or through their visits to prison facilities. The Ips containment strategy therefore posed various challenges for the access of prisoners to healthcare and suspicions arise that alternatives given instead of physical meetings with specialist healthcare workers were insufficient. Outside prisons, secondary medical care in Israel continued to be provided, including by phone and video consultations.

The Ips announced in early March that medical and therapeutic professionals will continue treatment in full cooperation with the Moh, including through technological means and telemedicine. However, the extent to which this actually took place was unclear. The Ips and the Moh did not respond to Phri's repeated requests to provide information on what services were available and the criteria for receiving services during this time. As a result of Ips restrictions on leaving and entering facilities, individual prisoners appealing to Phri confirmed that there was a roughly 3 months period of a near-total suspension of specialist health services, medical tests and procedures. Meanwhile, the Ips, in response to Phri's petition to the Supreme court, claimed that "consultations with medical specialists will only be given in cases where this is truly necessary, with the approval of the (Ips) district doctor" (Phri v. Ips). However, as Ips doctors, including district doctors, are generalists, this potentially puts the health of inmates at risk during the Covid-19 outbreak.

Mental health services were also harmed during the outbreak, precisely at a time when emotional distress is rising dramatically. The Ips's confusing,

contradictory stance regarding mental health services was revealed in their response to Phri's petition to the Supreme court. The Ips both noted that psychiatric treatment will be provided only in cases of first aid and, simultaneously, that "psychiatric doctors are continuing to meet prisoners and provide treatment in their field as needed" and that tele-psychiatry was possible (Phri v. Ips). This somewhat contradictory response, which did not clarify the scope of psychiatric treatments available and potentially indicated that the Ips sees only emergency psychiatric treatment as necessary, raised concerns that not all prisoners requiring such treatment will indeed receive it.

The Ips promised that social workers, typically the first response to inmate mental health crises, were available as usual and that "it is making efforts to maintain the service offered to inmates as much as possible" (Phri v. Ips). Yet here as well, inmates in different prisons reported to Phri that they had not seen social workers in prisons since the prisons started to operate under the emergency Covid-19 regulations.

Although these services were instituted following the end of the first wave, after the second wave of Covid-19 infections, the Ips published a directive that "the entry of specialists will be possible for the purpose of providing medical treatment to the prisoner, in the absence of the ability to provide medical treatment in a non face-to face meeting" (Ips Spokesperson's office, August 3). Again, the Ips has not been transparent regarding the extent to which it is providing alternatives to face-to-face meetings, including through phone and video calls to specialists, social

workers and other healthcare providers.

### **3. Ongoing lack of transparency from the Ips and Moh**

Contrary to the Moh's transparency with the Israeli public regarding infection, recovery and mortality numbers in the Country, as well as guidelines and recommendations, developments within prison facilities remained opaque.

The Ips — compared to the Moh — has shared information belatedly and on an *ad hoc* basis. Information divulged by the Ips on the suspected and confirmed numbers of staff and inmates was often published several days after the information had been spread, not always accurately, by inmates and sometimes even published in the media. Worryingly, of late, the Ips has not been fully transparent regarding the number of staff infections, even while Phri has received information that they number several dozen, out of roughly 18,000 people that work in the Ips (Ips, 2019). Only at the end of July, did the Ips establish a phone center for families of concerned prisoners to share information regarding developments in Ips facilities.

Information regarding access to secondary healthcare was only provided following Phri appeals to the Ips and a Supreme court petition and even then the information provided was limited and did not answer all of Phri's queries. Initially the Ips did not even publish information regarding the quarantine conditions for inmates who were ill or suspected of having contracted the virus, only providing information to Phri regarding, e.g., access to phone, regular walks etc. following our outreach (Phri v. Ips). Moreover, while the Ips has made numerous references to holding inmates

in quarantine and incoming detainees in separation wards according to Moh guidelines, it is not clear what these guidelines are.

The Moh has referred to prisons in the context Covid-19 only once, recommending that sample tests be conducted in closed facilities, including prisons (I. Efrati 2020). In light of this, Phri and other organizations contacted the Minister of public security and the acting Commissioner of the Ips to demand that they publish morbidity statistics. The number of sample tests carried out, the criteria according to which they are carried out and the extent of the Moh's involvement in providing guidelines for these tests remain unclear.

### **4. Conclusion**

Israel is in the middle of its second wave and in the midst of a second national lock-down and developments within prison facilities are still marked by a lack of transparency both from the side of the Moh and the Ips. Over the years, the Moh has repeatedly claimed that it does not have "neither the authority nor the means to intervene in the inmate health care system" (N. Michaeli, 2020, p. 78), and it is unclear to what extent Ips restrictions during the Covid-19 outbreak have resulted specifically from public health considerations, as opposed to, e.g., financial limitations, security needs, etc. Going forward into the first winter of the Covid-19 outbreak, it is critical that the Moh share its guidelines *vis a vis* public health needs in prison facilities, and the Ips act with greater transparency, to enable critical discussion and responses by civil society actors and ensure that the right of health of prisoners is protected.

## Notes

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## ITALY - Coronavirus and Italian prisons: a success story?

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### 1. The first response to the arrival of the virus

At the beginning of 2020, the pandemic caught Italy unprepared and severely hit the northern regions of the country, leading the government to issue a decree<sup>2</sup> on 23 February, containing the first measures to try to slow down the spread of the virus, thus establishing a lockdown in some city-wide red zones.

On the previous day, both the Department of Penitentiary administration (Dap) and the Department of Juvenile justice issued two similar recommendations<sup>3</sup> that stated that all personnel, volunteers, family members and other professionals resident (or living) in red zones should not enter prisons as a precautionary measure. Transfers of detainees to and from the territories of Turin, Milan, Treviso, Bologna, Pontremoli and Florence were halted.

On 22 February, the Ministry of health issued guidelines on the management of Covid-19 cases<sup>4</sup> that was promptly endorsed by the Dap<sup>5</sup> and adapted to the prison

context. The Dap indicated to penitentiary institutes the necessity to create space for the eventual need to isolate (suspect) positive detainees and added that newly-arrived detainees had to undergo a pre-triage to verify whether they had Covid-19 symptoms.

With a worrying increase in cases in the north of the country, the Dap had to deal with the necessity to prevent outbreaks of the virus in Italy's overcrowded prisons. For this reason, on 26 February, the Dap issued another note<sup>6</sup> addressed to the *Provveditorati Regionali*<sup>7</sup> most hit by the virus (namely the regions of Piedmont, Liguria, Lombardy, Veneto, Friuli Venezia Giulia, Trentino Alto Adige, Emilia Romagna, Marche, Tuscany and Sicily) with more stringent measures. The note suspended recreational and work activities for detainees that required contacts with people coming from outside the prisons and work activities involving detainees carried out outside the institute. Moreover, family visits were suspended and substituted with video calls (i.e., using Skype); what is more, each prison had the possibility of increasing the number and length of phone

calls that are limited by Penitentiary law to one 10-minute call per week.

The *Provveditorati* targeted by the regulation quickly implemented it while the heads of those remaining and the directors of penitentiary institutes were given the choice to take the measures that they deemed necessary.

The note also stressed the importance of informing the detained population in advance of the provisions to be adopted. This reasonable indication is peculiar since it directly recommended informing detainees - who are often mere recipients of directions and orders - of the necessity of these extraordinary measures. In several cases, prison administrations held meetings with inmates or their representatives, but the information that Antigone received over the following weeks suggests that this did not take place everywhere. The freedom that was given to some of the heads of *Provveditorati* and prison directors to implement the measures they deemed necessary resulted in a patchy adoption of restrictions throughout Italy: some prisons suspended activities, family visits, the reception of packages, and the entrance of volunteers. Detainees suddenly felt abandoned and completely cut off from their loved ones who, on the other hand, did not know if they could visit their imprisoned relatives and were concerned for their health. Confusion and panic started to spread amongst detainees and their relatives: it was an early warning sign of a ticking bomb that was about to go off.

## 2. Lockdown and prison riots

8 and 9 March were the hottest days of the brisk Italian spring, not only because they were the first two days of an over

two-month-long lockdown, but also because of the riots and revolts that took place in 49 prisons.

In the previous two weeks, Covid-19 cases in Italy had soared from less than 100 to over 7,000 and intensive care units had started to fill. The worsening of the situation led the government to order a lockdown for the entire country on 8 March<sup>8</sup>. The lockdown decree also considerably affected the prison system. It suspended family visits and the granting of permits throughout the country and allowed an extended use of telephone and video calls in all penal institutions so that prisoners could contact their family members. In the severely overcrowded prison system, where confusion and panic were running wild and the tension was already palpable, the news of the lockdown triggered revolts and protests.

Unfortunately, the bulletin of those two days did not only include the damaged property of the Dap but also the lives of 13 detainees who, according to the accounts, entered the prison infirmaries and overdosed on drug reduction medicines (investigations of these events are still ongoing) (Antigone, 2020a, p. 63). But this is not the only shadow that fell on those days because Antigone received some allegations of ill-treatment that had taken place in some of the prisons where the revolts took place (Antigone, 2020b, p. 10). Antigone has filed several complaints even for the crime of torture that was introduced in the Italian penal code only in 2017.

According to the accounts, in the Milan-Opera prison, the revolt that took place on 9 March was suppressed at 6.00 pm, and detainees were taken back to their



cells. Allegedly, around 8.30 pm, the lights were cut and police forces entered the cells to beat both the detainees, who had taken part in the revolt, and also those who had not. After collecting all the testimonies, Antigone filed a complaint to the authorities for abuse, violence and torture and official investigations are currently underway.

In the Pavia prison, the revolt took place on 8 March. Antigone was contacted by detainees' family members who reported that the day after the revolt, the police had used violence and humiliated several detainees, hitting them, insulting them, stripping them of their clothes, and leaving them without food. According to the accounts, some detainees had also been immediately transferred to other penitentiary institutes without their personal belongings and without notifying their families of the transfer. Following these events, Antigone filed a complaint for abuse, violence and torture; the authorities are investigating the events.

In the Melfi prison, the protest took place on 9 March. Several days later, Antigone was contacted by family members who reported that during the night between 16 and 17 March, several members of the penitentiary police had entered the cells in the high-security section, handcuffed the detainees, beat them up with truncheons, placed them in isolation, insulted and spat on them. After the events, allegedly detainees were forced to sign a declaration in which they stated that the injuries were the result of an accidental fall. In the following hours, several detainees were transferred to another institute allegedly without the possibility of getting dressed or of taking any personal effects. In April 2020, after collecting the accounts,

Antigone filed a complaint for violence, abuse and torture.

Yet, the gravest case allegedly took place in the S. M. Capua Vetere prison at the beginning of April. On 5 April, detainees found out that one inmate had been found positive to coronavirus and started a protest. According to the accounts of some detainees' family members who contacted Antigone, the day after the protest, around 400 members of the penitentiary police had entered the Nilo section and the cells in riot control gear (wearing helmets covering their faces and gloves) and allegedly beat up detainees with kicks, punches and truncheon blows. Some inmates had undergone other kinds of humiliation, some of them were allegedly isolated after the beatings, and others were transferred. Only a few detainees had been visited by prison doctors who had not reported their injuries. After collecting the accounts, Antigone filed a complaint to the authorities for – among other – torture (for police officers), forgery and omission to report (for prison doctors); investigations are currently underway.

### **3. Prevention and case management in prisons**

On 13 March, the Dap issued a new note<sup>9</sup> urging prison administrations to adopt protocols with the territorial health departments for the management of Covid-19 cases in prisons and transfers to hospitals in case of need.

The note also gave further operational instructions for the prevention of the contagion.

Newly-arrived inmates had to be visited by a prison doctor, who decided if the detainee needed to be isolated or not.

Isolation had to take place in a single cell with sanitary facilities. On the other hand, if detainees already present in the prison institute presented typical Covid-19 symptoms, they were to be visited by a prison doctor in their cell along with their cellmates. Testing was arranged and carried out by the territorial health department: if the result was positive, the infected inmate had to be isolated immediately and kept under observation in case the need for a transfer to hospital arose.

After isolating the prison system, the Dap, government officials and other decision makers in the judicial system started to work to reduce the number of detainees.

Overcrowding of the Italian penitentiary system has been chronic for years: as of 29 February, there were 61,230 detainees for 50,931 available places, which means a prison population rate of 120.2%. Antigone has estimated a rate of 130%, taking into account unavailable places in some prisons (Antigone, 2020a, p. 11). In practice, this means adding one or two beds to many cells, cramped spaces, few activities and jobs for too many people.

A Covid-19 outbreak in prisons would have led to terrible consequences for the entire prison population and personnel and could have become a burden on the already overwhelmed territorial health systems.

In the first weeks of March, the prison population began to drop thanks to a lower number of crimes committed during the lockdown (hence a lower number of new detainees entering the prison system) and a more extensive application of the already-existing alternative measures to

detention and pre-trial detention by judges. This fact suggests that the law is often only one of the factors that affect the numbers of the prison population and the regulation of prison life. At this time Antigone along with other associations and one of the largest trade unions elaborated several proposals to reduce the prison population and to make life in prison a little better during these uncertain times. At the beginning of the second wave, Antigone would once again propose similar measures because the number of detainees still needed (and still needs) to be reduced in order to live a safer prison life.

At that time, the government decided to include in the decree law of 17 March<sup>10</sup> two articles to further push in this direction. To the disappointment of many, the two articles did not add any new measures to the existing ones. Art. 123 was about home detention. To benefit from this measure, an inmate had to have less than 18 months of prison term to serve; if the detainee had to serve between 7 and 18 months, electronic monitoring was needed. As already underlined, this measure already existed in the law and the decree law basically expedited its application.

Detainees could be excluded from benefitting from this measure for several reasons. For example, if they were condemned for serious crimes (listed in art. 4 of the penitentiary law) such as: terrorism, association of mafia-type, kidnapping, human trafficking, sexual violence; or if they were subjected to the regime of special surveillance (*ex art. 14-bis* of the penitentiary law) which is a preventive regime for detainees who

disrupt the good order of the prison; or if they were habitual offenders or re-offenders; did not have a home that satisfied the requirements for home detention; their home was the same as where the victim of their crime lives.

Art. 124 allowed detainees in semi-freedom (spending the day outside the prison for work or educational purposes and re-entering at night) to spend the night at home.

Another very important indication that aimed at lowering the prison population came from the General Prosecutor of the Court of Cassation, who on 2 April published a document with some reflections<sup>11</sup> on the possibility for prosecutors of extensively interpreting some norms so as to prevent as many people as possible from entering prisons. This document included (among other) reflections on pre-cautionary measures (the arrest) to be carried out in the form of home arrest or police stations instead of prison, the possibility of suspending the execution of some prison sentences, granting the alternative measure of social service even in the absence of the work to be performed.

All these factors decreased the prison population even though this decrease is still not sufficient if compared to available places in the prison system. By mid-May, there were 52,600 detainees compared with the 61,000 detained at the end of February: 8,551 fewer (-13.9%). One very important outcome was a great decrease of the pre-trial prison population, which indicates that there was less recourse to pre-trial detention: this is a trend to be encouraged also in normal circumstances.

However, the National Guarantor of the rights of detained people and people deprived of personal liberty (the Italian national preventive mechanism) pointed out that as of 20 May, those who benefitted from the measure of home detention were 3,379, of whom 975 with electronic monitoring, while the 17 March decree had foreseen the use of 5,000 monitoring bracelets. What became evident was the lack of electronic bracelets and the high prices that the State was (and still is) paying to the private contractor of the service.

One good practice that was implemented in some prisons in Lombardy, where the number of inmates who were found positive to Covid-19 was becoming dangerously high, was the cooperation with Doctors without borders, who were granted access to prison establishments to manage a specific Covid-19 section. This experience proved to be positive because the infection was contained and reduced and this project was extended to other prisons in Marche, Piedmont and Liguria (*Medici senza frontiere*, 2020).

Another welcomed good practice was put in place by the Dap that granted detainees the possibility of carrying out video calls with mobile phones. Around 1,600 cell phones were acquired by the Dap (as strongly demanded by Antigone that also mediated between the Dap and a private donor who was willing to provide more phones). Video calls were often made via WhatsApp directly in the wards. Never before had a mobile phone entered a prison legally. It was truly a cultural revolution that will hopefully leave its effects even at the end of the health emergency.

#### 4. Did *phase two* take off in the prison system?

The emergency measures issued in March expired at the end of June, and the country moved towards the so-called *phase two*: at the end of May, the lockdown had ended, most of the work activities and services in the country were re-opened and most of the limitations and prohibitions were lifted. How did this apply to prisons?

To find out, Antigone surveyed 30 prison institutes scattered throughout Italy (Antigone, 2020b, p. 7). The sample was significant, given that it included many of the largest institutions in the country and that these prisons alone were hosting 23,601 inmates, 44% of the entire Italian prison population. The information was collected between 20 July and the first days of August. The 30 institutes monitored are located in Lombardy (6), Sicily (5), Latium (5), Campania (5), Puglia (2), Tuscany (2), Piedmont (2), Umbria (2), and Calabria (1).

Over the summer, family visits were resumed everywhere and took place with various preventive measures (acrylic glass separations, masks, temperature control, etc.). The number of visitors was limited to one or two and often minors were not allowed.

Despite the lift of the suspension of family visits, in most prisons telephone calls continued to be granted beyond the limits prescribed by the law. Video calls were still essentially made in all the institutions monitored and often counted as family visits. Even if the physical presence of a loved one would certainly have been preferred, video calls showed many advantages for elderly parents or young children who were able to see their

imprisoned relatives without the need for a long commute.

Antigone also tried to find out whether recreational, sport, educational and vocational activities had resumed and found that, when these activities required the entering of prison by volunteers or other personnel, they were not resumed. Only in a few cases were these activities carried out using video calls, which was appreciated by detainees.

Finally, the survey revealed that in more than half of the prisons, detainees were once again benefitting from leaves. However, the measures taken upon return to prison varied greatly. In many institutions, 14 days of quarantine were compulsory upon return, which discouraged many prisoners from benefitting from permits. In other cases, prisoners were tested for Covid-19 and the result came back within a few hours. If the result was negative, they were allowed back into their section.

#### 5. Is the Italian case a success story?

During the first phase of the Covid-19 outbreak, Italian prisons saw only a limited number of infections and few deaths. Thus, is it possible to call the Italian response to the pandemic in prison a success story?

Surely the prison population was reduced and this helped to create space for the isolation of positive inmates, but the prison system was (and still is) overcrowded and social distancing impossible to practice. Indeed, in some prisons the virus spread rather quickly with great risks for the whole prison population. In short, the efforts to reduce the prison population have been



insufficient and the number of detainees is still far from the official prison capacity. The prison system has obviously benefitted from the reduction of the prison population but more needs to be done. The limited number of infections in prison has also to do with a little luck.

The second wave is confirming this. Over the summer, the prison population grew again and at the end of September, there were 54,227 detainees and an official prison population rate of 107.3%. At the end of October, the government issued a new decree<sup>12</sup> in which it granted measures similar to those already granted in March, hence with the same limits of applicability.

In November, the government issued a new decree<sup>13</sup> that included restrictions of the freedom of movement in areas at greater risk; the decree also affected life in prison, as it prevents people from areas at greater risk from travelling to other regions (or even municipalities) to visit their imprisoned relatives. Also, the Dap issued an internal regulation<sup>14</sup> with a new set of preventive measures to be applied within prisons depending on the number of infected inmates and staff.

In this second wave of Covid-19, the official numbers of infections in prison are proving to be much higher than in the first wave when on any given day the number of infected detainees was never higher than 200 people (*Garante nazionale dei diritti delle persone detenute o private della libertà personale*, 2020b, p. 225). However now, according to the latest data released on 9 December by the National Guarantor of the rights of detained people and people deprived of personal liberty, 1,049 detainees are positive to the virus: 959 of them are asymptomatic, 90 have

symptoms and 41 of them are hospitalised (*Garante nazionale dei diritti delle persone detenute o private della libertà personale*, 2020a). Many prisons have become Covid-19 clusters and recently 9 detainees have lost their lives due to coronavirus. Among prison staff, 853 are infected. Numbers are very variable because the situation is constantly changing. The Dap has only recently started to publish these numbers on its website, which is much appreciated. Antigone has been demanding transparency since the first moment the pandemic hit Italy. Prison must always be transparent, all the more in this dramatic situation because a lack of news and updates creates panic.

What emerges from the current situation is the need to create space in prisons to allow social distancing and the isolation of cases otherwise the success story of the first wave risks turning into a terrible tragedy.

Hopefully, some lessons learned during this difficult time will not be forgotten and will help to build a new prison system. This concerns not only the issue of prison overcrowding but also the use of new technologies. The emergency has shown that they can enter prisons without causing security problems or excessive burdens on the system. Antigone hopes that they will also be used when the situation is back to normal because they can be used not only to maintain ties with one's family but also to carry out activities foreseen by prison treatment.

## Notes

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<sup>2</sup> Decreto legge n. 6,23 febbraio 2020, *Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da Covid-19* <https://www.gazzettaufficiale.it/eli/id/2020/02/23/20G00020/sg> (accessed 20 October 2020).

<sup>3</sup> Dap, *Raccomandazioni organizzative per la prevenzione del contagio del coronavirus* [https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?facetNode\\_1=0\\_62&contentId=SDC248986&previousPage=mg\\_1\\_8](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?facetNode_1=0_62&contentId=SDC248986&previousPage=mg_1_8;); Dipartimento di giustizia minorile e di Comunità, *Raccomandazioni organizzative per la prevenzione del contagio del coronavirus* [https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?facetNode\\_1=0\\_62&contentId=SDC249009&previousPage=mg\\_1\\_8](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?facetNode_1=0_62&contentId=SDC249009&previousPage=mg_1_8) (accessed 20 October 2020).

<sup>4</sup> Direzione generale della prevenzione sanitaria, *Covid-19. Nuove indicazioni e chiarimenti* <https://www.certifico.com/component/attachments/download/16935> (accessed 5 October 2020).

<sup>5</sup> Dap, *Ulteriori indicazioni per la prevenzione del contagio da coronavirus* [https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?facetNode\\_1=0\\_62&contentId=SDC249492&previousPage=mg\\_1\\_8](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?facetNode_1=0_62&contentId=SDC249492&previousPage=mg_1_8) (accessed 5 October 2020).

<sup>6</sup> Dap, *Indicazioni specifiche per la prevenzione del contagio da coronavirus - regioni Piemonte, Liguria, Lombardia, Veneto,*

*Friuli Venezia Giulia, Trentino Alto Adige, Emilia Romagna, Marche, Toscana e Sicilia* [https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?facetNode\\_1=0\\_62&contentId=SDC249652&previousPage=mg\\_1\\_8](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?facetNode_1=0_62&contentId=SDC249652&previousPage=mg_1_8) (accessed 5 October 2020).

<sup>7</sup> The territories in which the Italian State is divided by the Ministry of Justice for the administration of justice. They sometimes correspond to regions (even if they are completely different entities), but often they include several regions.

<sup>8</sup> Decreto legge n. 11, 8 marzo 2020, *Misure straordinarie ed urgenti per contrastare l'emergenza epidemiologica da Covid-19 e contenere gli effetti negativi sullo svolgimento dell'attività giudiziaria* <https://www.gazzettaufficiale.it/eli/id/2020/03/08/20G00029/sg> (accessed 5 October 2020).

<sup>9</sup> Dap, *Ulteriori indicazioni operative per la prevenzione del contagio da coronavirus negli istituti penitenziari* [https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?facetNode\\_1=0\\_62&contentId=SDC253426&previousPage=mg\\_1\\_8](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?facetNode_1=0_62&contentId=SDC253426&previousPage=mg_1_8) (accessed 5 October 2020).

<sup>10</sup> Decreto-legge n. 18, 17 marzo 2020, *Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da Covid-19* <https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg> (accessed 5 October 2020).

<sup>11</sup> Procura Generale delle Corti di Cassazione, *Pubblico ministero e riduzione della presenza carceraria durante l'emergenza coronavirus*, <https://www.sistemapenale.it/it/documenti/pubblico-ministero-e-riduzione-presenza-in-carcere-coronavirus-procuratore-generale-corte-cassazione-giovanni-salvi-1-aprile-2020> (accessed 13



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<sup>12</sup> Decreto legge del 28 ottobre 2020 n. 137, *Ulteriori misure urgenti in materia di tutela della salute, sostegno ai lavoratori e alle imprese, giustizia e sicurezza, connesse all'emergenza epidemiologica da Covid-19*, <https://www.gazzettaufficiale.it/eli/id/2020/10/28/20G00166/sg> (accessed 13 December 2020).

<sup>13</sup> Decreto del Presidente del Consiglio dei Ministri 3 novembre 2020, *Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 25 maggio 2020, n. 35, recante «Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19», e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante «Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19»*, <https://www.gazzettaufficiale.it/eli/id/2020/11/04/20A06109/sg> (accessed 13 December 2020).

<sup>14</sup> Dap, circolare n. 0401524.U del 10 novembre 2020, Monitoraggio dei casi di Covid-19 e nuove misure da adottare, [http://www.ristretti.it/commenti/2020/novembre/pdf3/circolare\\_10\\_novembre.pdf](http://www.ristretti.it/commenti/2020/novembre/pdf3/circolare_10_novembre.pdf) (accessed 13 December 2020)

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## PORTUGAL - The management of Covid-19 in Portuguese prisons

*Vera Silva<sup>1</sup>*

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Portugal is considered one of the safest countries in Europe and the world, with low crime rates. However, Portuguese prisons are overcrowded because of the high rates of incarceration in the last decades. According to the Council of Europe high incarceration rates in Portugal are also due to the fact that the average effective length of imprisonment is three times longer than the average in Europe.

The prison population is largely made up of people from precarious socio-economic backgrounds, with a significant number of people from racialized communities, and people with no Portuguese citizenship. Criminality is generally associated with drug trafficking, property crime, road traffic offences and also some people are imprisoned due to non-payment of fines.

There are around 13,000 people (men, women and transgender) imprisoned, dozens of children 3-5 years old and around 5000 professionals in the 49 prisons of the country. There is a high number of elderly and inmates with health problems: chronic

and infectious diseases (Hiv, hepatitis B and C), and a high number of mental health problems.

The European prisons observatory in Portugal has found that around 60-80% of people in prison have had previous experiences of institutionalisation in state institutions, such as childcare institutions, youth detention centres, psychiatric hospitals, shelters for victims of domestic violence, immigration detention centres. According to Confiar (Ngo) 70% of the children of prisoners do not break the cycle of crime and recidivism is around 75%.

Most prisons are very old buildings, overcrowded and have poor conditions. In some establishments the conditions are degrading, as reported by the European prisons observatory in 2015. Health services in prisons are precarious with more than half of the health professionals being employed in outsourcing. The prevention of suicide among people deprived of their liberty is ineffective; according to Council of Europe data - annual crime statistics from the 47

Member states 2019 - the suicide rate in Portuguese prisons was very high (i.e. 25% higher than the European average). Although without empirical data, the suicide rate of professionals, in particular prison guards, is alarming. Over time, mortality rates in prison are very high, for example in 2012 the mortality rate was almost double the European average. Over the years, both the Council of Europe's European Committee for the prevention of torture and inhuman or degrading treatment or punishment and in a national level: the Ombudsman's office, the Order of psychologists, the Order of nurses and others have identified and denounced a significant number of human rights violations relating to prison healthcare.

This report is mainly based on information collected in the media, websites of the Ministry of Justice and of the General directorate of health, denouncements from prisoners and their relatives at social networks, complaints and information from Ngos and reports of the Prison observatory on the management of the pandemic in the prison system. There are strong contrasts and mismatches between the discourses of the representatives of the Ministry of Justice, Dgrsp (*Direção-Geral de Reinserção e Serviços Prisionais*) and Dgs (*Direção-Geral da Saúde*), on the one hand, and the denouncements of prisoners and their relatives, Ngos and the prison guard union, on the other hand.

At the beginning, the management of Covid-19 in prisons reflected a weak coordination between the various institutions and agencies running these establishments. The first measures for prisons were communicated by the director of Dgs on 8 March, live on the

evening news of a national public television channel. These emergency measures were taken in response to the first outbreak of Covid-19 identified in the northern region of the country. They required the suspension of visits and deliveries from outside, in prisons as well as in other tutelary institutions and care homes of the north. However, according to the prison guard union, the Dgrsp didn't alert on time the directors of the target prisons. This lack of communication between agencies provoked a lot of confusion for inmates, their families and friends, as well as for prison directors, guards, educators and volunteers. On March 9<sup>th</sup>, in the north prisons of the country visits did not take place as it was ordered by the Dgs. In some, the delivery of clothes and food was authorised; in others not. This generated a lot of despair and revolt, especially for inmates, and their relatives and friends who went to visit them. In the prison of Oporto some inmates protested and refused to have lunch and were repressed and lockdown. At the prison of Braga some inmates also protested refusing to eat lunch.

There is a contingency plan for prisons since February 17<sup>th</sup> but it was never made public due to security reasons, as justified by the Minister of Justice. However, some measures and some information were published at the website of the Dgrsp with few updates. The only public official information about the management of Covid-19 in prisons were the sanitary and prophylactic measures from Dgs on March 23<sup>rd</sup>; the Ombudsman's Recommendation for the prevention of contagion in the prison system, on March 26<sup>th</sup>; and, on May 26<sup>th</sup>, the Dgs recommendations for

visiting procedures.

The national State of emergency was decreed on 19 March. Although the contingency measures in prisons began to be implemented in March 9<sup>th</sup>. First, as mentioned above, visits and orders of clothing and food from outside were suspended. Later on, under the guidance of the General directorate of health, these deliveries from relatives to inmates were allowed. These restrictions were gradually applied in prisons, first in the north and then throughout the country.

On March 16<sup>th</sup> visits in all prisons were suspended. In order to overcome this severe restriction the number of phone calls permitted increased to 3 daily calls of 5 minutes. However, inmates must pay for it. In some prisons video calls have been allowed and expanded. Unfortunately, with many limitations due to lack of phone devices and human resources, which differ from prison to prison. Also, many inmates' relatives and friends have difficulties to access to computers or mobile phones with internet.

Some measures implemented along March were the suspension of visiting and entering of volunteers, academic researchers, teachers and other professionals; the two prison hospitals were prepared to receive separately Covid-19 patients; two prisons were seconded to receive ill inmates; infirmary spaces in prisons have been created and expanded; the armed forces built campaign hospitals in 5 prisons; the most vulnerable such as elderly, pregnant women and chronically ill (about 750 people) were isolated and inmates returning from temporary release were quarantined. Those were some of the prophylactic

measures demanded by Dgs, on 23 March, although some have hardly been implemented considering the different conditions in each prison.

Maximum security wings and solitary confinement cells were used to isolate and put inmates in quarantine. Lockdown strategy resulted in the physical and psychological torture of solitary confinement or in overcrowded prisons, isolation in cells with 3, 4 or in some situations more than 10 people.

Prison labour was mostly suspended with the exception of some services such as cooking, cleaning, agricultural work (in some prisons). However, measures concerning labour were different from prison to prison. In the women's prison of Santa Cruz do Bispo, one of the working companies, in the end of March, had change its production to protective equipment, masks, uniforms for health workers. Dozens of women prisoners worked day and night to earn a derisory wage. However, for many women the possibility of working has allowed them, for example, to charge a telephone card, buy cleaning products and food.

Educational, recreational and religious activities were suspended. The kindergarten spaces in women's prisons have been closed, during confinement, which worsened the conditions of women mothers and their children who have been confined in the cells and wings.

Administrative staffs, educators and prison guards were halved, which had implications for prison management and directly affected inmates, who spent more than 22 hours a day locked in cells and had limited access to telephone calls, video calls and money deposited by relatives.

The judicial system also slow down and the resolution of court cases concerning convict inmates or on remand became even slower or suspended.

During March in some prisons there were protests by inmates. In social media, several videos of inmates circulated calling for their release and denouncing the lack of protective material for inmates and professionals, the poor healthcare, the poor living conditions and the risk of contagion. On the other hand, relatives and civil society organisations also denounced the poor conditions and the danger to which inmates were exposed, the lack of contact and information about what was happening inside prisons. There have been, also, reports from relatives in social media denouncing the covert punishments, including prison transfers of inmates accused of releasing videos to Monsanto maximum security prison.

During March three public petitions circulated: one was signed by inmates and asked for release measures; another one was signed by relatives of inmates and demanded for house arrest for all inmates; the third petition was signed by Apar, a Ngo, reclaiming house arrest for the most vulnerable inmates, including mothers.

Protective equipment for professionals and prison guards only began to be distributed at the beginning of April, after the confirmation of almost a dozen cases of Covid-19 in different prisons. Only one of these confirmed cases was from a woman recently imprisoned. The remaining cases were from guards and other staff.

On 10 April, the Assembly of the Republic approved the Law No. 9/2020 - exceptional measures for flexibility in the

execution of prison sentences and measures of grace<sup>2</sup> - which was in force until 29 May. These measures covered around 2,000 people (15% of the prison population). According to official media reports, of the 2,000 persons released, only 5 have relapsed for minor crimes; 34 persons have returned to prison for not respecting the rules of temporary releases and 3 persons have returned voluntarily to prison.

There has been no investment in reintegration programs for those who left prison. Only networks with local authorities have been strengthened, under decision of the Minister of Justice. On 14 April, 40 released men who were left homeless were resettled on the Monsanto campsite, due to a partnership with the local authority and the Ngo O Companheiro. However, at the end of May they were forced to leave because of the opening of the campsite to the public.

On 19 May, the media reported the official confirmation of two inmates positive to Covid-19 in the prisons of Pinheiro da Cruz and Vale de Judeus. Apar and the prison guard union have denounced that quarantine measures have not been respected in these prisons.

According to information on the website of the Portuguese Association for prison education, educational activities were resumed (in distance learning) by the great majority of prisons at the end of April. There were some prisons (Aveiro and Pinheiro da Cruz) which didn't suspended the learning/training activities. However, there were prisons which, for reasons of internal organization, only started in May (the prisons of Beja, Porto and the women's prison of Santa Cruz do Bispo).



The end of the state of emergency occurred at the beginning of May. On 26 May, the Dgs released recommendations for visits to prisons and youth detention centres. From June 15th till the end of the month visits were gradually resumed in all prisons with special rules and severe limitations. No visits on weekends. Visits must be in working days, only two people allowed, with the duration of 30 minutes and in visitations booths. The state made an investment of 300,000 Euros for the installation of 675 visitation booths in prisons and in youth detention centres.

The new conditions of prison visits caused a lot of despair and discontentment among inmates and relatives, especially women and children relatives. Many families have to travel hundreds of kilometers to have only half an hour to visit. With visits taking place on weekdays, many relatives are unable to go to the visit or have to miss a day of work or school, preventing children to visit their parents/relatives in prison. Allowing only two people per visit also prevented several relatives, including children, from visiting their relatives in prison. The visitation booths were also subject of complaints: difficulties in listening to each other and no physical contact allowed. On September 4th, a movement of women relatives of prisoners organized a demonstration in front of the Ministry of Justice and the Dgrsp and delivered a letter signed by hundreds of citizens demanding legal compliance concerning the human rights of prisoners, especially the right to have contact with their relatives.

Denouncements of relatives and Ngos about wrong practices and human rights violations persist. The pandemic has brought new severe limitations and

amplified old problems in prisons. In the last months the media reported dozens of cases of inmates positive to Covid-19 confirmed by Dgrsp and Dgs. However, till now, there is no official data about all positive cases of Covid-19 in the prison population (inmates and staff) and information about the management of Covid-19 and its real impacts in each prison.

## Notes

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<sup>2</sup> The law provided for the pardon of the President of the Republic for prisoners over 65 years of age and with chronic illnesses, except those convicted of sexual crimes, domestic violence, murder, drug trafficking, arson, among others; the pardon of 2 years for those who have less than 2 years of sentence to serve or who have sentences of less than 2 years, except for those convicted of crimes of domestic violence, murder, sexual abuse of minors, drug trafficking, among other exceptions; and, finally, the granting of 45 days temporary release for those who are already in this regime.





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# SIERRA LEONE - Covid-19 responses to mitigate the impact of the virus in Sierra Leone's prisons: an overview

*Lydia W. Kembabazi<sup>1</sup>, Isabella Cordua<sup>2</sup>*

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## **1. Introduction: Covid-19 in Sierra Leone**

The President of Sierra Leone, Julius Maada Bio, confirmed the country's first case of Covid-19 on 31 March 2020 (Who, 2020a). When in April 2020 the government of Sierra Leone confirmed its second case – a person who had no history of travel or contact with the first person – it announced a 3-day lockdown. Following a second 3-day lockdown, the government also put in place additional measures, including an inter-district travel ban and a curfew from 9pm to 6am, and advised all citizens to wear face masks at all times but did not make them compulsory until June<sup>3</sup>. While these measures were put in place to respond to the health emergency, they have in some cases been counterproductive and have disproportionately impacted marginalised groups, and especially women. For example, women have been arrested for leaving their houses to go and fetch food or water for their families after curfew or during a lockdown<sup>4</sup>.

In July 2020, President Bio announced that air travel could resume and slowly eased most of the restrictions, including lifting the curfew for an initial 4 weeks more recently in October 2020. Wearing a face mask, however, remains compulsory. As of October 2020, the Covid-19 death toll is 74 (Who, 2020b).

## **2. The suspension of all non-essential visitations and its bloody consequences**

Perhaps because of its experience with Ebola, the prison authority in Sierra Leone responded to this health emergency rather quickly, based on the model they had adopted during the 2014 outbreak. The response, however, consisted mostly of locking down all prisons and suspending all non-essential visitations indefinitely. The decision to suspend visitations was abrupt and not communicated promptly to those in prison or their families. In some cases, even visitations from lawyers were made very difficult, with some being denied the required essential worker pass to travel across the country to see their clients (Cyrus

R. Vance Center for international justice, 2020). Notably, since most educational and skills training programmes for imprisoned people were provided by civil society organisations, when all non-essential visitations were paused indefinitely, so were these programmes.

To help imprisoned people not feel isolated, keep in touch with their relatives and friends and access medical and legal services, the United Nations development programme (Undp) donated 40 mobile phones with three months prepaid subscription to Sierra Leone's 21 operating prisons (Undp, 2020). Every person was allowed to make up to three calls every week for a total of 15 minutes, with more time being allowed for those who had family emergencies or needed specific services (Undp, 2020). Civil society organisations such as AdvocAid also used those phones to provide psychological support services to incarcerated women over the phone (Cyrus R. Vance Center for international justice, 2020).

Yet, these strict restrictions on visitation only exacerbated tensions among people in detention and, following the first recorded case of the virus in a correctional centre in April, a riot broke out in the severely overcrowded male prison in the capital, Freetown. During this riot, 31 people were killed: one officer and 30 men in detention as a result of a "heavy-handed response from prison guards who used live ammunition" (Amnesty international, 2020). When the Sierra Leone Correctional service (Slcs) released a report into the main causes of the riot, it found that 400% overcrowding, staff shortages, and the severe Covid-19 restrictions imposed on those imprisoned

had all played a role (A.R. Thomas, 2020).

### **3. Physical distancing and overcrowding**

The prison population in Sierra Leone has doubled in the last ten years, leading to alarming overcrowding<sup>5</sup>. According to internal data provided by the Sierra Leone Correctional service, there are currently 4018 incarcerated people in the country, though the overall capacity of the 21 operating prisons is 2045<sup>6</sup>. Some prisons are holding more than four times their capacity, and only four centres are not exceeding the maximum occupancy rate (AdvocAid, 2020a). In the capital, the female correctional centre, which was designed to hold 18 women at a time, currently hosts more than 60 (Cyrus R. Vance Center for international justice, AdvocAid, 2020); the male prison, which was built for 324, now holds over 1000 (AdvocAid, 2020a). The reason for overcrowding is partly linked to numbers of people in pre-trial detention and the long delays in cases reaching trial (Cyrus R. Vance Center for international justice, AdvocAid, 2020). According to official data released by the Sierra Leone Correctional service, approximately 58% of all incarcerated people in Sierra Leone are in pre-trial detention<sup>7</sup>. Recently, a group of people in detention in the country's South went on a hunger strike due to the continued absence of a magistrate to hear their case (AdvocAid, 2020a).

Given the severe overcrowding, physical distancing is impossible within the country's prison, which means that face masks and quarantining of people suspected of Covid-19 are the main protective measures put in place by the

severely underfunded prison authorities, although even this does not always happen. This, combined with lack of sufficient clean water and appropriate medical care and facilities, increases the risks of spread of the new coronavirus (Cyrus R. Vance Center for international justice, AdvocAid, 2020). It is worth noting that most protective equipment, including gloves, masks, soap, hand sanitizer, thermometers, and hand washing stations, was donated to correctional centres by civil society organisations (Cyrus R. Vance Center for international justice, 2020).

#### **4. Quarantining suspected cases of Covid-19**

Prison quarantining practices are inconsistent across Sierra Leone. In some correctional centres, there are designated quarantine spaces, often the same ones that were used during the Ebola outbreak (Cyrus R. Vance Center for international justice, 2020). However, while in the Freetown male prison the Slcs developed new health structures to quarantine suspected cases of Covid-19, most other correctional centres have no dedicated isolation units. For example, a facility in the North of the country is using a spare bathroom as an isolation unit (AdvocAid, 2020a).

#### **5. Releasing pre-trial and vulnerable detainees**

In spite of calls from international and regional bodies to reduce prison overcrowding in response to Covid-19<sup>8</sup>, it is clear that the number of prisoners released in Sierra Leone since the outbreak of the virus is paltry, with only 150 men and three women being released in July following a presidential pardon (A. K.

Sesay, 2020). This is just 4% of Sierra Leone's prison population; it stands in stark contrast to the releases authorised in other African countries such as Ghana, Kenya and Zambia, which have released prisoners in the thousands between March and July 2020<sup>2</sup>. A report which surveyed civil society organisations in Argentina, Bolivia, Brazil, Colombia, Indonesia, Kazakhstan, Kenya, Kyrgyzstan, Malawi, Mexico, Nigeria, Pakistan, Philippines, Sierra Leone, Thailand, The Gambia, and Venezuela found that only Sierra Leone had not taken steps to reduce its prison population (Cyrus R. Vance Center for international justice, 2020).

The only prisoners who were released in Sierra Leone since the Covid-19 outbreak were those who were granted presidential pardons on Sierra Leone's Independence day. This is a yearly occurrence and, in spite of repeated calls from civil society to release at least pre-trial and vulnerable detainees (AdvocAid, 2020b), the number of people released this year did not increase compared to that of last year<sup>10</sup>. These releases were also significantly delayed because of the prison lockdown and as a result of the riot in the capital's male prison.

#### **6. The suspension of court sittings**

Another strict Covid-19 measure put in place by the Sierra Leone government was intermittent suspension of all court sittings, which left many in pre-trial detention without being able to go to court.<sup>11</sup> The suspension of court hearings meant that many who could have easily been discharged, granted bail or given suspended sentences remained in prison, with a high risk of being exposed to Covid-19. Sierra Leone did not adopt any

alternative measure to physical trials (Cyrus R. Vance Center for international justice, 2020).

The suspension of court sittings and the altering of court operations affected the provision of timely and fair hearings and increased an already alarming backlog of pending cases. This also worsened the severe overcrowding of Sierra Leone's detention facilities. Halting court sittings was counterproductive as it not only exacerbated existing tensions among incarcerated people, it increased the risks of their exposure to the virus in prison.

## 7. Conclusion

In Sierra Leone, Covid-19 has had a disproportionately negative effect on all those who were already most vulnerable before the pandemic. It is exposing and exploiting the pre-existing inequalities and contradictions of the country's criminal justice system.

The authors call on the government to ensure that human rights inform all decisions that govern the implementation of Covid-19 prevention regulations inside and outside prison. This includes – but is not limited to – releasing people in pre-trial detention and those who are most vulnerable and developing alternatives to incarceration; putting in place alternatives to in-person trials; monitoring the state of the country's prisons to adapt to the current circumstances and designing a comprehensive emergency plan providing for medical isolation and quarantine, referral and health care plans and health and safety measures to mitigate the spread of Covid-19 and prevent outbreaks.

Although some of these restrictions are

essential and require a delicate balancing exercise between rights protection and public health safeguarding, the side effects of the pandemic will otherwise have a distinct impact on groups which are already at great disadvantage.



## Acknowledgments

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## Notes

<sup>1</sup> **Lydia Kembabazi:** is the legal manager at AdvocAid, the only organisation in West Africa providing holistic access to justice to women and girls caught up in Sierra Leone's often unjust legal system.

<sup>2</sup> **Isabella Cordua:** is a human rights researcher and consultant at the Cyrus R. Vance Center for International Justice. As part of the Vance Center's *Women in prison project*, she has led the first comprehensive study on the causes and consequences of women's imprisonment in Sierra Leone, jointly with AdvocAid.

<sup>3</sup> See: <https://www.africanews.com/2020/07/10/virus-free-sierra-leone-records-covid-19-scuffles-over-quarantine-at-airport/> (accessed 20 November 2020).

<sup>4</sup> These are preliminary findings shared with the authors by AdvocAid on its nationwide assessment of correctional centres undertaken in the month of November. This document has not been published yet.

<sup>5</sup> For up-to-date data: <https://www.prisonstudies.org/country/sierra-leone> (accessed 20 November 2020).

<sup>6</sup> Based on internal documents of the Sierra Leone Correctional service, which are not available to the public but were seen by the authors.

<sup>7</sup> Based on internal documents of the Sierra Leone Correctional service, which

are not available to the public but were seen by the authors.

<sup>8</sup> See for example the Unodc, Who, Unaid, Ohchr *joint statement on Covid-19 in prison*: <https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings> (accessed 20 November 2020) and the press statement of the African Commission on human and peoples' rights on the Covid-19 crisis <https://www.achpr.org/pressrelease/detail?id=480> (accessed 20 November 2020).

<sup>9</sup> See: <https://allafrica.com/stories/202007060575.html>, <https://www.aa.com.tr/en/africa/covid-19-kenya-frees-nearly-4-000-prisoners/1789969>, <https://www.lusakati.com/2020/05/22/president-lungu-paradons-2-984-inmates-to-commemorate-african-freedom-day/> (accessed 20 November 2020).

<sup>10</sup> For comparison, see: <https://allafrica.com/stories/201905230293.html> (accessed 20 November 2020).

<sup>11</sup> For more information: <https://www.africanews.com/2020/04/27/coronavirus-sierra-leone-public-notice/> (accessed 20 November 2020).

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# SPAIN - Coronavirus management in Spanish and Catalan prisons

*Alejandro Forero Cuéllar<sup>1</sup>*

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## **1. Introduction<sup>2</sup>**

The news coming from Italy of several deaths following protests in its prisons, due to restrictive communication measures decreed by the government to control the Sars-CoV-2 pandemic, set off alarm bells among human rights organisations in Spain and Catalonia. As Sirecovi<sup>3</sup> since the beginning of the health emergency we have been concerned with analysing the consequences that the virus, and the measures taken to manage it, are having on the prison system. That is why we have carried out different campaigns in collaboration with other human rights organisations, family associations and in support of inmates, urging public administrations to adopt more respectful measures regarding the fundamental rights of inmates, in compliance with the many international recommendations<sup>4</sup>. On the other hand, after the impossibility we had of continuing visiting prisons due to the lockdown, we have had to think about strengthening other ways of obtaining information. After the first two months of

work, we decided to set up a structured research project which we called Monitoring the deprivation of freedom and police activity during the Covid-19 emergency. Its main objective is to carry out constant monitoring of the impact that the pandemic and the measures adopted to combat it are having on prisons, and the implications of police activity in their surveillance regarding restricting movement, activity or social distancing measures. As is clear, the end of the most restrictive confinement measures does not mean the end of the pandemic, and as public administrations are facing a very complex challenge, with possible advances and setbacks in the coming months, we have planned this monitoring at least until the summer of 2021.

What is presented in this article, therefore, in a very summarised way, are the conclusions of the analysis of the impact of the pandemic and the measures that have been taken to control it by the two prison administrations of the Spanish State (general and Catalan), not only in their quantitative (number of infections) but also in their

qualitative (right to communications, to treatment activities, or on reduction of the prison population) forms. The analysis carried out so far covers two periods: the first of the state of alarm (March-May), and second, on the de-escalation (May-July)<sup>5</sup>.

## **2. The pandemic and its management by the Spanish and Catalan prison administrations**

The Covid-19 pandemic has proved to be a very complex challenge in terms of public management in general, even more when we talk about closed institutions such as prisons. However, some of the measures taken, especially at the beginning, to radically contain the spread of the virus, have meant a reduction in the fundamental rights of inmates and their families.

We can highlight as positive the fact that the state administration (General secretariat of penitentiary institutions - Gspi) began to act well before the peak of the health crisis. Unlike what happened in the Catalan prisons, in February, the Gspi began to take action. However, the first stage of confinement was characterised by the fact that many of the measures were adopted or managed late, almost always in a reactive rather than a preventive manner. In the second stage of de-escalation, the management by the Gspi was more proactive and approved various regulations in which it gave indications and recommendations to develop - with limitations and in stages - many activities of daily life in prison. However, these indications were not protocolised, and although they allowed a necessary flexibility to be able to adapt to the pandemic development, they also caused a lot of improvisation and brought

about an uneven application for the inmates depending on the centre they were in. This improvisation and the constant changes in regulations led to confusion and misinformation among inmates and their families. In the case of the Secretary of penal measures, rehabilitation and attention to the victim (Smprav, in Catalan) also the de-escalation stage, unlike the previous one, was highlighted by a proactive and planned response, in this case, with a very detailed protocol for the implementation of different activities in centres.

## **3. Number of infections and deaths with Covid-19**

In relation to contagion, the impact has been moderate. In the case of the Gspi, in the lockdown phase, 51 inmates and 261 workers, a total of 312 people tested positive for Covid-19, resulting in 6 deaths of 4 workers and 2 inmates. In the case of Catalonia, the infections reached 140 (60 inmates and 80 workers), but there were no deaths. In the period of de-escalation, the number of cases in the Gspi prisons rose to 85 inmates and 280 workers, 365 in total. In the case of Catalonia, infections rose to 272, 102 inmates and 170 workers. It is clear that the numbers must be interpreted with caution, and that they only reflect positive cases, which depends on the number of tests that are carried out and the methodology with which they are applied.

## **4. Health measures**

The number of infections and deaths has been relatively low considering the great shortage of personal protective equipment (Ppe) for officials and inmates. In addition to this lack of protective equipment, in the case of the Gspi, the pandemic arrived in a



prison system characterised by a crisis in medical staffing. This situation led to many inmates feeling vulnerable and abandoned. An emergency open competitive exam for new staff had to be set up to cover part of this lack. And, even though these medical staff were supposed to be recruited into the workforce between June and July, by the middle of the latter month no such recruitment had taken place. Despite the fact that there is no particular shortage of medical staff in Catalonia, given that prison health depends on the public health system (and not on the prisons themselves as in the case of the Gspi), both workers and inmates denounced the shortage of Ppe and of diagnostic tests being carried out. This situation finally led to the intervention of the High court of justice of Catalonia, which required the administration to carry out the tests. And, despite having a good health care system in prison, the first hospital areas enabled in prisons were set up as a reactive response, as in the cases of the Brians 2 and Quatre camins centres in Catalonia. In the latter case, a module in reforms which was enabled for lockdown of inmates, resulted worrying, leading to complaints and protests from inmates and their families regarding the poor conditions of detention which made it impossible to implement the health authorities' recommendations.

### **5. Right to communication and family relations**

In March, both administrations bought smartphones for video calls (235 for the Gspi and 230 for the Smprav), something we had been calling for from the beginning of the pandemic. Calls could last 10 minutes. Both administrations also

increased the number of ordinary calls from 10 to 15 per week. Although these measures were welcomed by inmates, family members and human rights organisations, groups of family members highlighted some of their limitations. On the one hand, 230 telephones in Catalonia meant an average of approximately one telephone for every 35 inmates. In the case of the Gspi, the ratio rose to one phone for every 150 inmates approximately. The Gspi reported in May that 54,000 video calls had been made, as a great success, but if that number is divided by the prison population, the outcome is of 1.6 calls on average per inmate, in 2 months. Some inmates who were under closed regime could not make a single call. But beyond this clearly insufficient number, it is worth highlighting the conditions in which the video calls were made, especially the lack of privacy (always in the presence of a guard), their reduced duration, or connection problems. Given the complaints that occurred in the first period regarding the lack of privacy with the calls and other problems, the Smprav undertook to review the system for the de-escalation stage. It should also be noted that inmates with few resources could not take advantage of the increase in ordinary calls (calls cost even more than €20 per week), nor could those in a situation of poverty, since the money guaranteed by the administration was insufficient, increasing the situation of inequality among inmates.

### **6. The right to legal defence**

During the first period of confinement, the right to legal defence was also undermined. Although in Catalonia lawyers were allowed to go to the prisons, in the rest of Spain many lawyers

encountered problems in gaining access to centres. Likewise, the Prison legal advice service (which depends on the Bar associations and provides a free legal advice service) was not able to function normally in many prisons, leading to such serious situations as charging inmates for their telephone calls to speak to this service. Another limiting situation occurred during the de-escalation stage in Catalonia when, due to the confinement of the health area where the Ponent prison (Lleida) was located, the bar association was also closed and since no telephone assistance system had been implemented, the inmates in this centre were left without this legal service.

### **7. Prison treatment, work and training**

With regard to the so-called prison treatment, in the lockdown stage most of the programmes, activities and releases were interrupted, so that inmates were not able to follow their treatment and the Treatment boards were not able to evaluate them, which meant that their possibilities of accessing prison leave, regime progression or conditional releases were postponed. With the de-escalation, activities were gradually resumed and in some modules of some prisons, so that access to these rights continues to be delayed in many cases.

Although in the Gspi prisons, unlike those of the Smprav, productive workshops were stopped with the state of alarm, the fact that some of them resumed in the middle of the pandemic, disregarding international recommendations and the complaints of guards and workers who warned of the impossibility of guaranteeing health and security measures, also shows in prison how the

economic criterion prevailed over the health one, adding that inmates have worse working conditions than those at liberty.

Another discriminatory situation appears in the Catalan administration, which established in the de-escalation that those inmates who had work or activity assigned within the prison and, at the same time, could go on leave, were obliged to choose between the leave and losing their job, or keeping their job by giving up the leave. This is, of course, unacceptable.

### **8. Measures for prison population reduction**

In both administrations, the possibility for inmates who were under a semi-open regime to spend the lockdown in their homes was promoted from the beginning. While on 15 April this measure had been applied to 90% (1,655) of inmates in Catalonia, in the case of the Gspi prisons it had been applied to 77% of cases. As for women with children in prison, 88% of those under the semi-open regime were at home with their children by mid-May, but only 20% of women under the ordinary regime were at home in this situation.

In general terms, according to data from the Council of Europe, as of 15 April, only 5.4% of inmates had been granted release as a preventive measure related to Covid-19. In Catalonia this figure is more positive, as this percentage rises to 17%<sup>6</sup>. In any case, and even if this has been a positive measure taken, it is important to highlight that this measure is not a real release, but rather home detention. And although we very positively value the fact that the vast majority of people who were in a semi-open regime could be in their homes, this possibility was only given in a

very limited way to people in ordinary regime with a risk with respect to the pandemic, such as those over 70 years of age and, above all, people with high risk health problems with respect to the Covid-19. The Smprav then studied the situation of people over 70 (108 inmates), and tripled the percentage of these people in home detention (from 16% before the pandemic to 41% in mid-April), and continued to assess the situation of 28 other inmates, 25% more.

For the de-escalation period, the Gspi informed that it would study the situation of those who were serving their sentences at home so that they could generally continue there, but we have not been able to access real figures on this situation.

### **9. A few reflections**

After 4 months of the pandemic we can say that opportunities are being lost to have less populated, more open prisons with measures to reinforce certain fundamental rights such as health or family relations. It is true that the management of the pandemic is becoming very complex and that in the case of the Gspi and the Smprav the situation has not got out of control. But the shortcomings have been evident for workers and inmates and many of the effective measures have had a very decisive impact on the fundamental rights of inmates.

And although the measure of having the vast majority of inmates in a semi-open regime in their homes has been welcomed, it is true that these measures are not having a determining impact on reducing the prison population. Nor are they, in the vast majority of cases, strictly measures of release, but rather involve house arrest (always related to the possibility of

re-entry in the event of non-compliance with conditions), and in many cases probably temporary for the duration of the pandemic, or the worst of it. This measure has also reached a very limited sector of the prison population and, as we have been requesting through civil society organisations, it should continue to be extended to other groups such as pregnant women or women with children in prison, people over 65 years of age, people with serious or chronic illnesses, and those with illnesses or pathologies that are at risk with respect to Covid-19.

Likewise, the pandemic must serve to ensure that, once and for all, measures are taken to improve the conditions of those who remain in prison: i) the real guarantee of equal access to health for inmates with respect to those at liberty, while public health systems are strengthened and recover from the looting to which they were subjected; ii) the extension and standardisation of internet access and the normalisation of videocalls, in conditions of greater privacy; iii) tackling the complex problem of the increase in cases of mental illness of inmates.

On the other hand, from Sirecovi we request that measures be taken regarding the time in which inmates have not been able to carry out programmes or activities that are important for their assessment by the Treatment boards. Understanding that, constitutionally, the aim of a prison sentence is rehabilitation, we consider that this time lost in which people have been detained without access to treatment should be rewarded or restored with formulas for sentence reduction, flexible access to prison benefits, or progression in prison regimes.

## Notes

<sup>1</sup> **Alejandro Forero Cuéllar**: PhD in Law and Political Science. Coordinator of the System for the Documentation and Communication of Institutional Violence (SIRECOVI) of the Observatory of the Penal System and Human Rights of the same (University of Barcelona).

<sup>2</sup> This article is based on the work we have done during the pandemic within the OspdH-Sirecovi team (I am therefore grateful for the hard work from Cristina Garés, Sheila Marín, José Navarro, Katherine Oliveri, and Rachele Stroppa).

<sup>3</sup> The System for the documentation and communication of institutional violence (Sirecovi, in Spanish) is an alert system that is part of the University of Barcelona's Observatory on the penal system and human rights: [https://sirecovi.ub.edu/index\\_en.html](https://sirecovi.ub.edu/index_en.html) (accessed 20 November 2020).

<sup>4</sup> i.e. Urgent call from Un's Hchr, Michelle Bachelet, on 25<sup>th</sup> March: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E> (accessed 20 November 2020). Many other calls and guidelines from international bodies were issued (see OspdH-Sirecovi, 2020, Recomendaciones internacionales, estatales y nacionales sobre la gestión del coronavirus en las prisiones. Marzo-Mayo'20, [http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/recomendaciones\\_compressed.pdf](http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/recomendaciones_compressed.pdf) (accessed 20 November 2020).

<sup>5</sup> Complete reports made so far can be consulted (in Spanish and Catalan) at the following links (accessed 20 November 2020):

International, state and national recommendations on Coronavirus management in prisons: [http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/recomendaciones\\_compressed.pdf](http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/recomendaciones_compressed.pdf)

Coronavirus management in Spanish prisons: [http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/estado\\_cuestion\\_espana\\_compressed\\_1.pdf](http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/estado_cuestion_espana_compressed_1.pdf)

Coronavirus management in Catalan prisons: [http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/\\_estado\\_cuestion\\_catalunya\\_1\\_compressed.pdf](http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/_estado_cuestion_catalunya_1_compressed.pdf)

De-escalation management in Spanish prisons: [http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/info\\_rme\\_desconfinamiento\\_espana\\_1\\_compressed.pdf](http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/info_rme_desconfinamiento_espana_1_compressed.pdf)

De-escalation management in Catalan prisons: [http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/info\\_rme\\_desconfinamiento\\_catalunya\\_1\\_compressed.pdf](http://www.ub.edu/ospdh/sites/default/files/documents/publicacions/info_rme_desconfinamiento_catalunya_1_compressed.pdf)

We are currently finishing the reports for the next period, from mid-July to mid-September. English versions will be available soon.

<sup>6</sup> <https://www.euopris.org/wp-content/uploads/2020/06/SPACE-I-Prisons-in-pandemic-time.pdf> (accessed 20 November 2020).





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# UNITED KINGDOM - Covid-19 in prisons: the view from England and Wales

*Matt Ford<sup>1</sup>*

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## **1. Introduction**

Written in the middle of the second wave of the coronavirus, this article outlines the approach taken to manage the virus in prisons in England and Wales and explores some of the impacts. It tracks some of the key developments in the approach through the first wave, into the following lull in cases, and again into the second wave.

## **2. Context to the prison system in England and Wales**

Early on in the Covid-19 pandemic the state recognised that prisons in England and Wales were potential hotbeds of contagion (R. Neil, 2020). England and Wales has the highest prison population and one of the highest imprisonment rates in western Europe, with just under 84,000 people imprisoned in March 2020 (Ministry of justice, 2020a). 60 per cent of prisons are overcrowded (J. Beard, 2020). 22.5 per cent of prisoners are held in overcrowded cells. Many prisons are over a hundred years old (Ministry of justice, 2020b). There is a £900 million maintenance backlog (R. Neil, 2020).

Inspections reports persistently describe conditions as unsanitary and squalid.

On top of this, the profile of the prison population makes it susceptible to experiencing more severe symptoms of Covid-19. Due to longer sentence lengths, England and Wales has an ageing prison population. Between 2002 and 2019, the proportion of prisoners over 50 increased from 7 per cent to 16 per cent (G. Sturge, 2019). 96 per cent of prisoners are male (Ministry of justice, 2020a).

Prisoners are in poorer health than the general population, often as a result of the social circumstances from which they come (Health and social care committee, 2018). Rates of diseases which weaken the immune system, such as Hiv, are more prevalent amongst prisoners. Prisoners also have poorer access to healthcare whilst incarcerated.

## **3. Approach to Covid-19 in prisons**

The first confirmed case of Covid-19 in the general population in the UK was on 31



January 2020. The first confirmed case of a prisoner with Covid-19 was on 18 March 2020. At this point, there were no restrictions to prisoner movements within or between prisons unless a prison had a confirmed case.

### 3.1 Restricted regime

On 24 March, the prison service moved to implement a more restricted regime in prisons in an attempt to enable social distancing of two metres within establishments (J. Beard, 2020). Under this regime, the following were suspended: social visits, all education, training and non-essential employment activities, access to gyms, religious and general association. Prisoners spent more time in their cells as restrictions on the numbers allowed out, including in exercise yards, at any point in time were imposed.

Prisons began to ease restrictions over the summer, but prisons moved at different speeds based on local circumstances<sup>2</sup> (J. Farrar, 2020). It was not until September that all prisons had moved to a stage where social visits and offender management programmes could resume<sup>3</sup>.

In mid-September, the Ministry of justice lowered its national alert level further to allow prisons to begin indoor gym, chapel services and classroom lessons (Inside time, 2020a). Take up of social visits was reportedly low due to the social distancing and other restrictions.

In early November 2020, the second wave was in full flow in the community. National restrictions were re-imposed. In prisons, social visits, education, chapel services and libraries were again suspended, with gyms allowed to remain open (Inside time, 2020b).

### 3.2 Compartmentalisation of the estate

On 31 March, the prison service began to compartmentalise the estate (J. Beard, 2020). Transfers of prisoners between prisons were significantly reduced. Within prisons, *cohorting* strategies were implemented. These included *protective isolation units* to accommodate known or probable cases, *shielding units* to keep the highest risk prisoners, identified through the health service, away from the general prison population, and *reverse cohorting units* to hold new receptions or transfers to prison in quarantine for 14 days so any infection could be detected.

By 21 April, approximately a quarter of prisons had implemented full compartmentalisation, half had implemented protective isolation units and shielding units fully, and 35% the reverse cohorting units only (É. O'Moore, 2020).

### 3.3 Creating head room in the estate

It was accepted that putting prisoners in single cell accommodation was the best way to keep them separated, but initial modelling estimated the prison population would need to be reduced by 15,000 to achieve this and it was decided against (É. O'Moore, 2020). Nevertheless, *head room* of around 5,000 to 5,500 places in the estate was required to achieve the compartmentalisation strategy set out above (R. Buckland, 2020).

A number of early release schemes were implemented as part of a strategy to achieve this (J. Beard, 2020). On 31 March, the government announced that pregnant women and women in mother and baby units who were deemed to pose a

low risk to the public would be eligible for early release. On 4 April, the government announced an early release scheme for *low-risk* offenders within two months of their release date, which they estimated could release up to 4,000 prisoners on electronic tags.

Capacity in the estate was also to be expanded, with up to 2,000 temporary single cell units to be installed to reduce cell-sharing. By 22 June, 896 temporary units had been installed<sup>4</sup>. The government additionally announced on 29 April that a wing of a closed prison, capable of providing 70 places, would be reopened (Beard, 2020).

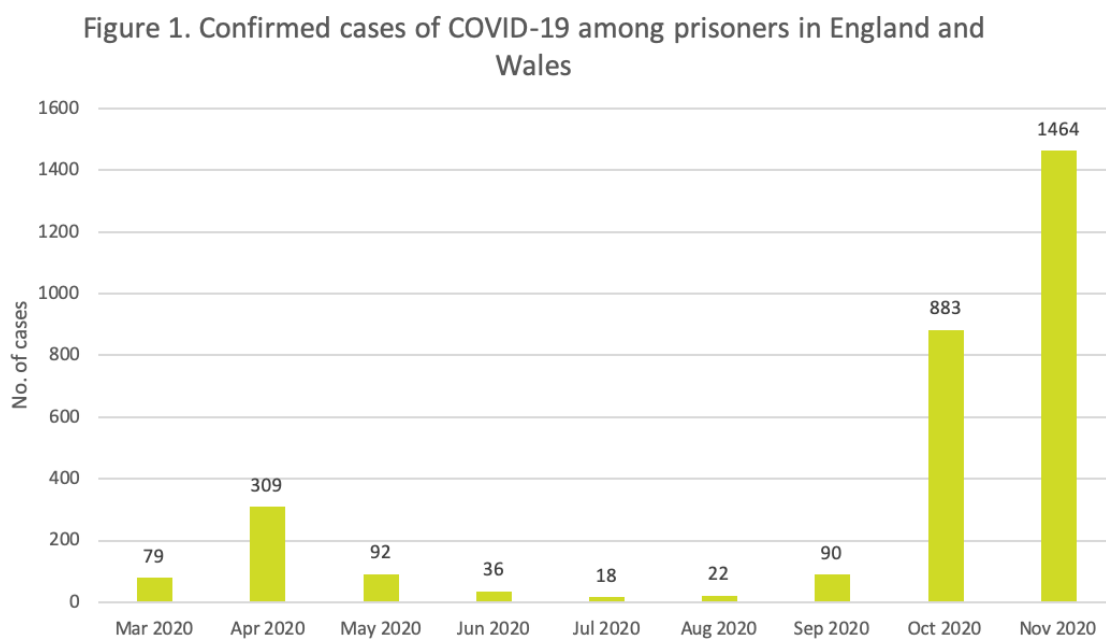
#### 4. Impacts

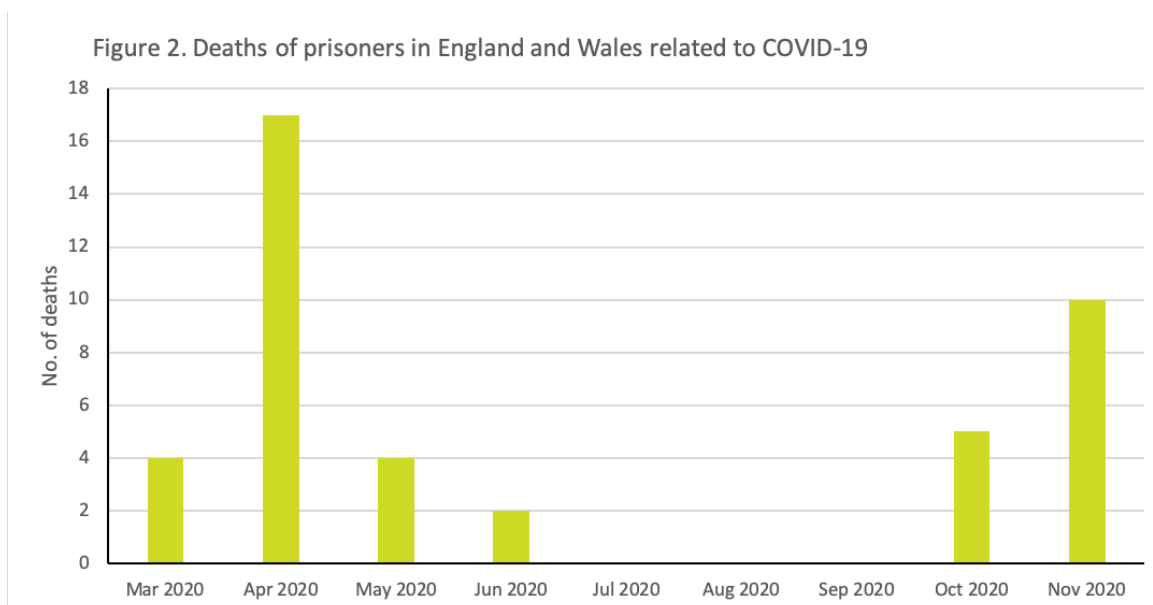
##### 4.1 Cases and deaths

By the end of November 2020 there had been 2,993 confirmed cases and 42 deaths amongst prisoners (Ministry of justice, 2020c; 2020d; 2020e). In the initial emergency phase of the pandemic, as in

the community testing capacity could not meet demand (É. O'Moore, 2020). It was not until mid-April that all symptomatic prisoners were tested (Ministry of justice, 2020e). Public health England estimate that to 24 April, as well as the confirmed cases, there were an additional 1,385 probable/possible cases (É. O'Moore, 2020). Modelling by Public health England in April suggested there may be as many as 77,800 cases and 2,700 deaths without any mitigation measures.

Official data suggests confirmed cases and deaths fell rapidly between April and May and through into June, suggesting measures may have been effective in containing the outbreak (Ministry of justice, 2020e). There were relatively low numbers of cases in July and August and no deaths of prisoners between July and September. Cases amongst prisoners began to climb again in September, and rose 900% in October, with an additional five prisoner deaths. Cases rose by another two thirds in November and ten new





deaths were registered (Ministry of justice, 2020c; 2020d). The rise occurred in the context of a slight easing of restrictions in prisons and a second wave of infection in the community.

Analysis by the Nuffield trust showed that, after controlling for the different age profile of the prison population, rates of the disease were higher among prisoners than the general population (M. Davies, E. Keeble, 2020). Up to August, the rate of infection in prison was 7.6 per 1,000 people, compared to 4.9 per 1,000 people in the community.

Until August, data on the demographics of prisoners who were confirmed to have contracted the virus and who had died from it were published by the Ministry of justice (Ministry of justice, 2020f). According to this data, a higher proportion of white people had contracted the virus than there were in the prison population, and a lower proportion of black people had contracted the virus than were held in prison, although black people are significantly over-represented in the

prison population as a whole. 78 per cent of confirmed cases were white compared to 72 per cent of the prison population being white. 6 per cent of confirmed cases were black prisoners compared to 13 per cent of the prison population being black. In the community, rates of Covid-19 and related deaths have been higher amongst black and Asian people than white people. A much higher proportion of women had contracted the virus in prisons than women made up of the prison population. 10 per cent of confirmed cases in prisons were amongst women compared to 4 per cent of the prison population being women.

#### 4.2 Changes to prison population

As of 4 December 2020, the prison population in England and Wales has fallen by over 5,000, or six per cent (Ministry of justice, 2020g). This is the result of the extraordinary impacts the pandemic had on the ability of courts to carry out their business, meaning the number of people convicted and sentenced to prison dropped significantly (Justice

committee, 2020). Routine releases as people complete the custodial part of their sentences have continued unaffected, meaning there are far more people leaving prison than entering prison.

To date, only 262 people out of the projected 4,000 prisoners were released under the End of custody temporary release scheme, and 53 under compassionate release which includes pregnant women, women with children and those particularly vulnerable to the virus (Ministry of justice, 2020f). The schemes were paused in August.

Concerns were raised that, despite estimates that around 70 pregnant women and new mothers would be released, only 23 had been released by June (Justice committee, 2020). The women's prison population overall fell more than the male population. Between 6 March and 4 December 2020, the number of women incarcerated fell by 12.9 per cent,

compared to 5.7 per cent for men (Ministry of justice, 2020h). This is because there is a far higher proportion of women serving short sentences so the residual population is smaller.

The decrease in the prison population affected different ethnic groups differently. The population of white prisoners fell 4.9 per cent between the end of March and end of September 2020, compared to only 3.7 per cent for Black and Asian prisoners (Ministry of justice, 2020h). This reflects the fact that a higher proportion of black and Asian prisoners serve longer prison sentences.

After 2,000 prisoners were released into rough sleeping and other forms of homelessness during the first wave of the pandemic, the government implemented a Conditional release date accommodation scheme providing accommodation in hotels and bed and breakfasts for up to 56 days (Inside time, 2020a).

Figure 3. Number of self-inflicted deaths among prisoners in England and Wales by quarter

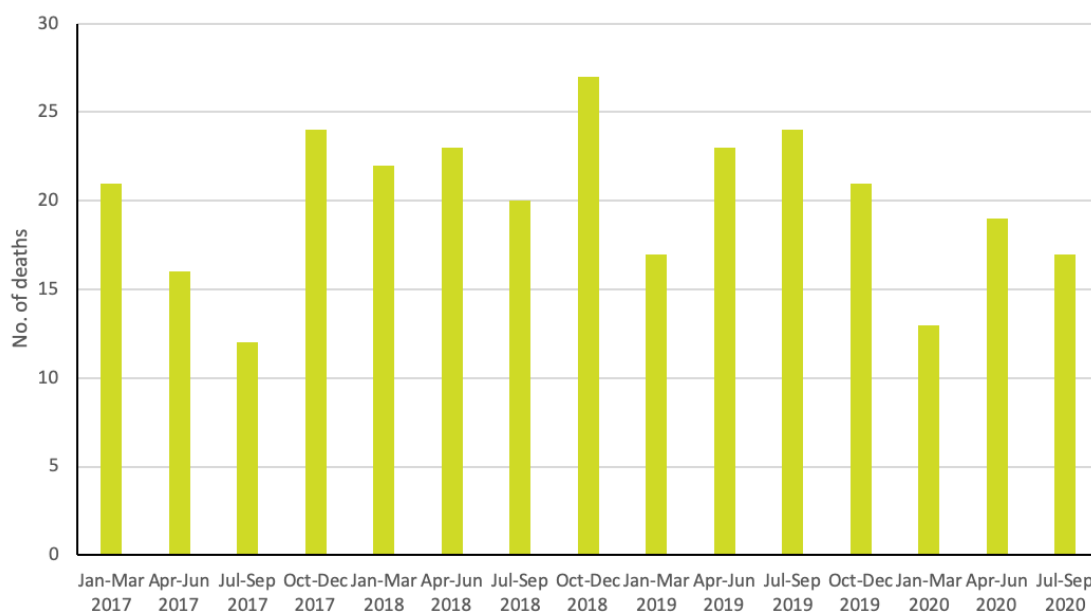
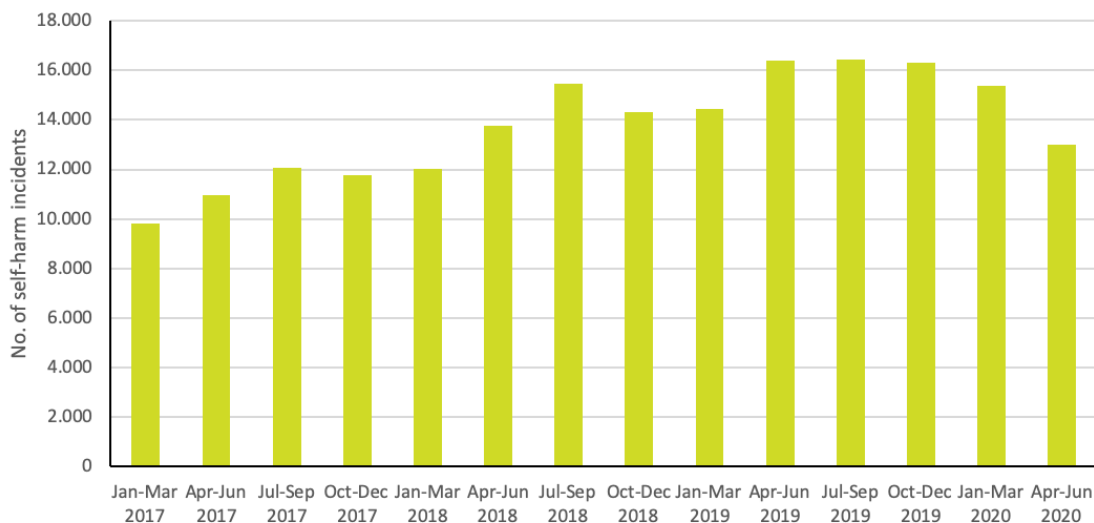


Figure 4. Self-harm incidents among prisoners in England and Wales



### 4.3 Mental and physical health

The restrictive regime imposed on prisons meant for a period of around four months that the majority of prisoners were locked in their cells for more than 23 hours a day (M. Davies, 2020). Extreme isolation, coupled with lack of purposeful activity and worries about the health of their families in the pandemic, raised fears of the mental health effects (Justice committee, 2020; M. Davies, 2020).

Anecdotal evidence suggests the regime has had a detrimental effect on prisoners' mental health. This was particularly the case for women, many of whom had extended periods without seeing their children during the lockdown, and when they were able to visit, they were not allowed to hold them (M. Busby, R. Storer, E. Allison, 2020).

Official statistics on self-inflicted deaths and self-harm were published in October (Ministry of justice, 2020i). Self-inflicted deaths were actually lower in the first three quarters of 2020 than in the same quarters in previous years. Similarly, the

number of self-harm incidents declined in the first two quarters of 2020. The drop in self-inflicted deaths may reflect the fact that there were significantly fewer new receptions to prison and inter-prison transfers, as the first few days and weeks in prison or in a new prison are the highest risk periods for prisoner suicide. Similarly, reduced staff prisoner contact and prisoner cell-sharing mean self-harm may now be less likely to come to the attention of the authorities.

There were also concerns that restrictions in prisons will further restrict access to health services for prisoners (M. Davies, 2020).

### 4.4 Inspections

A programme of streamlined inspections has continued throughout the pandemic (J. Beard, 2020). These involve short *scrutiny visits* lasting one day. The Inspectorate described the focus of these visits:

"Inspectors will focus on issues which are essential to the safety, care and basic rights

of those detained in the current circumstances. These include: healthcare, nutrition and hygiene; contact with families, friends and the outside world; legal rights; use of time and the need for meaningful human contact; support for those at risk of self-harm and suicide; and support and risk management for those being released” (P. Clarke, 2020).

### **5. The view going forward**

National restrictions in the community were eased in early December and local areas are now subject to different tiered restrictions. After initial falls throughout November, cases at the national level have remained constant. Infection levels in the community are likely to remain high throughout the winter, posing a significant threat to prisons. Custodial establishments are therefore likely to maintain a restricted regime of varying extents until sufficient roll out of the vaccination programme. Impacts on mental and physical health as well as the disruption to education and other programmes are likely to be exacerbated in this period.

Worryingly, the Prison officers’ association (Poa), the trade union for prison officers, has shown support for the restricted regimes owing to reduced levels of violence (J. Parkinson, 2020). The Poa have said splitting prisoners down into smaller living groups and preventing wider mixing of prisoners should become permanent. Covid-19 may leave a permanent imprint on prison regimes after the emergency is over.



## Notes

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<sup>2</sup> Oral evidence to the Justice committee from Jo Farrar <https://committees.parliament.uk/oralevidence/1325/pdf/> (accessed 5 December 2020).

<sup>3</sup> According to the email sent by the Ministry of justice on 24 September to a stakeholder mailing list with updates about the situation.

<sup>4</sup> Oral evidence to the Justice committee the *Secretary of state for justice* Robert Buckland <https://committees.parliament.uk/oralevidence/1325/pdf/> (accessed 5 December 2020).

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## UNITED STATES OF AMERICA - United States' failure to respond to the Covid-19 crisis in prisons and jails<sup>1</sup>

*Udi Ofer<sup>2</sup>*

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The United States incarcerates more people, both per capita and by volume, than any other nation in the world. On any given day, there are 2.3 million people incarcerated in 3,134 local jails, 1,833 state prisons, 218 immigration detention facilities, and 110 federal prisons. In comparison, the United Kingdom has one-fifth the prison incarceration rate of the United States, while Canada has one-sixth and Germany one-tenth (Prison policy initiative, 2018).

This American exceptionalism cannot be explained by victimization rates as the United States ranks about the same as countries in Western Europe<sup>3</sup>. Rather, it is explained by a cultural and political backlash that began in the United States in the 1960's in reaction to civil rights protests and growing calls for racial justice, and which led to the implementation of a harmful tough-on-crime approach to public safety that has had a devastating impact on people of color in the United States<sup>4</sup>.

As a result, during a span of 50 years, states and the federal government began to pass

laws and institute practices that criminalized more behaviors and increased dramatically jail and prison sentences. Once out of prison, people now face nearly 50,000 legal restrictions as they try to reintegrate back into society, including restrictions on voting rights and other basic human rights. And as mass incarceration grew, many social services programs faced cuts or remained stagnant, resulting in prisons and jails becoming the primary institution to house people with medical, mental health and substance abuse needs.

The incarcerated population today in the United States suffers from extreme racial and ethnic disparities due to racist policies and practices. A Black boy born today has a 1-in-3 chance of being incarcerated, compared to a 1-in-17 chance for a white boy<sup>5</sup>. Combined Black and Latino people represent about 30 percent of the United States population yet 60 percent of the nation's people in prison. A majority of people in prison have drug, alcohol or mental health needs (United States Department of justice, 2006), and 40 percent

suffer from at least one chronic health condition (The center for prisoner health and human rights, 2020). Due to extreme sentences, there are nearly 200,000 people age 55 and older who are incarcerated in the United States (M. McKillop, F. McGaffey, 2015). And while mass incarceration impacts many more men by sheer volume and rate, incarceration rates have increased more rapidly for women than for men since the early 1970s, particularly incarceration rates of Black women.

It's in the above context that the Covid-19 pandemic hit and ravaged the United States and the nation's decentralized and bloated system of thousands of jails, prisons and detention centers. As of September 1, 2020, jails and prisons accounted for 90 of the 100 largest clusters of Covid-19 in the United States.

The fact that Covid-19 has spread dramatically in prisons and jails was anticipated by public health experts and human rights activists. Even before the first reported case of Covid-19 in a prison or jail, human rights organizations warned about the virus spreading through the thousands of detention facilities, which lack social distancing and proper hygiene, and which house vulnerable individuals particularly susceptible to the virus. Experts explained that reducing prison and jail populations will bring down infection rates and prevent Covid-19 from spreading into the broader community.

On March 18, the American civil liberties union (Aclu) sent letters (Aclu, 2020b) to the federal Bureau of prisons (J. Coleman, 2020) and to governors (Aclu of Colorado, 2020), prosecutors, police and other criminal legal system stakeholders in states

across the country warning of the impending disaster (H. Fowler, 2020). Public health experts also sent letters (L. Riley, 2020), as well as many state-based human rights organizations<sup>6</sup>. The letters warned about the spread of Covid-19 and called for changes in incarceration practices, including the safe release of vulnerable populations. Advocates demanded that people in prison who fit the Centers for disease control and prevention's (Cdc) criteria for people most vulnerable to Covid-19 be released, as well as the release of people who are nearing the end of their sentences.

Advocates also demanded that police and prosecutors use their discretion to dramatically reduce the number of people entering jails in the first place. In the United States, police make 10.3 million arrests a year, and according to the FBI, 95 percent of these arrests do not involve a violent offense and 80 percent of all arrests are for misdemeanors. Once arrested, individuals who cannot afford cash bail are trapped in the jail system while awaiting trial, sometimes weeks, months or even years. On any given day, there are about 500,000 people in pretrial detention in the United States, the majority of whom are incarcerated for the sole reason of inability to afford cash bail.

Human rights organizations, like the Leadership conference on civil and human rights and many more, lobbied the White house and Congress to take action, but we focused in particular on governors for pressure campaigns, pleading with them to issue executive orders to reduce prison and jail populations (Aclu, 2020a). Governors have enormous authority over incarcerated individuals, including the ability to direct their state corrections and



parole and probation boards to reduce prison populations, use their power of clemency to commute sentences, and also pressure local municipal and county stakeholders, such as police, sheriffs and prosecutors, to change their arrest and charging practices to reduce prison and jail populations (U. Ofer, 2020). Given the decentralized nature of the criminal legal system in the United States, and that 90 percent of the 2.3 million people who are incarcerated are under state or local jurisdictions, pressuring governors was the most direct way to help people.

As the advocacy efforts were gaining steam, with many grassroots organizations leading efforts in their local communities, reported cases of Covid-19 began to pour in. On March 20<sup>th</sup>, the first reported cases appeared in Georgia (Georgia Department of Corrections, 2020) and Massachusetts (The Enterprise, 2020), exactly two months following the first reported case of Covid-19 in the United States. Six days later, the first known Covid-19 death of a person in prison came to light, when Anthony Cheek died in Lee state prison in Georgia. He was 49-years-old and 18 years into a 20-year sentence (J. Sharpe, 2020).

Two days later, Patrick Jones became the first person in federal prison to die from Covid-19 (K. Johnson Kevi, 2020). Mr. Jones' experience with the criminal legal system is very much the story of the United States' mass incarceration crisis. He was arrested in 2007 for possessing a crack pipe, and later convicted for selling drugs after a search of his apartment found 32 grams of crack cocaine. He was sentenced to an astounding 27 years in prison because of the racist disparities in sentencing between crack and powder cocaine, a prior burglary record from the

age of 17, and because he was living within 1,000 feet of a junior college. These types of sentencing enhancements have led to extreme sentences in the United States, as well as extreme racial disparities in who's incarcerated.

Worrying that policymakers were failing to take adequate steps, the Aclu and other advocacy organizations began to increase our work as the weeks progressed. On March 30, the Aclu released a poll finding that 63 percent of registered voters supported releasing people from jails and prisons to help stop the spread of Covid-19, and 72 percent support clemency for elderly incarcerated individuals (Aclu, 2020c). The Justice collaborative also released a similar poll in March (The justice collaborative, 2020). On April 9th, the Aclu took the unusual step of launching television ads in numerous states to increase the pressure on governors to act (Aclu, 2020d). This is an extraordinary and expensive measure to take, but we did it to emphasize the severity of the situation and pressure governors to take extreme measures to save lives.

Also in April, the Aclu along with epidemiologists from the University of Tennessee, Washington state university and the University of Pennsylvania released a model estimating that the number of deaths from Covid-19 would increase by 100,000 more than White house estimates should states fail to reduce their jail populations (B. Hutchinson, 2020)<sup>7</sup>. There are nearly 11 million admissions a year into jails, as well as hundreds of thousands of employees in prisons and jails. Each admission and employee serve as a vector point for the spread of Covid-19 inside and outside of



jails and prisons. The model showed how tens of thousands of people could be saved if police stopped making arrests for anything other than the five percent of crimes that are defined as the most serious by the FBI, and by releasing people incarcerated in jail who have not been convicted of a crime and can safely await trial at home.

The ACLU also increased its advocacy with international human rights bodies, and on April 17, numerous human rights organizations submitted recommendations to the United Nations on Covid-19, detailing the risks faced by people in custody in the United States (ACLU, et. al., 2020). A broader letter was sent on April 29 by 69 human rights organizations urging the President of the United Nations Human Rights Commission to ensure that the rights of vulnerable communities are included in the Human Rights Council resolution on the implications of the Covid-19 crisis (The Advocates for Human Rights, Africa Solidarity Centre Ireland, Awnp, AfDiDi, Avf, Acat, ACLU, et. al., 2020).

While Covid-19 spread in prisons and jails, facilities began to subject people to solitary confinement. In June, Unlock the Box released a report finding that there had been a 500 percent increase in the use of solitary confinement in response to the outbreak of the Covid-19 pandemic – a trend that put the lives of countless incarcerated people, corrections officers and community members at risk. The report noted in extensive detail the analysis of medical experts on the risks associated with federal and state jails and prisons utilizing punitive solitary confinement instead of targeted depopulation efforts and medical isolation

to contain the spread of the virus (Unlock the Box, 2020).

Also in June, the ACLU and Prison Policy Initiative released report cards for every state grading their response to the Covid-19 crisis in prisons and jails. The report cards graded states on four factors: (1) whether the state provides testing and personal protective equipment (PPE) to correctional staff and the incarcerated population; (2) whether the state reduced jail and prison populations in response to the spread of the pandemic; (3) whether the governor issued an executive order — or the department of corrections issued a directive — accelerating the release from state prisons of medically vulnerable individuals and/or those near the end of their sentence; and (4) whether the state published regularly updated, publicly available data on Covid-19 in the state prison system. The report cards concluded that all states failed to implement a cohesive, system-wide response. The grades ranged from a D- to an F, as state responses ranged from disorganized or ineffective at best, to callously nonexistent at worst.

Advocates also filed hundreds of lawsuits to challenge conditions and demand releases, with at least three of these lawsuits reaching the United States Supreme Court (B. Bentley II, 2020). The ACLU alone has filed 77 legal actions in prisons and jails and 58 in immigration detention facilities<sup>8</sup>. Even corrections officers have filed lawsuits to protect them from Covid-19 (NBC 5 Dallas-Forth Worth, 2020). Claims have been filed under the Eighth Amendment's prohibition against cruel and unusual punishment and under the Due Process Clause of 14<sup>th</sup> Amendment to the United States Constitution, as well

as under the Americans with disabilities act and other anti-discrimination statutes.

Many of these cases have been unsuccessful, even in securing basic rights, as judges have failed to question executive actions. For example, the United States Court of appeals for the eleventh circuit ruled that jails cannot be forced to give people in prison soaps and masks, even in a jail that had hundreds of people test positive for Covid-19 (D. M. Reutter, 2020). And the United States Supreme court has overturned two lower court decisions that sided with plaintiffs, one that requested better cleaning in a Texas geriatric facility, and the other that required better health and safety procedures in a California jail.

Due to the efforts of advocates, six months into the pandemic, tens of thousands of people have been released. The Aclu tracks the results of our advocacy, and we estimate that 48,695 people have been released due to our advocacy along with partner organizations. UCLA School of Law's Covid-19 behind bars data project has estimated more than 100,000 releases from prisons and jails<sup>2</sup>. Most of the releases have been from jails, and both the releases from jails and prisons have been largely the result of non-litigation advocacy, as courts have been reluctant to intervene and question executive actions.

But this is nowhere close to enough. As of September 4th, there are 150,195 confirmed cases of Covid-19 in prisons and jails, and 1,036 deaths from the virus. Cases continue to peak in prisons and jails, particularly as states begin to finally engage in mass testing of people in prison and it becomes clear that the virus had been circulating among people without

symptoms in much greater numbers (C. Aspinwall, J. Neff, 2020). Some states are seeing dramatic increases, such as in Missouri, where confirmed cases increased more than 50 percent during August (St. Louis post-dispatch, 2020).

The work continues as lives are still at serious risk. Human rights advocates across the United States, representing organizations large and small, continue to push for actions by local, state and federal government, including for decarceration provisions in what is expected to be another stimulus package passed by Congress. But the presidential race in the United States is stealing attention away from the crisis overall, and in particular the dire situation in jails and prisons. Unfortunately, both political parties in the United States have continued to fail in their responses, and people in prisons and jails, as well as surrounding communities, are paying the price.

## Notes

<sup>1</sup> September 10, 2020.

<sup>2</sup> **Udi Ofer:** is the Deputy national political Director of the American Civil Liberties Union (ACLU) and Director of the ACLU's Justice division. He is also a visiting lecturer at Princeton University's School of Public and International Affairs. Mr. Ofer has been a civil rights lawyer and advocate for close to 20 years.

<sup>3</sup> United nations Interregional crime and justice research institute, International crime victims survey, available at [http://www.unicri.it/services/library\\_documentation/publications/icvs/](http://www.unicri.it/services/library_documentation/publications/icvs/)

<sup>4</sup> Presidential campaigns have played a key role in the rise of mass incarceration. During the 1964 presidential election, United States Senator Barry Goldwater ran an unabashed law-and-order campaign, deploying race-based appeals to a white electorate opposed to racial justice and slamming the civil rights movement as violent and un-American. During the 1968 election, candidate Richard Nixon won by going after southern white Democrats who opposed the civil rights movement and were willing to defect from the Democratic party. Law-and-order politics gained even more traction under President Ronald Reagan, who not only ran on the platform but also launched an aggressive War on drugs that pumped hundreds of millions of dollars into law enforcement. His media offensive perpetuated racist images of a crack-cocaine epidemic plaguing American cities and Black communities. Reagan's successor, President George H. W. Bush, boosted this racist message even further when he ran the infamous Willie Horton campaign ad. By the late 1980s,

Democratic politicians also began to adopt the tough-on-crime rhetoric, and it was new Democrat Bill Clinton who seized this strategy, running for president in 1992 vowing that he would never permit any Republican to be perceived as tougher on crime. Once elected, President Clinton championed the 1994 Crime Bill, which continues to lead to extreme sentences and exacerbate racial disparities in incarceration.

<sup>5</sup> Sentencing project, Trends in U.S. corrections, available at <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>

<sup>6</sup> Urgent action needed to protect individuals in Connecticut's prisons and jails from Coronavirus-19 pandemic, Letter to Governor Lamont, March 26, 2020, available at <https://drive.google.com/file/d/1E41348ai4el1e2toWctVgoHRWLo6i2-m/view>

<sup>7</sup> At the time of the report, April 2020, the government estimated nearly 100,000 deaths from Covid-19. At of September 10, 2020, the United States has had 190,714 deaths from Covid-19.

<sup>8</sup> List of cases on file with author. You may contact the author at [uofer@aclu.org](mailto:uofer@aclu.org).

<sup>9</sup> UCLA School of Law Covid-19 behind bars data project, available at [https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA\\_HkPVTk/edit#gid=845601985](https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=845601985)

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**PART TWO**  
**THE PANDEMIC AND PRISON: REFLECTIONS AND**  
**INSIGHTS**





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# The Covid-19 pandemic: the urgency to rethink the use of pre-trial detention<sup>1</sup>

*Laure Baudrihay-Gérard<sup>2</sup>*

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## 1. Reducing prison population is a public health priority

In response to the Covid-19 pandemic, states across the world closed courts, delayed hearings and moved proceedings online, often as people waited in pre-trial detention for those proceedings — and for their freedom. But the grip of Covid-19 across the globe has made the liberty of detained people take on a new urgency. Incarcerated people are some of the most vulnerable to infectious disease due to poor access to sanitation and health facilities, unsanitary conditions and often overcrowded detention facilities, making physical distancing and isolation impossible.

One of the most important public health measures to combat Covid-19 is restriction of physical contact and proximity. But the very nature of incarceration makes this practically impossible. As staff contracts the virus and visitation is suspended, tension and violence also increase, leading to further risks to the life and health of both residents and prison staff. The only way to preserve

public health and safety and protect the right to life is to reduce the number of people in detention facilities. With pre-trial detainees making up a third and more of the prison population in many countries, reducing the use of pre-trial detention would protect the health not only of detained persons, but also the many professionals who come into contact with people in detention (including detention staff and lawyers) and the families and communities to which both staff and prison residents return.

Several states across the globe adopted measures to release people from prisons, but not in large enough numbers to seriously impact the spread of the pandemic. Furthermore, many states failed proactively to take any steps to release people held in pre-trial detention or limit new entrants in pre-trial detention, despite the health risks and the presumption of innocence, leaving it up to a case-by-case decision (Section 2). People in detention faced restrictions on access to their rights, including to seek legal assistance or even judicial review of the continued necessity of pre-trial detention,

which further limited the opportunity to seek release (Section 3). Most concerning are the reforms that were introduced in many states which limit even further, and on a long-term basis, the rights of people held in pre-trial detention. But as the pandemic rages on across the globe, this is an opportunity for reform to tackle the overuse of pre-trial detention (Section 4).

## 2. Pre-trial detainees left out from release efforts

In the Covid-19 era, incarceration poses a mortal risk to people who reside and work in prisons (K. Kauffman, 2020). People in prison suffer from underlying health conditions at rates greater than that of the population at large, and they are unable to isolate themselves from each other to reduce the risk of infection<sup>3</sup>. The risk to health and life does not start and end behind bars – seriously ill people in prison often rely on the same medical providers as everyone else, particularly in the case of intensive care that is not usually available in prison medical units. Explosions of cases in prison inevitably put pressure on the same health systems on which we all rely (J. Neff, B. Schwartzapfel, 2020).

Across the globe, states made efforts to reduce the incarcerated population in order to preserve public health and safety. In Europe, about 18 Member states engaged in decarceration, including by releasing certain categories of prisoners early (as in the Netherlands, Ireland and France) or by delaying the commencement of prison sentences (as in Germany and Czech Republic)<sup>4</sup>. Sadly, many countries have taken no steps towards reducing the use of imprisonment, including those with serious overcrowding problems, such as Hungary, Romania, Bulgaria and Sweden

(J. Russell, 2020; Antigone, 2020). In addition, certain classes of prisoners have also been made ineligible for release: notably, those convicted of certain classes of offences, and pre-trial detainees. Any failure to consider these populations for large-scale release undermines efforts to contain the virus' spread.

Despite being presumed innocent, pre-trial detainees – which make up a third and more of the prison population in many countries – have not been included in the release schemes in many jurisdictions. In Mexico, for instance, the prison population has actually increased during the pandemic, due to a sustenance of the use of pre-trial detention and a slowing of releases as hearings were suspended. Often, a distinction is made between pre-trial detainees and sentence detainees because decisions on pre-trial detention are within the ambit of individual judges, rather than prison or corrections administrations, raising potential conflicts in separation of powers between the judiciary and the executive and administrative branches if the latter attempt to influence judicial decisions on release. In Spain, for example, those convicted of third degree, but not second degree offences can be released, due to the fact that detention in second degree cases is a judicial, rather than administrative, decision (Fair Trials, 2020e). But leaving decision on release up to a case-by-case decision by judges may be too slow and cumbersome to achieve public health aims, and can create arbitrary differentials in treatment as between judges (Menafn, 2020).

By contrast, some states adopted general policies aimed at reducing use of pre-trial detention which have proved successful

and need to be promoted. For instance, United States' prisons and jails achieved greater reductions by reducing pre-trial detention and imprisonment for violation of probation and parole than by releasing sentenced prisoners. The strategies jails used to reduce their populations varied by location, including reductions in the amounts of cash bail, release of pre-trial detainees held for *non-violent* offences or those with medical issues. For instance, California managed to drop the jail population by 30% or more (almost 45% in Orange County's jail) by reducing bail to \$0 for most misdemeanours and some low-level felony offenses (Prison policy initiative, 2020). In Brazil, the *Conselho Justiça* issued recommendations that accelerated review of pre-trial detention decisions, prioritizing medically vulnerable people, as well as re-affirming the exceptionality of new orders of pre-trial detention<sup>5</sup>. As a result, approximately 300,000 people were released from custody in Brazil (including pre-trial and sentenced people, making up approximately 3% of the total population of incarcerated people).

Significant reductions in pre-trial populations have also been achieved through directives to police and prosecutors to avoid arrest and prosecution of many offences and to refrain from requests for pre-trial detention which helped reduce the number of new entrants in pre-trial detention. In the early days of the pandemic, a number of elected prosecutors in major Us cities declined to prosecute all but violent offences in order to constrain jail populations (J. Pishko, 2020). In Greece, minor offences carrying a sentence of up to 1 year were not prosecuted (Fair Trials, 2020f). There was also anecdotal evidence of prosecutors not making pre-trial detention motions in relation to arrested persons with underlying health conditions, such as in the Netherlands (Fair Trials, 2020c).

Practitioners in Italy and Belgium reported increased use of alternatives measures such as electronic bracelets or house arrests<sup>6</sup>.

These examples of positive legislative, prosecutorial and judicial practices are encouraging but they are far from universal (J. Iannelli, 2020). Failure to release sufficient numbers of detainees to ensure social distancing and safe conditions in places of detention resulted in a catastrophic spread of the virus in certain prisons. In the Us, the Covid-19 mortality rate in state and federal prisons is twice that of the death rate for the general population (Fair Trials, 2020j). Cook county jail in Chicago, for example, had, during the month of April, the world's highest known concentration of Covid-19 cases at a rate 30x higher than its surrounding county, despite a modest reduction in the jail's population<sup>7</sup>. In Europe, Italy, Spain (Centre for Crime and Justice Studies, 2020) and France (Observatoire international des prisons, 2020) reported a significant number of infections among both prisoners and staff<sup>8</sup>. Efforts to reduce prison populations have recently slowed – and even reversed in the United States (E. Widra, 2020). There is an urgent need to continue and speed up the release of detained people. Nothing less than an extreme reduction in the prison population, including pre-trial detainees – much more drastic than we have yet seen – can protect our public health. No class of prisoners can be exempt from this life-threatening calculus.

### 3. Restrictions on access to defence rights in prisons

The decision to order pre-trial detention is one that carries grave consequences for the person concerned and places them at a significant procedural disadvantage. The very fact of being in custody can make it much harder to prepare a defence. For this



reason, human rights standards require detention hearings to be oral, adversarial and to involve the effective participation of the defence<sup>2</sup>. This protects suspects' right to liberty, and provides valuable information to prosecutors, judges and probation services notably on the opportunity for release or appropriateness of alternatives to detention. A lawyer's presence and active participation in the proceedings from the moment of initial custody helps a suspect to understand the legal situation and the consequences of choices made at this crucial stage. If complied with, the lawyer's presence at the initial stages of the criminal process serves as a *gateway* to other rights and helps not only to prevent prejudice to the suspect's defence, but also play a key role in limiting the use of pre-trial detention as a measure of last resort to cases in which it is really justified. Lawyers increase the chance of release or, where necessary, alternative measures to detention being applied and as a result contribute to lower rates of pre-trial detention and reduction in prison overcrowding (Fair Trials, 2019b). A study in the Us noted that providing suspects with lawyers at their first bail hearing made them more than twice as likely to be released without bail, and more than twice as likely to receive lower, more affordable bail (The constitution project national right to counsel committee, 2015).

As a result of the Covid-19 pandemic, physical access to police stations, courts and prisons was severely restricted, non-urgent court hearings were postponed, and states increased the use of video-link and telephone hearings. In practice, resorting to remote justice and additional changes in policy during the

Covid-19 pandemic seriously limited access to justice and defence rights, including people's ability to exercise their right to legal assistance, to obtain access to the materials in the criminal case file and interpretation services (for further analysis on these issues in Europe, please refer to Fair Trials, 2020h). In particular, detainees' access to an effective consultation with a lawyer was severely restricted. Remote access to a lawyer – in police stations, prisons or courts – made it challenging for lawyers and their clients to interact with each other and to have confidential and meaningful communication. Lawyers in England and Wales, for example, reported instances where a suspect was charged without an interview because an interpreter could not attend the police station, and where a 14 year-old-girl was kept in detention for 24 hours whilst waiting for an appropriate adult to turn up. Across Europe, lawyers raised concerns that telephone communications with their clients in police custody were taking place in open areas and/or facilitated by police officers. From prison, detainees were not able to speak confidentially with their lawyers as calls are often set in common areas or monitored by guards. Lawyers also noted the difficulty to assess clients' needs and vulnerabilities over a telephone conversation. In England and Wales, Belgium or Bulgaria, lawyers complained that persons held in pre-trial detention had no opportunity to consult their own case files, making it impossible to take instructions from them<sup>10</sup>. Lawyers in the Us reported difficulties to establish contact with the client in detention before their initial appearance, due to phone calls being limited and in some cases cut off entirely (S. Turberville, K. Hawkins

2020).

Overall, these restrictions made it much more difficult for pre-trial detainees to prepare a meaningful defence and to challenge the legality or necessity of their detention. These restrictions came at a time when enabling persons held in detention to exercise their rights to seek release became more urgent than ever.

#### **4. Legislative changes penalise people in pre-trial detention**

During the pandemic, countries closed courts, and/or delayed some hearings, to protect people's health and safety by reducing the possibility of Covid-19 transmission at in-person court hearings. Many countries turned to remote hearings — using online video or audio-conferencing technology and other similar tools — as an alternative to in-person hearings in the context of both pre-trial and trial proceedings. Courts gradually re-opened since the summer but, as a result of the measures adopted during the pandemic, they are now facing massive case backlogs. The delays cause serious challenges for pre-trial detainees who are facing prolonged pre-trial detention and have little to no idea when their trial would take place, and how much longer they would be detained (for further analysis on these issues in England and Wales, please refer to Fair Trials, 2020g).

Yet states are adopting measures aimed at further restricting the ability of people held in pre-trial detention to challenge their detention, in particular measures aimed at extending procedural deadlines to rule on release applications, delaying or suspending review hearings, or extending pre-trial detention time limits. France, for instance, opted to extend pre-trial

detention duration, depending on the seriousness of the offence, by 2, 3 or up to 6 months, without any hearing. It also doubled the timeframe in which judges could rule on applications for release in the context of pre-trial detention and replaced oral hearings by written submissions on this issue (Fair Trials, 2020b). The Netherlands considered relaxing the rules around how long accused persons can spend in pre-trial detention. If instituted, this would double the number of days that people can be detained before seeing a judge from 6 to 12, and double how long they can be detained while their cases are investigated from 12 to 24 days (Fair Trials, 2020a). In Germany, a regional court decided that pre-trial detention could be extended if the trial had to be postponed because of Covid-19 measures. According to German Criminal procedure law, pre-trial detention may only exceed six months if there is an important reason for a delay in passing a sentence. In its decision the regional court argued that the postponement of a trial was justified because of a high risk of infection for a large number of people involved in the proceedings<sup>11</sup> (Fair Trials, 2020d). In England and Wales, custody time limits for pre-trial detainees have been increased from six months to eight months to ease the pressure of a rising backlog of court cases. There are now thought to be over 500,000 cases waiting to be heard in magistrates' and crown courts, an increase of about 100,000 on pre-pandemic levels. A shortage of court capacity has caused delays of up to three years (Fair Trials, 2020i).

Due to delays and longer periods in pre-trial detention, concerns have been

raised about pre-trial detention overpassing the maximum sentence faced by suspects, notably in the Netherlands and in England and Wales<sup>12</sup>. Research indicates that judges may be unwilling to order imprisonment for shorter periods than those actually spent in pre-trial detention, so as to avoid questions about the legality of the pre-trial detention (Fair Trials, 2019a).

Because pre-trial detainees are presumed innocent, their detention is intended as an exceptional measure. Liberty should be the norm and countries should provide regular reviews of detention to ensure that it is still justified. But blanket extensions of pre-trial detention are not only posing severe restrictions on the rights of persons held in pre-trial detention, they also raise serious questions about the impact on the prison population at a time where states are still attempting to mitigate and contain the spread of coronavirus in prisons. By prolonging pre-trial detention, states undermine initial release efforts and risk a future spike in prisoner numbers, putting more lives at risk of infection and potentially resulting in more severe overcrowding.

Excessive and prolonged pre-trial detention is a longstanding issue. People are held despite national, regional, and international principles that allow detention only as a measure of last resort in exceptional circumstances. The spread of Covid-19 has given new urgency to the need to address these issues. The backlog of cases built up during the Covid-19 lockdown is likely to have a long-lasting impact, resulting in inordinate delays to criminal cases, and prolonged pre-trial detention for many detained defendants. Criminal justice systems cannot function

properly and cannot be expected to deliver justice in all cases if they are stretched far beyond capacity. Legally innocent defendants should not be stuck in detention on account of administrative failures and underfunding. It is essential that urgent action is taken to increase funding for the courts, and increase their capacity to cope with growing caseloads.

At the same time, the authorities should take the current Covid-19 context as an historical opportunity to end over-reliance on pre-trial detention and to reconsider their approach to incarceration. Judicial authorities in various jurisdictions have started to pave the way forward. In France, for instance, the Court of cassation and the Constitutional court recently ruled that people held in pre-trial detention should be allowed to challenge poor conditions of detention and overcrowding and to request release if necessary (Fair Trials, 2020m). In England, a judge refused to extend the custody time limit of a detainee stating that the lack of available courts and failure of the justice system to bring suspect to trial were not good enough reasons to maintain suspect in remand custody (Fair Trials, 2020k).

Fair Trials welcomes such judicial engagement in the absence of government or legislative measures. But shifting culture towards the use of imprisonment will require the active engagement of all actors, from the legislator to prison authorities and probation services, from judges to regional bodies. The Eu Commissioner for Justice recently reaffirmed the need for Eu action on pre-trial detention (Fair Trials, 2020l). It is time to translate these words into action, in Europe as across the world.

## Notes

<sup>1</sup> This article was produced in collaboration with colleagues across all three offices of Fair Trials (London, Brussels, Washington, D.C.): Isaline Wittorski (Legal and policy officer, Brussels), Bruno Min (Legal director, Uk & International) and Rebecca Schaeffer (Legal director, Americas).

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<sup>3</sup> See Un Hr Special procedures, Special rapporteur on extrajudicial, Summary or arbitrary killings, *Covid-19 Human rights dispatch – Number 2: Covid-19 and protection of right to life in places of detention*. Available here [https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch\\_2\\_PlacesofDetention.pdf](https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch_2_PlacesofDetention.pdf) (accessed 16 October 2020).

<sup>4</sup> See European parliamentary research service, *Briefing: Coronavirus and prisons in the Eu– Member-state measures to reduce spread of the virus*, June 2020, p. 11. Available here [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651976/EPRS\\_BRI\(2020\)651976\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651976/EPRS_BRI(2020)651976_EN.pdf) (accessed 16 October 2020).

<sup>5</sup> See Brazil National council, *Recommendation n°62 of 17 March 2020*. Available here <https://www.cnj.jus.br/wp-content/uploads/2020/03/62-Recomenda%C3%A7%C3%A3o.pdf> (accessed 16 October 2020).

<sup>6</sup> Fair Trials, *Justice under lockdown in Europe – A survey of the impact of Covid-19*

*on access to a lawyer in Europe* (to be published).

<sup>7</sup> See Injustice Watch, *Cook county jail population and Covid-19 tracker*, regularly updated. Available here [https://data.studio.google.com/u/0/reporting/1AI4THiXJ\\_6Nt-9NXwE0MfO\\_DUaa1Koxi/page/hcyJB?s=oQGghs5nYPk](https://data.studio.google.com/u/0/reporting/1AI4THiXJ_6Nt-9NXwE0MfO_DUaa1Koxi/page/hcyJB?s=oQGghs5nYPk) (accessed 16 October 2020).

<sup>8</sup> See European parliamentary research service, *Briefing: Coronavirus and prisons in the Eu– Member-state measures to reduce spread of the virus*, June 2020. Available here [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651976/EPRS\\_BRI\(2020\)651976\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651976/EPRS_BRI(2020)651976_EN.pdf) (accessed 16 October 2020).

<sup>9</sup> See European court of human rights, *Göç v. Turkey*, Judgment of 11 July 2002, App. no. 36590/97, para. 62. Available here <http://hudoc.echr.coe.int/eng?i=001-60597> (accessed 16 October 2020).

<sup>10</sup> Fair Trials, *Justice under lockdown in Europe – A survey of the impact of Covid-19 on access to a lawyer in Europe* (to be published).

<sup>11</sup> Oberlandesgericht Karlsruhe, Decision of 30 March 2020, Reference No. HEs 1 Ws 84/20.

<sup>12</sup> Fair Trials, *Justice under lockdown in Europe – A survey of the impact of Covid-19 on access to a lawyer in Europe* (to be published).



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# The Covid-19 pandemic highlights the urgent need to decriminalise petty offences in Sierra Leone and beyond

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## 1. Introduction

At the height of the Covid-19 pandemic, several Un agencies released a joint statement urging governments around the world to protect people in detention and all those deprived of liberty from their increased vulnerability to the virus by taking appropriate public health measures, including reducing overcrowding (Unodc, Who, Unaid, Ohchr, 2020). This was echoed by regional bodies, including the African commission on human and peoples' rights (African commission on human and peoples' rights, 2020). Despite this, some African countries continue to use custodial measures to detain people for petty offences (AdvocAid, 2020a). In some cases, these countries have even created – through restrictions put in place to combat Covid-19 – new petty offences for which people are being arrested and imprisoned (L. Muntingh, 2020).

Following the outbreak, imposing custodial measures on those who commit petty

offences is not only disproportionate and against the recommendations of the African commission on human and peoples' rights to decriminalise and declassify petty offences (African commission on human and peoples' rights, 2018) – it is counterproductive and puts their health at risk. This is without considering the devastating consequences that prison already had on people who were incarcerated before this public health emergency (Open society justice initiative, 2011). This essay will discuss the criminalisation of petty offences in Sierra Leone before and during the Covid-19 outbreak – with specific attention to women. It will subsequently show the urgency to decriminalise and declassify petty offences in the country and beyond. The essay will draw from the authors' first-hand observations while working on access to justice for women and girls in Sierra Leone.

## 2. Towards a definition of *petty offences*

Petty offences were imposed on African countries during the Colonial era and are

based on a policing model that, as Lukas Muntingh argues, “protected the ruling white colonial elite and aimed at social control, the vestiges of which are still visible in many jurisdictions” (L. Muntingh, 2015, p. 40). Yet, while most petty offences have now been repealed from the statutes of the main colonising countries, they are still criminalised in almost all African countries. These offences are defined by the African commission on human and peoples’ rights (the Commission) as: “Minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine (...). Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanours, summary offences or regulatory offences” (African commission on human and peoples’ rights, 2017, p. 9).

In 2018, the Commission recommended that State parties to the African Charter on human and peoples’ rights (the African charter) take steps to decriminalise and declassify petty offences as they violate a number of rights guaranteed by the Charter – namely the right to equality and non-discrimination<sup>3</sup>, the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment<sup>4</sup> and the right to liberty and security of the person and freedom from arbitrary arrest and detention<sup>5</sup>. The petty offences identified by the Commission as being ripe for repeal across the African continent include offences such as loitering, begging, failure to pay debts, being a common nuisance and disobedience to parents, urinating in public and washing clothes in

public, hawking, vending, being a rogue and vagabond, being an idle or disorderly person and being a vagrant (African commission on human and peoples’ rights, 2018).

These offences disproportionately impact those who are already marginalised and poor, arbitrarily targeting vulnerable groups such as the homeless, the beggars, the sex workers and the street vendors, but also people with psychosocial and intellectual disabilities (L. Muntingh, K. Petersen, 2015)<sup>6</sup>. When a State chooses to pursue prosecutions for petty offences, it is essentially punishing poverty (S. Mahtani, 2013).

These offences are enforced under often wrongly applied, outdated and vague laws which give the police wide discretion for enforcement (M. Kozah, 2017). This leaves ample liberty for the police to extort bribes and conduct arbitrary arrests of the poor and other marginalised groups (Carl, AdvocAid, 2019). In some cases, the vague character of these laws means that they are used by the police to arrest those against whom a substantive charge could not be imposed (L. Muntingh, K. Petersen, 2015). This is contrary, *inter alia*, to the Commission’s *Guidelines on the use and conditions of arrest, police custody and pre-trial detention in Africa* (the Luanda Guidelines), which provide that people can be arrested and incarcerated only on the basis of laws that are clear, accessible and precise, consistent with international standards and respect the rights of the individual<sup>7</sup>. Arrests for petty offences also arguably do little to promote public safety and are disproportionate to the offence they set out to remedy (Commonwealth human rights initiative, 2018).

### 3. Petty offences in Sierra Leone: the impact on women and marginalised groups

In Sierra Leone, petty offences are still criminalised both in law and in practice and make up a substantial share of the cases entering the criminal justice system. A study conducted by AdvocAid and the Centre for accountability and rule of law (Carl) in 2019 indicates that 33% of all offences for which people were in prison in the country – either in pre-trial or convicted – were petty (Carl, AdvocAid, 2019). Among the most common petty offences are loitering, the non-payment of debt (including fraudulent conversion and obtaining goods or money by false pretences), insulting conduct, and minor traffic offences. While those are the petty offences specifically criminalised in Sierra Leone, similar charges exist in the statutes of most African countries.

Tougher criminal justice policies have resulted globally in an increase in the number of women who are imprisoned for petty offences (Unodc, 2015). While both men and women are arrested and charged for petty offences in Sierra Leone, women generally experience higher rates of poverty due to limited access to capital, education, and job opportunities. These disadvantages place women at greater risk for arrest for petty offences. The vast majority of women in prison in Sierra Leone are marginalised, illiterate, petty traders and the sole caretakers of young children (Cyrus R. Vance Center for international justice, AdvocAid, 2020). Petty offences are often the survival crimes of women who commit them to support themselves and their families (AdvocAid, 2018a).

#### 3.1 The criminalisation of debt: fraudulent conversion and obtaining money or goods by false pretence

Both these offences relate to the non-repayment of debt and require in law a deliberate and fraudulent intention to maliciously defraud a person<sup>8</sup>. Based on the authors' observations, these offences are now generally misinterpreted and have been overextended to criminalise almost any instance of debt, regardless of intent. Following advice from the police, some women plead guilty to owing money to their accuser without really understanding that they are admitting to intentionally defrauding them or the implications of their plea. A recent study in fact revealed that low levels of education, combined with the fact that most women do not receive appropriate legal advice at the police stations, means that many women in the country do not understand the criminal justice process and plead guilty to charges they do not comprehend (Cyrus R. Vance Center for international justice, AdvocAid, 2020).

The enforcement of charges of both fraudulent conversion and obtaining money by false pretences creates opportunity for corruption and bribery. The authors have met many women who said they have been held at the police station as the police levied money from both them and their lender. Some of these women are then charged to court and spend such extended periods of time in pre-trial detention that by the time their case is heard in court, they have already served their time (S. Mahtani, 2013). Once an individual is convicted and goes to prison, the lender does not recover the money owed and the State incurs expenses in detaining someone who could have

instead worked to repay the lender. This further shows the need to develop alternatives to incarceration and community-based non-custodial measures in Sierra Leone and beyond, to reduce the devastating consequences of imprisonment, while also offering a more cost-effective approach for the State (Unodc, 2020).

A number of women in prison in Sierra Leone, who are already marginalised and often the breadwinners of their households, are therefore in prison for borrowing small amounts of money for business purposes and using it to provide for their children and families instead. Civil society organisations in the country say that the number of such cases among women has increased during the Covid-19 pandemic (AdvocAid, 2020a). As already mentioned, most women in Sierra Leone work as small-scale traders and, following the establishment of a curfew to limit the spread of the virus, they have had their trade hours – and thus their profits – reduced. This can mean that women are unable to repay their loans and are arrested under charges of fraudulent conversion and obtaining money by false pretences (AdvocAid, 2020a).

### **3.2 Marginalised and criminalised under loitering laws: sex workers**

The United Nations Committee on the elimination of racial discrimination has stated that laws which ban loitering essentially criminalise homelessness and have a disproportionate effect on vulnerable groups (Committee on the elimination of racial discrimination, 2014, para.12). Loitering in Sierra Leone is defined by the Public order act 1965 (section 7) as idling in the street “not

having any visible means of subsistence, and not giving a good account of himself”. This definition is vague and highly discretionary; it can lead to abuse of power on the part of the police and places vulnerable groups, and especially sex workers, at an increased risk of arrest.

Sex workers are globally harassed by the police and often face discrimination when they come in contact with the criminal justice system (C. Mgbako, 2011). In Sierra Leone, police officers sometimes extort money or sex from sex workers in return for their release (Justice studio, *et al.*, 2011; AdvocAid, 2018b). While sex work is otherwise legal in Sierra Leone<sup>2</sup>, sex workers are the target of arbitrary arrests by law enforcement under these vague loitering laws<sup>10</sup>.

This already vulnerable group has been severely affected by the pandemic across Africa, as measures such as lockdowns, curfews and travel bans have left many without income (The global fund, 2020). In Sierra Leone, sex workers are reportedly often arrested for violating curfew regulations and are sometimes forced to spend the night with a client to avoid breaching the limitation, frequently without being appropriately remunerated (AdvocAid, 2020a). Some of these women are then reported to the police for having stolen items from clients after not having been paid or having been physically abused by them.

### **3.3 Covid-19 and the creation of new petty offences**

Recently, many African countries have created new petty offences, often under community by-laws, to punish the violation of restrictions put in place to contain the spread of Covid-19 (L.



Muntingh, 2020). However, the criminalisation of petty offences relating to Covid-19 is not an appropriate public health response and disproportionately targets marginalised groups. While this public health emergency may require governments to limit and derogate from certain human rights, these restrictions must be based on legality, evidence-based necessity, *proportionality*, and gradualism<sup>11</sup>.

In Sierra Leone, measures such as restrictions on inter-district travels, curfew, and the compulsory use of masks have led to individuals being arrested and sometimes even detained. According to civil society organisations, women have been distinctly impacted by some of these measures (AdvocAid, 2020a). The authors have witnessed AdvocAid paralegals and duty counsels having to step in, in cases where women had been arrested for leaving their houses after the curfew or during a lockdown to go and fetch food or water for their families. The organisation also reportedly provided legal representation to 25 students and petty traders who were arrested in a market for not wearing a mask (AdvocAid, 2020d).

"I am so grateful to AdvocAid for intervening in my case and that I did not have to go to prison for failing to pay a fine for not wearing a mask. I fear being in a cell with strangers, who might have been exposed to the virus. I do not have money to buy a mask, but I will try to find one". Kadiatu, one of the many women who have been arrested for failure to wear face masks<sup>12</sup>.

#### 4. Overcrowding, petty offences and Covid-19

According to the latest report by Penal reform international and the Thailand

institute of justice (2020), prisons in 124 countries exceed their maximum capacity. As of September 2020, more than 214,246 people in detention have tested positive for Covid-19 in 106 countries<sup>13</sup>. This comprises many sub-Saharan African States, including South Africa, Namibia, Botswana, Zimbabwe, Madagascar, Malawi, the Democratic Republic of the Congo, Rwanda, Uganda, Kenya, Ethiopia, Sudan, Nigeria, Togo, Ghana, Guinea, Senegal and Sierra Leone. According to internal data obtained by the authors, correctional centres in Sierra Leone are on average holding double their capacity, with some prisons even exceeding the maximum occupancy rate by more than four times<sup>14</sup>. It is worth mentioning that another factor in the congestion of prisons in Sierra Leone is the continuous and excessive use of pre-trial detention the country makes for both women and men (Timap for justice, Prison watch Sierra Leone, Open society justice initiative, 2013)<sup>15</sup>.

Reducing overcrowding was already a priority under regional and international standards such as the Luanda guidelines and the Mandela rules, the Bangkok rules, and the Tokyo rules. Yet, the Covid-19 pandemic presents unprecedented challenges and thus requires extraordinary efforts to reduce prison overcrowding, which makes the social distancing rules recommended to prevent the transmission of the virus virtually impossible. Incarcerated people also commonly have poorer health than the general population, and often suffer from underlying conditions (L. Roy, 2020). These circumstances, combined with the substandard hygiene routines and infrastructures found in many correctional

centres around the world, puts the health of both those detained and prison staff at significant risk (Penal reform international, 2020).

Currently, most countries have attempted to reduce the spread of the virus in prison by limiting visitation from the outside world and placing infected individuals in isolation (Penal reform international, Thailand institute of justice, 2020). However, restrictions on visits from family, lawyers and independent monitoring bodies, combined with the fear of being infected with the virus, have exacerbated anxiety and tensions among people in detention, which in some cases have culminated in suicides, escapes and riots (H. Summers, 2020). In April 2020, the Sierra Leonean government confirmed the first Covid-19 case in a correctional facility. The man who contracted it had been charged with larceny, which is a minor offence (AdvocAid, 2020b). Following this, a riot broke out in the male prison in the capital and 31 people were killed – one officer and 30 men in detention. The Sierra Leone Correctional service released a report into the riot, finding that 400% overcrowding, staff shortages, and the severe Covid-19 restrictions imposed on those imprisoned were key causes of the riot (A. R. Thomas, 2020).

Yet, in spite of civil society organisations' repeated calls to release pre-trial and vulnerable detainees as part of Covid-19 prevention measures (AdvocAid, 2020c), the only people in detention who were released in the country since the outbreak were the 150 men and three women<sup>16</sup> who were granted *unrelated* presidential pardons on Sierra Leone's Independence day (A. K. Sesay, 2020). When comparing

the response of the Sierra Leone government to that of other countries in Africa<sup>17</sup>, Sierra Leone's efforts to decongest prisons to reduce the spread of the virus are insufficient. Not only has the Sierra Leone government not released people in detention to reduce prison overcrowding in response to Covid-19, it also continues to arrest people for minor, economic and petty offences, jeopardising the lives of those detained, prison staff and the general public.

The *Ouagadougou declaration and plan of action on accelerating prisons and penal reforms in Africa* had already identified in 2002 the decriminalisation of minor offences as an important measure towards reducing prison overcrowding in Africa<sup>18</sup>. This was reiterated in 2018 by the African commission on human and peoples' rights (African commission on human and people's rights, 2018). The recent Covid-19 outbreak demonstrates that the decriminalisation and declassification of petty offences in Africa can no longer wait.

## 5. Conclusion

Following the outbreak of Covid-19, prisons have become "ticking time bombs" (Penal reform international, 2020). It is clear, now more than ever, that there is an urgent need for governments around the world to decongest all places of detention.

Unnecessary arrests greatly contribute to the overcrowding of prisons in Africa. Petty offences target those who are already poor and marginalised – often women and vulnerable groups – without doing much to promote and guarantee public safety. The creation of new petty offences to punish violations of Covid-19 restrictions are increasingly impacting marginalised

groups and criminalising actions that fall under public health concerns rather than criminal justice. Custodial sentences for all petty offences are disproportionate and counterproductive and place those who are already struggling in a position of increased vulnerability. Their enforcement, combined with the overuse of pre-trial detention, contributes to prison overcrowding, which facilitates the spread of diseases.

Following the outbreak of the novel coronavirus, there is an obvious need for a moratorium on new arrests and prosecutions of petty offences in Sierra Leone and beyond. This global health crisis has further indicated that there is a pressing need to decriminalise and declassify petty offences across Africa and develop alternatives to incarceration as well as non-custodial measures such as diversion, cautions and warnings where necessary. This, combined with an effort to truly use (pre-trial) detention as a measure of last resort, might go a long way in curbing the spread of the virus in the already often underfunded and vulnerable African prisons.

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## Notes

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<sup>2</sup> **Joseph Bangura**: is the monitoring and evaluation officer at AdvocAid, the only organization in West Africa providing holistic access to justice to women and girls caught up in Sierra Leone's often unjust legal system.

<sup>3</sup> Articles 2, 3 and 18 of the African Charter.

<sup>4</sup> Article 5.

<sup>5</sup> Article 6.

<sup>6</sup> This is contrary to several human rights treaties, such as, for example, the International covenant on civil and political rights and the African charter.

<sup>7</sup> Article 2(a).

<sup>8</sup> Under the Larceny act 1916, a person is guilty of committing "fraudulent conversion" if: "...being entrusted (...) with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; (...) *fraudulently converts* to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof" (emphasis added). Fraudulent conversion carries a sentence of up to seven years in prison. Similarly, a person is liable to up to five years in prison if "by any false pretence — (1) *with intent to defraud*, obtains from any other person

any 'chattel, 'money, 'or 'valuable security (...)" (emphasis added).

<sup>9</sup> While solicitation is illegal under s.17 of the Sexual offences act 2012, prostitution itself is legal in Sierra Leone.

<sup>10</sup> International standards place positive obligations on States to protect sex workers, who are particularly exposed to abuse (Cedaw, 1992, paras. 15–16).

<sup>11</sup> The Siracusa Principles: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>

<sup>12</sup> Case study provided by AdvocAid. Name has been changed to protect the identity of the woman.

<sup>13</sup> To track the spread of the virus in prisons across the world: <https://www.jpp.org.pk/covid19-prisoners/>

<sup>14</sup> The prison population in Sierra Leone has doubled in the last ten year: <https://www.prisonstudies.org/country/sierra-leone>

<sup>15</sup> According to official data seen by the authors approximately 60% of all incarcerated people in Sierra Leone are held in pre-trial detention.

<sup>16</sup> This is approximately 3% of the total prison population.

<sup>17</sup> See, for example, Ghana: <https://allafrica.com/stories/202007060575.html>, Kenya: <https://www.aa.com.tr/en/africa/covid-19-kenya-frees-nearly-4-000-prisoners/1789969> and Zambia: <https://www.lusakatimes.com/2020/05/22/president-lungu-pardon-2-984-inmates-to-commemorate-african-freedom-day/>

<sup>18</sup> Download [here](#).

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# Pandemic and democracy: for a global constitutionalism<sup>1</sup>

*Interview with Luigi Ferrajoli<sup>2</sup>*

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**Do you think that, because of the Covid-19 pandemic, there should be a change in the political direction? Either from Italy, or the European Union, or even globally.**

There will be many changes in the political direction that will be imposed by the Covid-19 pandemic. I will mention two of them. The first consists of abandoning the absurd liberalist policies concerning the guarantee of social rights and in particular the right to health, and the revaluation of the public sphere. This dramatic pandemic has brought to light the irresponsible short-sightedness of government policies, which, at least in Italy, over the last ten years, intending to reduce taxes, have cut spending on healthcare by suppressing tens of thousands of hospital beds, closing hospitals and public hospital wards and reducing the number of healthcare personnel, to the benefit of private healthcare. Suddenly, this tragedy, with its load of dead and infected people, has revealed the inestimable value of public healthcare and its universal and free nature. It has highlighted the need to

strengthen our healthcare system by increasing the number of hospitals, intensive care units, doctors and nurses, and health equipment, from tests for Covid-19 to respirators and masks. It has revealed the incredible, irresponsible unpreparedness and the lack of foresight of all governments, which have done nothing to tackle the pandemic, even though it was long foretold: when a war is foreseen, military drills are carried out, bunkers are built, attack simulations and defence techniques are simulated and sophisticated weapons are built; against the announced danger of a pandemic, absolutely nothing was done, not even the purchase of respirators, tests for Covid-19 nor masks. Finally, this pandemic has demonstrated the superiority of political systems with public healthcare over those in which healthcare is entrusted to insurance companies and private health care. Just think of the catastrophe that is currently underway in the United States, where just one test for Covid-19 costs a few thousand dollars and millions of people are left to their own devices. The world's greatest power continues to accumulate increasingly deadly

weapons against non-existent enemies, but it has found itself without respirators or tests for Covid and thus counts tens, perhaps hundreds of thousands of deaths.

There is a second lesson we should learn from this pandemic. It comes from its global nature, which would have required - and still requires - the need to confront it with a united strategy, possibly global and at least European, to avoid that the variety of measures adopted, which were in many cases completely inadequate and untimed, ends up favouring the spread of the virus and increasing the death toll even in countries that have adopted the most severe measures. It would be sufficient for a few countries to underestimate the virus without tackling it or insufficiently addressing it, for the dangers of contagion to reappear in all other countries along with the reopening of travel. Yet, in Europe, common management of the epidemic should even be imposed by the Treaties. Article 168 of the Treaty on the functioning of the Union, which is devoted to public health, states that “a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities” and that “member States shall, in liaison with the Commission, coordinate among themselves their policies” and that “the European parliament and the Council, (...) may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges”. Also, article 222, entitled “solidarity clauses”, states that “the Union and its Member states shall act jointly in a spirit of solidarity if a Member state is (...) the victim of a natural (...) disaster”. Instead, what has happened is

that the European Union - whose Commission has a Health commissioner, a Cohesion commissioner and even a Crisis management commissioner among its members - has given up taking over the governance of the epidemic with uniform health directives for all the different countries, thus showing itself capable of imposing only sacrifices and austerity policies on the Member states in favour of balanced budgets, and incapable of taking health measures that benefit the lives of its citizens. If to this abdication of the Union’s role in managing the health emergency is added the painful conflict between sovereignists in the North and sovereignists in the South over economic aid to the countries that have suffered the most, the risk of suicide of the Union becomes evident.

Not only that. This epidemic has put on the agenda the need and urgency to create a global constitutionalism and a global public sphere guaranteeing not only the right to health but all the fundamental rights established in the many international charters of rights. There is already a World health organization (Who). But it does not even have the means or apparatus necessary to bring life-saving medicines to the poor countries of the world – originally there were just over 200 such medicines, today 460 - that 40 years ago the Who established should be universally accessible and lack of which causes 8 million deaths every year. Today the global epidemic is affecting everyone, without distinction between rich and poor. It could therefore provide an opportunity to make the Who a truly global guarantee institution, endowed with the powers and means necessary to prevent epidemics and then tackle them

with rational and appropriate measures, not conditioned by contingent or partisan political or economic interests, but aimed solely at guaranteeing the health and life of all human beings. I am sure that if such a Who had existed in the days of the coronavirus, today we would not be counting millions of infected people and hundreds of thousands of deaths worldwide.

**You mentioned the need for a global constitutionalism. Can you explain the contents of your proposal for a Constitution of the Earth?**

There are - and they are becoming more and more dramatic - global problems that are not on the political agenda of national governments but on whose solution - which is possible only at the global level - the survival of humanity depends: saving the planet from global warming, the dangers of nuclear conflicts, the growth of inequalities, the death of millions of people every year from lack of basic nutrition and life-saving medicines, the tragedy of hundreds of thousands of migrants and, now, this coronavirus tragedy. It is from this obvious awareness that the idea was born, well before this pandemic, to create a political movement - whose first assembly was held here in Rome on 21 February - aimed at promoting a Constitution of the Earth that should provide for the creation of an international public sphere able to face those great emergencies and therefore global institutions to guarantee the fundamental rights already established in the many declarations, conventions and charters of human rights. The coronavirus pandemic has dramatically confirmed the need for an expansion of the constitutional paradigm. Striking the

whole human race without distinction of nationality and wealth, there may be reason to hope that it generates awareness of our common fragility, our interdependence and our common destiny. It has a specific character compared to all other disasters, including ecological and nuclear ones. Because of its terrible daily death toll around the world, it makes the lack of adequate global guarantee institutions, which should have been introduced to implement the many international human rights charters, much more visible and intolerable than any other. More than any other emergency, it, therefore, makes the need to fill this gap more urgent and, at the same time, more universally shared.

A reawakening of reason may therefore follow. It is possible that this tragedy, in addition to the fragment of a planetary constitutionalism in the field of health, may raise awareness that we are all exposed, even if not always immediately and directly, to other serious disasters - environmental, nuclear, humanitarian - prevention of which requires other global guarantee institutions: for example, the establishment of planetary public property to protect public assets such as water, air, large glaciers and forests; the banning of nuclear and conventional weapons, the spread of which is responsible for hundreds of thousands of murders every year; the monopoly of military force by the Un; a global tax authority able to finance social rights to health, education and basic food, that are proclaimed in many international charters. These seem utopian hypotheses. And instead, they are the only rational and realistic responses to the great challenges on which the future of humanity depends.

### **What is the change that the law must make in this planetary process?**

I have repeatedly divided public institutions into two major classes: those that I have called government institutions and those that I have called guarantee institutions. Government institutions, legitimised by voting and political representation, should remain as close as possible to the electorate, within States and even more with local autonomies. At a global level, the Security council and the United nations General assembly are more than sufficient. What is almost totally lacking and needed at the international level, are the global guarantee institutions - whether primary, such as for health, education, welfare and basic needs, or secondary, like jurisdictional institutions - legitimised by subordination to the law and the guarantee of fundamental rights, such as civil liberties, social rights, education and health, and the protection of public assets such as air, drinking water, large glaciers and forests.

### **Should new international institutions be founded to guarantee the fulfillment of a new constitutionalism?**

Some of these institutions, such as the Un Food and agriculture organization (Fao) and the Who, have existed for a very long time. But they are institutions without the powers and means necessary for the implementation of their guarantee functions. The Who has not even been able to distribute life-saving medicines to the poor countries of the world – as it was previously mentioned, there were just over 200 such medicines originally, today 460 - which the Who itself 40 years ago declared *essential* and therefore a fundamental right for all. It is therefore a

question of adequately funding these institutions to enable them to provide basic medicines, healthcare and food for all just because they are human beings. It would be sufficient to provide a modest global tax - 1% or 2% of the gross world product - to fund them.

Other global institutions are established by the Un Charter but have not yet been executed, such as the Military staff committee (art. 47 of the Un Charter) placed under the Security council, which should have a monopoly on military force. Others - such as a planetary public property to guarantee the intangibility of public assets, and authorities to guarantee the environment, education, basic needs, housing and other vital rights - should be established in a future Constitution of the Earth. These are, in all cases, counter-majority functions and institutions, not only legitimised but also imposed, if we take international law seriously, by the many international human rights charters and conventions.

### **What would happen to the existing global institutions such as the United nations, the International monetary fund or the World bank in this new framework?**

The Un is today the international organisation of which practically all the States of the Earth are members. Its governing institutions - the Security council and the General assembly - should be democratised, but maintain only their current functions, to which functions of promotion and implementation of guarantee institutions should obviously be added. The International monetary fund and the World bank, on the other hand, have guarantee functions, as they were



originally conceived, but have lost and overturned their original role. They should first of all be democratised, removing them from the dominion of the richer countries, and above all overturning their functions, which today are subjected to the great global economic powers, and finalising them to the promotion of the economic development of poor countries, the guarantee of human rights and public assets and the imposition of elementary rules on global finance, which has developed until now without any real fiscal supervision. We can think of this perspective, and more generally of the development of a global constitutionalism, with a note of optimism. For the first time in history, the tragedy that unites us all is perhaps generating the awareness that we are one people on Earth, united by the common condition in which we all live and by a common public interest, much more general than all national and partisan interests: the interest in the survival of humanity as a single people, united by the same rights and the common dangers of global catastrophes, which therefore requires a common system of guarantees of our rights and our peaceful and united coexistence.

**What do you think of the Italian philosopher's Giorgio Agamben's reflections on the dangers of creating a real state of emergency in the face of the pandemic and its political management?**

The invocation of the state of emergency is always a perverse temptation of all governments. In Italy, for example, emergency laws, which in my opinion are unjustified and largely unconstitutional, have been passed in the past, against

terrorism and mafia. But this certainly does not mean that in this circumstance, as Giorgio Agamben said, in Italy or Spain or Germany or France the emergency has become the norm and a permanent paradigm of government. I deeply doubt these generic and summary judgements, which may remove credibility from the claims of actual illiberal and unconstitutional involutions in the name of the emergency. However, I do not see such a danger in the measures taken so far around the world to contain the contagion. In Italy, in particular, our Constitution does not, fortunately, provide for the state of emergency provided for by the Spanish Constitution (art. 116) or the French Constitution (art. 16). But this has enabled anyway, as proof of the needlessness of this dangerous institution, the limitations of freedom of movement, freedom of assembly and personal freedom, to guarantee the safety and public health, provided for by the constitutional laws that declare these freedoms.

It should be noted, however, that the Constitution would require that the limitations of these freedoms be adopted through the albeit numerous decree-laws issued by the government in the months of the emergency, and not also through their *implementing provisions* produced in the form of the decrees of the Prime minister. Unlike these administrative measures, indeed, the decree-law is an act of legislative rank, which is required by constitutional laws for the limitation of freedom of movement and personal freedom. It is precisely the necessity and urgency generated by the pandemic that would justify, as never before, the use of the decree-law, which is subject to the

control of Parliament and, earlier, to the examination by the President of the Republic who performs a constitutionality check. The Parliament, however, remained substantially an outsider in the formulation of all the vast apparatus of the measures adopted. If the form of the decree-law, which is perfectly suited to deal with the emergency because in any case, it remains in force for 60 days, had been adopted, a parliamentary debate would have favoured the involvement and accountability of the opposition.

**What challenges does the criminal justice system face in managing the problem of the pandemic? Do you think that there are risks of a rollback of criminal justice guarantees?**

These risks always exist and, of course, the political climate of the emergency may accentuate them. I find the number of bans imposed in Italy excessive, some of which are dictated by an unjustified lack of confidence in the intelligence and sense of responsibility of citizens. Above all, I fear abuses and the margins of appreciation in the exercise of police powers to control compliance with health measures to contain the contagion. Finally, there is the risk of a strengthening of criminal organisations, which with the enormous amount of cash at their disposal will be able to buy many companies affected by the crisis at bargain prices.

**What role should judges play in the face of possible temptations or authoritarian impulses to control the pandemic?**

Above all, they must play a role in guaranteeing our rights against police abuse. The jurisdiction will also have to watch over the possible, unjustified

expansion of the emergency, both in terms of its duration and in terms of the nature of the measures taken, beyond the strict needs dictated by the danger of contagion.

**Do you think that a public health problem has been turned into a security or public order issue?**

It is an ever-present danger, all the more so if the power of government falls into the hands of populist forces that conceive democracy as the omnipotence of the governing majority and, in fact, of its leader. The emblematic case is that of Victor Orban, who instrumentalised the tragedy of the coronavirus, which appeared in Hungary in relatively minor forms, to close the parliament and suspend constitutional rights and guarantees indefinitely. I believe that the European Union, if it wants to have any respect for itself, should intervene by initiating the sanction procedures provided for in article 7 of the Union Treaty against the Hungarian government, through the European parliament or the Commission or a third of the Member states. But even without such a coup d'état, authoritarian involutions are always possible. Just think of the *full powers* requested in Italy by Matteo Salvini, at a seaside rally last summer when he predicted, based on polls, a certain electoral victory. For this reason, to face such dangers, constant vigilance and severe criticism is needed not only of practices but also of authoritarian temptations on the part of democratic culture.

**How have you experienced the prison problem in Italy during the first days of the pandemic in which there were protests, violence and dead prisoners?**

Our government has given a shameful

response to the pandemic in prisons. The prison population in Italy currently numbers over 55,000 prisoners, while our prisons can only host 47,000. This overcrowding in itself creates a responsibility on the part of the government for the infections and deaths resulting from the impossibility of guaranteeing the prescribed distances. To reduce this overcrowding, all that would have been needed was a legislative measure that - based on the urgent need to protect the health and life of prisoners from the risk of contagion - would have transformed the sentences of prisoners with less than three years to serve into home detention.

**How do you conceive of the penalty in times of coronavirus? What challenges do prison conditions face?**

I believe that among the many teachings of this pandemic there is also the need to put an end to the centrality of prison in the penal system. Prison custody is an institutional contradiction. According to its theoretical and normative model, it should consist of an equal punishment, entirely and peremptorily determined by law, consisting of the deprivation for a fixed period of personal freedom of equal quality even if quantitatively differentiated and graduated by the legislator, and then by the judge, in proportion to the seriousness of the crime. In fact, because of its nature as a total institution, imprisonment is not - because it cannot be - a simple limitation of personal freedom, as the principle of legality and the principle of legal certainty want, but is instead an indeterminate, unequal and extra-legal set of deprivations, harassment and afflictions, both corporal and psychological.

Well, the coronavirus pandemic, with the need to ensure adequate distances between prisoners, could offer an opportunity to reduce this institutional contradiction: improving the living conditions of prisoners, guaranteeing them all rights other than personal freedom, drastically limiting the duration of prison sentences, reserving them only for the most serious offences to fundamental rights, and providing for a wider range of sentences for other offences, such as special surveillance, semi-freedom, social services, house arrest, obligatory stay and prohibition of habitation. These measures currently exist in Italy as alternatives to detention that can be imposed during the execution of the sentence, but which could well be converted into sentences imposed by the judge at the time of conviction.

Then there is one last measure, apparently unique, which would allow a reduction in the overcrowding of our prisons, all the more necessary today because of the danger it poses to the lives of prisoners: the provision of a *numerus clausus* (limited number) under which periodically - let us suppose from year to year - prisoners who still have to serve sentences or residual sentences of lesser duration should be allocated, in the number exceeding the capacity of our prisons, to alternative measures to detention, such as probation or house arrest. This would be a rational measure in several respects: a sort of automatic pardon which would benefit all prisoners, making imprisonment more compatible with the principle of the dignity of the person and the prohibition of overcrowding, and which would condone short or very short detentions, which, as is documented by all criminological research, have no punitive

sense and no preventive function.

## Notes

<sup>1</sup> This interview has appeared in Spanish in Iñaki Rivera Beiras (2020), (ed.), *Pandemia. Derechos humanos, sistema penal y control social (en tiempos de coronavirus)*, Valencia: Tirant lo Blanch.

<sup>2</sup> **Luigi Ferrajoli**: is one of the greatest philosophers of law in Italy and the world. After serving as a magistrate, he was professor of Philosophy of Law at the University of Camerino and the University of Roma Tre. He has received dozens of honorary degrees. His main works include *Teoria assiomaticizzata del diritto* (Giuffrè, 1970), *Diritto e ragione. Teoria del garantismo penale* (Laterza, 1989), *Principia iuris. Teoria del diritto e della democrazia* (Laterza, 2008).





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# Assessing strategies to prevent and control Covid-19 in prisons in the initial emergency phase of the pandemic

*Matt Ford<sup>1</sup>*

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## 1. Introduction

Prisons were identified early on in the Covid-19 pandemic as potential sites for major outbreaks and transmission into the wider community (R. Coker, 2020). Prisons contain highly concentrated populations held in unhygienic conditions in buildings with poor ventilation and with high levels of churn among staff and prisoners. They also contain high numbers of those most at risk of developing more severe symptoms. As such, prisons provide an ideal environment for high levels of infection, illness and death.

Guidance on how to prevent Covid-19 entering prison populations and control outbreaks therefore became important resources for prison administrations. The World health organization (Who) developed a checklist to help support policy-makers and prison administrators implement its interim guidance on preparedness, prevention and control of Covid-19 in prisons and other places of detention (World health organization regional office for Europe, 2020a; 2020b). The interim guidance contained measures recommended to

prevent the virus entering prisons, to limit its spread in prisons, and to prevent transmission from within prisons to the outside community. It was published on 15 March 2020, and was based on the evidence about Covid-19 available at that time. Whilst prison services used a variety of sources of guidance to develop their strategies to deal with Covid-19, the Who guidance is considered the international standard. The Who make clear, however, that their checklist is not exhaustive.

Areas covered by the World health organization checklist include:

- human rights - to ensure good principles and practice in prisoner treatment and prison management;

- risk assessment and management - to prevent Covid-19 from spreading in prisons and to manage the associated risks;

- referral system and clinical management - to enable identified cases to be appropriately managed and receive adequate health care;

- contingency planning - to check that



contingency plans are in place and are adequately communicated;

training – to equip prison staff with skills to deal with Covid-19;

risk communication – to ensure message coordination and consistency, as well as their accuracy, clarity and relevance in prison settings;

prevention measures – to assess prevention and control facilities in prison; case management – to ensure that cases are appropriately managed.

Covid-19 is a novel coronavirus and therefore its particular impacts, including those on prison populations, are unprecedented, and strategies to manage it untested. In March 2020, the Centre for crime and justice studies in collaboration with Antigone and the World Health Organization developed a survey to take stock of the incidence and spread of Covid-19 in prisons in Europe and to assess the different policies and practices pursued to limit possible infections, illness and death. The aim of the project was to produce an initial knowledge-base, for use by prison administrators and decision-makers, to help inform their evolving approaches in what remains a very fluid, unpredictable situation.

This article analyses the data collected by this survey to assess the impact of the Who guidance on rates of infection and death among a sample of European jurisdictions. The article seeks to answer the following questions:

Are rates of Covid-19 infection and deaths in prisons lower in jurisdictions that implement the Who guidance more extensively?

What impact do rates of community

infection, levels of overcrowding and proportions of older prisoners have on rates of infection and death in prison?

## 2. Methods

### 2.1 Survey design

The main areas covered by the survey were:

Overview data on total prison population, staffing, conditions of imprisonment.

Overview on prison health arrangements.

Official policy/policies on preventing and managing Covid-19 in prison.

Data on Covid-19 cases in prison, both in relation to prisoners and staff.

Prison disturbances and complaints related to Covid-19.

To assess official policy on managing Covid-19 in prison the survey incorporated the Who's checklist. The Who's guidance is considered the international gold standard and is therefore appropriate for international research. The survey asked respondents to assess whether policy at the time of the survey reflected items in the checklist in full, partly or not at all, or stating that insufficient information was available. Responses to this module therefore reflect respondents' interpretation of the policy, including disconnects between stated policy and implementation.

### 2.2 Data collection

The survey was circulated to members of the European prison observatory, an international coalition of non-governmental organisations and

educational institutes, on 9 April 2020 with a provisional deadline of 17 April 2020 for responses. The European prison observatory includes representatives from institutions who monitor prisons in Italy, Romania, Bulgaria, the UK, Greece, Germany, Poland, Hungary, Portugal, Latvia, Austria, France, and Spain. Responses to the survey were received for Austria, Bulgaria, Hungary, Italy, Portugal, Romania and Spain including Catalonia. Staff at the Centre for crime and justice studies completed the responses for England and Wales, Scotland and Northern Ireland. Responses were received between mid-April and early May 2020.

Due to time constraints and, in some cases, lack of transparency from prison administrations, the responses to the Who module for most jurisdictions are based on information respondents had access to, which variously included publicly available official sources such as published operational policies and guidance, media and other reports, corroborated anecdotal evidence and direct observation. The responses to the Who module for England and Wales and Northern Ireland are official responses from the prison administrations in those jurisdictions. A response to the Who module for Romania was not received as the respondent completed an earlier version of the survey that did not incorporate the Who checklist. The responses to the Who module for Spain and Catalonia are identical because the same strategy applied to both jurisdictions.

### 2.3 Analysis

The main analytical focus for this article is the potential impact of the extent of implementation of the Who checklist on rates of infection, illness and death in

prisons among the sample of jurisdictions. Other potential influences for which data was collected were overcrowding and the proportion of older prisoners in each jurisdiction's prison population. The survey asked for data on the proportion of other at-risk populations such as those suffering with cardiovascular diseases but the data was too inconsistent to include in the analysis. Infection rates in the community were also seen as important contextual variables so data on rates of Covid-19 related deaths in the community was collated from the website [ourworldindata.org](http://ourworldindata.org) for inclusion in the analysis.

To allow comparisons of cases and deaths in prisons among the jurisdictions in the sample rates were calculated using information provided by respondents on the number of staff in prisons and the number of prisoners. As testing was poor in many jurisdictions at this stage of the pandemic, transfers to hospital and deaths were calculated as proportions of the prison population, rather than as proportions of positive cases.

Age data provided by respondents was inconsistent so information on the percentage of prisoners aged over 50 and aged over 65 was collated from the Council of Europe's Space 1 Report 2019 (M.F. Aebi, M.M. Tiago, 2020).

Data provided on overcrowding was also inconsistent so a simple binary variable indicating whether prisons were overcrowded or not was computed. Several jurisdictions implemented measures that significantly reduced prison populations in the first wave of the pandemic and this may have had impacts on overcrowding which the survey did not capture.

Responses to items on the Who module were aggregated to produce scores for each jurisdiction in the sample.

The rate of cumulative deaths at 15 April 2020 in each jurisdiction is used as a measure of community transmission on the assumption that these were a better, although not unproblematic, measure of real levels of community infection. For example, Portugal and Austria had similar rates of confirmed cases in the community to the United Kingdom by mid-April, but these jurisdictions also had much higher rates of testing. Data on death rates in the community did not disaggregate information for the nations of the United Kingdom nor Catalonia from Spain. Other more limited data sources suggest that there was some variation in rates of death across nations of the United Kingdom.

Scores on the Who module and the consequent impacts on infection rates for England and Wales and Northern Ireland are analysed separately to the other jurisdictions because these responses represent official claims directly. Jurisdictions with fewer than half of the information on the Who module present are omitted from the analysis. The meanings of responses of *partly* were deemed too varied for meaningful comparison so these were also omitted from the analysis.

The survey was intended to capture real-time data to provide quick analysis to reflect the pace of developments during the initial stage of the pandemic. The analysis in this article looks for simple patterns in the data rather than applying sophisticated statistical tests to reflect the quality of the data. As such, the conclusions drawn are tentative.

### 3. Results

Table 1 shows data on factors and outcomes. Firstly, patterns in each factor and outcome are explored by turn, before correlations between factors and outcomes are analysed.

#### 3.1 Factors with potential impacts on outcomes

Among the jurisdictions information was provided for by non-state respondents about how far policy matched Who guidance, Spain and Catalonia had the fewest elements of Covid-19 policy that reflected items in the Who checklist fully, and also had the most items in the Who checklist not implemented at all. In this group of respondents, Scotland had the highest number of *fully* responses, followed by Italy. These two jurisdictions also had the lowest number of items from the Who checklist that were perceived not to be part of official policy, with only one item not thought to be implemented in each of these places. For jurisdictions where respondents to the Who module were representatives of prison administrations, far more of official policy was perceived to reflect items of the Who checklist than for jurisdictions where respondents were not from prison administrations, although there was also far less missing information for these jurisdictions. The official from Northern Ireland claimed that policy reflected 52 items of the Who checklist fully, 25 per cent more than in England and Wales. Only one item was claimed not to have been implemented in Northern Ireland, compared to two items in England and Wales.

Compared to the rest of the sample, Bulgaria had an exceptionally high proportion of older prisoners, with over a

**Table 1. Factors and outcomes<sup>2</sup>**

	Factors								Outcomes				
Jurisdiction	Who module 'fully'	Who module 'partly'	Who module 'not'	Who module 'no information'	% prison population over 50	% prison population over 65	Binary measure overcrowding	Rate of cumulative deaths in the community per million people	% cases among staff and visiting professionals.	% of suspected cases in quarantine	% of prison population testing positive	% of prison population transferred to hospital or specialist care	% of population dead of COVID-19
Catalonia	11	18	8	20	17.8	2.4	Uncrowded	390.89	0.91 (n=48)	-	0.697 (n=58)	0.3 (n=25)	0
England and Wales	41	17	2	0	16.5	3.6	Overcrowded	207.89	0.27 (n=96)	-	0.285 (n=232)	0.036 (n=29)	0.0184 (n=15)
Italy	25	23	1	11	24.7	3.7	Overcrowded	348.47	0.55 (n=209)	-	0.192 (n=111)	0.019 (n=11)	0.0035 (n=2)
Scotland	36	20	1	3	15.2	2.8	Uncrowded	207.89	-	2.58 (n=188)	0.11 (n=8)	-	0.0275 (n=2)
Spain	11	18	8	20	19.7	2.5	Uncrowded	390.89	0.96 (n=219)	0.9 (n=450)	0.062 (n=31)	0.002 (n=1)	0.004 (n=2)
Austria	17	9	1	33	14.5	2.3	Overcrowded	42.64	0.17 (n=7)	0.52 (n=43)	0.024 (n=2)	-	0
Romania					13.2		-	17.88	0.2 (n=22)	1.64 (n=330)	0.015 (n=3)	0.005 (n=1)	0
Portugal	19	7	7	27	21	3.1	Overcrowded	55.61	0.06 (n=4)	-	0.009 (n=1)	0.0086 (n=1)	0
Northern Ireland	52	5	1	1	13.2	2.9	Uncrowded	207.89	0.34 (n=5)	-	0	0	0
Hungary	6	14	3	37	16	1.4	-	13.87	0.01 (n=1)	0.28 (n=47)	0	0	0
Bulgaria	13	19	6	22	35.2		Overcrowded	5.04	0	-	0	0	0

third of the prison population being over 50 years old. Italy also had a very high proportion of older prisoners for the sample, with just under a quarter of the population over 50 years of age. Portugal, Spain and Catalonia also have high levels of prisoners aged over 50 relative to other jurisdictions in the sample.

Italy and England and Wales had the highest proportions of prisoners aged over 65 years old in the sample, followed by Portugal, Northern Ireland and Scotland. Spain, Catalonia and Austria all have similar proportions of prisoners aged over 65, proportions which are lower than other jurisdictions in the sample.

Data on overcrowding suggests that over half of the nine jurisdictions in the sample for which information was provided had overcrowded prison systems.

Spain, Catalonia and Italy had the highest rates of confirmed Covid-19-related deaths in the community at the time of the survey, followed by the United Kingdom. Relative to these jurisdictions, Portugal, Austria, Romania, Hungary and Bulgaria had relatively low levels of community infection.

### 3.2 Outcomes

All jurisdictions in the sample except Bulgaria had recorded cases of prison staff testing positive for the virus at the point the survey was conducted. Spain had the highest number of staff testing positive for the virus, closely followed by Italy, then England and Wales. Austria, Portugal, Hungary and Northern Ireland all had under 10 confirmed cases of Covid-19 among prison staff.

Taking into account the different number of staff who work in prisons among the jurisdictions in the sample sees some

changes to the ordering, with Catalonia having the second highest rate of cases, and Northern Ireland overtaking England and Wales. The figure for confirmed cases among staff in Northern Ireland refers to the end rather than middle of April, which suggests the rate could be more similar to that of England and Wales at this point. It is interesting that infections among staff in two pairs of jurisdictions, which are effectively subunits of larger jurisdictions, even out after controlling for staffing levels: Spain and Catalonia have similar rates as each other, as do England and Wales and Northern Ireland.

As it is known that testing was poor in many jurisdictions at this point of the pandemic, the survey asked for information on the number of suspected cases among prisoners as a potential proxy indicator of incidence. Only half of the respondents in the sample could provide this data. All of these jurisdictions had suspected cases. Spain had the highest number, followed by Romania and Scotland. At the lower end of the scale were Austria and Hungary, both with just under 50 suspected cases. Additional information was received that all 47 prisoners who were suspected cases in isolation in Hungary tested negative, suggesting jurisdictions with low numbers of suspected cases and no confirmed cases had no infection in prison at this point. After controlling for the different sized prison populations, Scotland ascends to be the jurisdiction with the highest proportion of the population suspected to have Covid, followed by Romania then Spain, Austria and Bulgaria.

All jurisdictions in the sample bar three - Bulgaria, Hungary, and Northern Ireland - had recorded positive cases of Covid-19 among their prison population at the time



of the survey. Scotland, Romania, Austria and Portugal had only recorded a handful of cases each (under 10). England and Wales had the highest number of confirmed cases, followed by Italy. Both of these jurisdictions had over 100 recorded cases. Catalonia and Spain also had relatively high numbers of recorded cases among the jurisdictions in the sample.

After controlling for different sized prison populations among jurisdictions with confirmed cases in the prison population, there is still a group of five jurisdictions, consisting of Catalonia, England and Wales, Italy, Scotland and Spain, with high rates of infection, and another, which includes Portugal, Austria and Romania, with low rates of confirmed infection. There are also still variations between jurisdictions with high rates of infection.

Prisoners experiencing the most severe symptoms of the disease probably represent the most reliable measures of how far the virus had spread in prisons in the sample. Most respondents could provide data on those prisoners transferred to hospital or specialist care. England and Wales and Catalonia appeared to have the highest number of prisoners experiencing severe symptoms, both with 25 or more prisoners transferred for medical care. Italy also had a high number of prisoners transferred to hospital. No other jurisdiction had more than one prisoner transferred to receive medical care, and in some of these jurisdictions transfers were reported to be for testing rather than treatment of severe symptoms.

Four jurisdictions recorded Covid-19-related deaths. England and Wales had by far the highest number, with 15. Spain, Italy and Scotland had all recorded two deaths each by the time of

the survey.

After accounting for prison population size, Catalonia had a far greater rate of prisoners transferred to hospital or specialist care than the other jurisdictions in the sample. The magnitude of difference between the proportion of prisoners transferred for medical care between England and Wales and Italy is reduced compared to the difference between the number of cases.

After accounting for prison population size, Scotland had by far the highest proportion of Covid-19-related deaths of prisoners, followed by England and Wales. Spain and Italy had a relatively similar proportion of Covid-19-related prisoner deaths at the time of the survey, much lower than England and Wales and Scotland.

Looking at the outcomes data in the whole, the data suggests that there is a group of five jurisdictions where prison systems were impacted significantly by the Covid-19 pandemic, as indicated by high rates of infection among staff and prisoners, hospitalisations and deaths, and another group of jurisdictions where prison systems were not impacted significantly.

### 3.3 Relationships between factors and outcomes

The data suggests that rates of transmission in the community quite strongly influence whether a jurisdiction has high rates of infection in their prison system or not. Rates of transmission in the community appear to correlate directly with rates of infection among staff. That jurisdictions which form sub-national parts of larger countries, such as England and Wales and Northern Ireland, and Spain and Catalonia, had similar rates of



infection among staff to each other, provides further evidence that rates of infection among staff reflected rates of infection in the community.

Looking at the six jurisdictions with the highest community rates of death their rate of Who guidance implementation can be compared. Among our jurisdictions with high rates of infection in prison, there seems to be at least some evidence of a correlation between the number of Who items thought to be implemented fully and infection rates. Catalonia, the jurisdiction with the highest rate of confirmed cases among prisoners, was one of the jurisdictions with the fewest checklist items perceived to be implemented fully. Italy had much higher numbers of items thought to be implemented fully and had a lower rate of infection. Scotland had a greater number of checklist items perceived to be implemented fully than Italy, and a correspondingly lower rate of infection. Spain appears to be an anomaly here, with the joint lowest level of Who guidance implementation but low rate of confirmed infection among prisoners.

As outlined in the methods section, Who module scores for England and Wales and Northern Ireland were analysed separately as representatives of prison administrations provided responses for these jurisdictions and are therefore not comparable to the other cases in the sample. They nevertheless provide at least some evidence of a correlation between the number of Who items thought to be implemented fully and infection rates. England and Wales had a high rate of infection among prisoners, whereas Northern Ireland had recorded no cases and had implemented a far greater number of the Who checklist items fully. Whilst the data suggests that Northern Ireland's

prison system was uncrowded whereas that of England and Wales was not at this time, this would only be a relevant factor to infection rates if the virus enters the prison system.

The data also suggests some correlation between overcrowding and infection rates among jurisdictions in our sample with high rates of transmission. Two of the three jurisdictions with the highest rates of infection among the group of five high infection jurisdictions had overcrowded prison systems, whereas the two jurisdictions with the lowest rates of infection among the high infection group had uncrowded prison systems.

More than anything else, the rate of hospitalisations looks like it correlates with rate of infection and, by extension, the extent to which Who guidance had been implemented. There appears to be some weak evidence of a correlation between the proportion of older prisoners and the proportion of the prison population who experience the most severe symptoms of Covid-19. England and Wales has one of the highest rates of prisoners aged over 65 in our sample and has high rates of hospitalisations and deaths. Italy also has one of the highest rates of prisoners over 65 years old and has a relatively high rate of hospitalisation, but a lower rate of death compared to other jurisdictions in the sample. Scotland has a high proportion of prisoners aged over 65 and has the highest rate of death, but there was no data for hospitalisations for this jurisdiction. Spain has a relatively low proportion of prisoners aged over 65 and a low rate of hospitalisations (although only one case) and a lower rate of death than other jurisdictions in the sample. Catalonia has a low rate of prisoners aged over 65 years old but has

the highest rate of hospitalisations in the sample and no deaths.

#### 4. Discussion

The data explored in this article suggests that in the initial emergency stage of the pandemic jurisdictions with high rates of community transmission were most at risk of high rates of infection in their prison populations. Within those jurisdictions, administrations that implemented the Who guidance more fully and which had uncrowded prisons reduced infection levels. There is some evidence jurisdictions with lower rates of infections and lower proportions of older people saw lower rates of prisoners experiencing the most severe symptoms of Covid-19.

At the time of writing rates of infection in the community in many countries have begun to rise again. Notwithstanding measures to control transmission in the community, preventing another increase in infection levels in prisons in these jurisdictions will be determined by recognition by prison administrations of the protective effects of implementing the Who guidance more extensively. There is scope for further research to assess pandemic readiness and infection risks as countries potentially enter a second wave.

#### Notes

<sup>1</sup> **Matt Ford:** is a research analyst at the Centre for Crime and Justice Studies. Matt leads on research projects at the Centre, particularly those involving quantitative data collection and analysis. He has a particular interest in mapping the size and scope of the criminal justice system, as well as self-harm and suicide in prisons. Before joining the Centre in 2014 he interned at children's charity Barnardo's where he supported evaluation research projects.

<sup>2</sup> All responses except those for England and Wales and Northern Ireland used publicly available information to complete the World Health Organization module, therefore not all responses are comparable.

Figures for overcrowding were computed into a binary measure due to inconsistent data provided by respondents. Due to a combination of reduced or suspended court activity, suspension of prison sentences and early release schemes prison populations were in a state of flux across European jurisdictions. Overcrowding figures not based on real time information may not reflect the reality in terms of levels of overcrowding in individual prison systems.

Figures for cases among staff are for approximately equivalent time periods in mid-April except for Romania, which is as at 7 May, and Northern Ireland which is as at 30 April.

Figures for cases among prison staff in Portugal are those publicly acknowledged by authorities, but there are no reported totals.

Staffing figures used to calculate rates of infection among staff mainly refer to figures from 2018 and 2019. Staffing

figures are for non-healthcare staff, and non-officer functions.

Prison population figures used to calculate rates of cases are real time figures.

There are media reports that there are prisoners with symptoms who are self-isolating in prisons in Northern Ireland and Portugal but no official figures on suspected cases. All 47 suspected cases in Hungary tested negative.

The one confirmed case of a prisoner with the virus in Portugal was contracted in the community.

Figures for prisoners transferred to hospital or specialist care are as at late April for England and Wales and Romania, and the start of May for Spain and Catalonia.

Deaths of prisoners are as at mid-April for Italy and Scotland, the end of April for England and Wales, and the start of May for Spain and Catalonia.

Figures for Scotland refer to the minimum number of suspected and confirmed cases in prisons as data was collated from imprecise announcements from the Scottish Prison service which gave active suspected and confirmed cases per day.

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# How the pandemic had aggravated the gendered impacts of drug policies on women who use drugs and incarcerated women for drug offences in Mexico

Corina Giacomello<sup>1</sup>

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## 1. Introduction<sup>2</sup>

“We cleaned it (marijuana), we packaged it, we bundled it up and it was like a process. In the town, people were happy when that kind of work began, because even children, and old people, people of all ages were involved”.

Gaby, Female prison centre Tanivet, Oaxaca, Mexico

2020 marks the tenth anniversary of the United Nations *Rules for the treatment of women prisoners and non-custodial measures for women offenders*, known as the Bangkok rules, which outline the features that prison systems should possess in order to guarantee minimum living standards for incarcerated women and stress on the importance of preferring non-custodial measures in the case of women who are pregnant, primary or sole caregivers and responsible for non-violent offences.

It will also be remembered as the year of Covid-19. Since the outbreak of the

pandemic, numerous calls have been made to prompt governments to release people from prison, especially the most vulnerable groups, such as pregnant women, women with children, the elderly and people with chronic medical conditions (Ohchr, Who, 2020). Such calls are not only urgent in the context of rapid infection and the risks for the prison population and prison staff, but are also a reminder of the need to widen and accelerate the implementation of alternatives to incarceration (Pri, 2020) given the detrimental effects of incarceration on inmates and their families. These are particularly evident in the case of women prisoners. Women accused of or sentenced for a criminal offence are usually the primary or sole caregivers of other people - mainly their children -, they allegedly participate mainly in minor, non-violent offences and they share a history of gender-based violence that often shapes their life since childhood and that usually also impacts on the crimes they commit and the way they are treated by the criminal justice system. The female prison population has been increasing steadily and at a faster rate than the general

world population and prison population as a whole (R. Walmsley, 2017). One of the underlining and strongly documented causes of such increase worldwide is the implementation of punitive drug policies that heavily rely on the use of pre-trial detention, minimum prison sentences and that obstruct or formally forbid the access to alternatives to incarceration for people on remand or sentenced for drug-related offences.

But prison is not the only facet of women's deprivation of liberty. Another effect of drug policies is the presence, particularly in some regions and countries - among them Latin America and the Caribbean - of compulsory drug treatment centres, which operate as private facilities, mainly run by religious groups or former drug users, in a context of semi-illegality and severe human rights violations. In 2012 several Un agencies published the Joint statement *Compulsory drug detention and rehabilitation centres* (United nations, 2012) in which they call for the closure of compulsory drug detention and rehabilitation centres and the immediate release of people arbitrarily detained. Nevertheless, compulsory treatment is still a reality in several regions and countries and it has drawn little attention during the pandemic.

This article looks at female deprivation of liberty in prison and in compulsory drug treatment centres in Mexico and argues that current drug policies foster violence against women and children and further undermine gender equality and development.

Women's narratives are the main methodological resource used to unpack some of the gendered impacts of drug

policy on women in detention. The case studies of women in prison for drug offences presented in the second section of this essay are part of an awareness-raising and lobbying effort developed with the civil society organisations Equis Justice for women (Mexico) and the Washington office on Latin America (Wola, United States). The cases are discussed within the larger framework of women in prison for drug offences. They benefit from the author's over ten years of empirical research, mostly in Mexican female and mixed prisons, as well as comparative law and policy research on women in prison for drug offences with a focus on Latin America (C. Giacomello, 2013a; C. Giacomello, 2013b; C. Giacomello, 2017a; C. Giacomello, 2017b; C. Giacomello, I. Erreguerena, I. Blas, 2017).

The information presented here on women who use drugs and are deprived of their liberty in drug treatment centres or in prison is the result of one year of research carried out by the author, including nine months of field work between February and November 2019 in i) two prisons, ii) two public and one semi-private treatment centre, iii) a semi-private opioid-substitution-treatment clinic, and iv) five private treatment centres (for people with low incomes) - three of these being for women and girls only and the others being for both men and women and adolescents of both sexes - in four states of Mexico.

## 2. Women in prison for drug offences

The incarceration of women for drug offences is a global phenomenon that has witnessed a staggering increase (M.C. Álvarez, 2018; M.C. Álvarez, 2019a; M.C. Álvarez, 2019b; Iachr, 2017; Incb, 2016;



Pri, 2020; Unodc, 2018; Un Women, 2014; Wola *et al.*, 2016). It is also the main cause underlying the growth of the female prison population. Although women still constitute a significant minority in all prison systems, making up 6.9 per cent of the global prison population, the Institute for criminal policy research's prison lists testify that the female incarceration rate has increased by 53 per cent since 2000. In comparison, general prison population growth advances at the same pace as the world population, increasing by roughly 20 per cent in the same time frame (R. Walmsley, 2017, p. 2).

In Latin America, drug offences constitute, depending on the country, either the principal or the second reason for the incarceration of women (C. Giacomello, 2019).

The following cases represent some of the women incarcerated for drug offences in Mexico. They strengthen existing knowledge with regard to incarcerated women's profiles, and to their involvement and participation in drug offences. These are often poor, uneducated women with a history of violence used against them as children and/or sexual gender-based violence used against them as women and girls, who grew up in a context of general underdevelopment and a lack of state services, in which drug trafficking organisations can proliferate. Women mainly become involved in trafficking through their male partners. Their role as agents in a context of victimisation makes the difference between consent and coercion to commit a crime more complex. Whereas most of the women I interviewed acknowledge their active

participation in selling, transporting, or introducing drugs into prisons or trafficking them across borders, the context of their involvement conveys a *forced choice* rather than free, willing and full consent. In addition, these complexities show the inextricable relationship between gender, violence and punishment in which agency and victimisation coexist (C. Giacomello, 2017a).

## 2.1 Gaby

Gabriela Cruz (Gaby) grew up in a rural area in one of the most stunning states of Mexico: Oaxaca. Situated in the south-east, Oaxaca is a place of many beauties and treasures: a varied gastronomy, lush jungles, amazingly preserved pyramids, virgin white-sanded beaches, a multitude of indigenous languages, and mind-enhancing plants - Maria Sabina's *little children* full of psilocybin, *salvia divinorum*, and Gaby's village's main source of employment, marijuana.

Gaby had her first daughter when she was 15 years old. Her pregnancy was the product of rape by a man from her village. Gaby, a victim of violence against children (G. Lenzer, 2015) and of gender-based violence against women and girls (Council of Europe, 2011), was also, by then, a victim of one of the worst forms of child labour (ILO, 1999). Since the age of twelve, she had been carrying small packages of marijuana to Mexico City. Her recruiter was also a man from her village.

When she grew up, she fell in love with a drug trafficker and became pregnant again. The trafficker abandoned her. She had no money to pay for private

healthcare, and public healthcare in Mexico is insufficient, especially in rural areas. Gaby's child was born with physical and brain paralysis, and Gaby continued to carry marijuana in order to pay for medical examinations.

So far, the state had been almost absent from Gaby's life. Neither the sexual violence nor the child-labour exploitation merited its attention or intervention. Poverty and underdevelopment were balanced by the employment provided by illicit crop cultivation, and lack of healthcare was *compensated* with local knowledge of herbs and infusions.

One day, the state became interested in Gaby. She was arrested when transporting marijuana and given a ten-year prison sentence. She was locked away together with her child and finally became a number. The only official trace of Gaby lies in the registers of another global phenomenon with specific impacts in Mexico and Latin America: international drug policy. Mexico is not only host to opium and marijuana cultivation, cocaine and heroin flows, and other facets of international drug trafficking (Unodc, 2019). It is also home to some of what the United Nations Office on Drugs and Crime (Unodc) has labelled "collateral consequences" (Unodc, 2008) - namely, the increasing incarceration of low-level offenders and drug users as well as lack of treatment for dependent drug users.

In light of the drug policy paradigm, where rates of incarceration are an indicator of success (D. Bewley-Taylor, 2016), Gaby's prison sentence represents a step forwards, towards a *drug free world*. But as we dissect Gaby's story and peel

back the layers of gender-based violence, social exclusion and racial discrimination, as well as the impacts of imprisonment on her child, the balance shifts towards other possible interpretations. Gaby's story becomes part of a global trend: the gendered impacts of drug policy on women and development.

During her detention, she was transferred from a mixed prison - a prison where men's facilities have a few spaces for women; either dorms, sections, or some sort of separate buildings - to Tanivet, an all-female facility closer to the state capital. Gaby's son was no longer in Tanivet with her since she had had to face the choice of whether to keep him with her or send him to a public institution to receive rehabilitation for his conditions. At first, she asked the judge to grant her the right to accompany her son to rehabilitation and come back with him so they did not have to part. The judge, however, argued that "children are one matter and the crime is a different one", adding that "she should have thought about it before trafficking marijuana". Such arguments constitute a violation of article 9 of the *Convention on the rights of the child*, which protects the children's right to be close to their families as long as it is in their best interest. They also do not take into account the *Un Rules for the treatment of women prisoners and non-custodial measures for women offenders* (Bangkok rules) on applying non-custodial measures to women who are sole or primary caregivers of children (C. Giacomello, 2018). Gaby had to choose between her son's right to health and his right to being close to her, while both rights are interdependent and indivisible human rights (E. Verhellen, 2015).

## 2.2 Sonia

Sonia's story shares common traits with Gaby's. She was accused of possession of cocaine, which translated into a five-year prison sentence. She transported the drug from Guatemala to Mexico, hidden under her skirt, travelling on a bus, with her two-year-old son on her lap and her recruiter-husband sitting beside her. The way she tells her story echoes those of most drug mules: an economic emergency - a debt incurred by her husband - which led to her husband participating as a mule in the largest world land corridor for cocaine. He then told her to travel with him: in that way, they would pay off the debt more rapidly. She refused at first, not wanting to put her family's well-being at risk, but she finally accepted. The gender axiom mandated that she obey her husband and endure the violence. She did both and simultaneously fulfilled the prescription of the good mother: she would take her youngest son with her, since it was her responsibility to look after him.

Gender prescriptions can be used to camouflage trafficking: young, beautiful women crossing borders and seducing guards, normal-looking women queuing as prison visitors, *families* travelling together, the woman dutifully sitting by her husband (C. Giacomello, 2013a). In this case, Sonia's husband suggested she should hide the drug taped to her legs, under her skirt.

When arrested, they were taken to the federal police prosecution office. Officials threatened to take Sonia's son from her "and give him to a family who truly loves him". The child was later sent to a public institution and both Sonia and her

husband underwent pre-trial detention. He was released and she was sentenced. The lawyer convinced Sonia to plead guilty to the accusation, so her husband could be freed and go back to Guatemala with their child. Sonia has not seen her children since her imprisonment, her husband having never fulfilled his promise to visit.

Both Gaby and Sonia, together with dozens of incarcerated women I have spoken with over the years, share three axes that condition their agency in drug offences, since most of them acknowledge having committed an offence. The first is underdevelopment: multifactorial poverty, lack of access to basic services, little or no economic opportunities, the feminisation of poverty, and a low level of schooling. This axis is reinforced by gender discrimination and violence, which run through these women's lives and have an impact on how they become involved in drug offences, the roles they play and their exposure to being caught transporting drugs. The axis of drug policy manifests itself in two ways. First, through the creation, via prohibition, of illicit drug markets and drug trafficking organisations, which mirror hegemonic gender systems and treat women and children as disposable objects, maintaining sexist structures that lead to the exploitation of women's labour by their male partners, patriarchal relations with regard to illicit waged labour, and patriarchal violence and culture.

The other direct result of drug policy is the implementation of a punitive discourse that rests on incarceration as a means of deterrence. This has not only clearly failed, given the growth of illicit drug markets (Unodc, 2019), it has two

consequences that are obliterated by the rhetoric and purposes of drug policies themselves. The incarceration of poor, uneducated women who are mostly victims of violence is one such consequence. The impacts of incarceration on millions of children with incarcerated parents and the creation of institutionalised, transnational children is the other (C. Giacomello, 2019).

Drug policy, therefore, creates the conditions for women's exploitation in a context of structural inequality, and their further exclusion through incarceration. Women incarcerated for drug offences are, rather than traffickers, trafficked women. The interplay of gender systems and drug policy sets the stage for the human trafficking of women by both the patriarchal state and criminal organisations. Through the current implementation of drug policy, particularly the hyper-use of the criminal justice system to the detriment of health-centred approaches, states not only fail to accomplish their mandates in terms of development and gender equality, they also generate and reinforce new and existing forms of discrimination and violence against women.

That is also the case for women who use drugs, as shown in the following section.

### 3. Women's drug use and access to treatment

In 2008, the Un Office on drugs and crime identified five unintended consequences related to the implementation of the current international drug policy framework, which is made up of the three Un conventions on drugs and drug-related policies.<sup>3</sup> These consequences are: i) the creation of a criminal market; ii) *policy*

*displacement*, meaning that more resources have been put into supply-control efforts, thus neglecting public health-oriented measures, despite the fact that public health is "the driving concern behind drug control" (Unodc, 2008, p. 216); iii) geographical displacement, or the *balloon effect*, which changes production trends and trafficking routes in order to avoid law enforcement; iv) substance displacements; and, finally v) "the way the authorities perceive and deal with the users of illicit drugs". The Unodc continues, "A system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalised from the social mainstream, tainted with a moral stigma, and often unable to find treatment even when motivated to seek it" (Unodc, 2008, p. 216).

This section is concerned with the following unintended consequences: policy displacement (ii) and how authorities deal with drug users (v).

Available information shows that, at the global level, women use illicit drugs much less than men do, while women's non-medical use of opioids and tranquillisers is at a comparable level to that of men, or higher (Unodc 2018, p. 6). Data from Latin America (Cicad, 2019) and Mexico (Inegi, 2017) confirm these trends. Gender differences with regard to drug use tend, however, to be reduced or disappear among adolescents. Women usually become involved in drug use mainly through intimate male partners, and tend to develop dependency more rapidly than men, a phenomenon known as the *telescoping effect* (Unodc, 2018).

According to the Council of Europe's



Pompidou group's study *Improving the management of violence experienced by women who use psychoactive substances*, women drug users experience more and more severe violence than i) men, ii) women in the general population, and iii) male drug users. Also, people who use drugs have experienced more violence than people who do not use drugs (T. Benoit, M. Jauffret-Roustide, 2016). Women drug users are victims of i) domestic and intimate partner violence; ii) violence during childhood; iii) drug-use scenes, mainly sexual violence; iv) sex work-related violence; v) human trafficking-related violence and vi) institutional violence. The latter manifests in different settings, including police stations and patrols, as well as in drug treatment centres, particularly in those shared by male and female patients.

According to the International narcotics control board, "fewer women than men who need to access treatment are able to do so" (Incb, 2016, p. 8). Furthermore, women who use drugs and are victims of violence are usually denied access to shelters for women victims of violence based on their drug use, either by law or by institutionalised practice, thus leaving them and their children in a situation of further vulnerability due to the actions of state and private institutions (T. Benoit, M. Jauffret-Roustide, 2016).

### 3.1 Women in drug treatment centres in Mexico

In Mexico, public drug treatment facilities are scarce: only 44 residential centres, plus 11 facilities operated by Centres of juvenile integration (Centros de integración juvenil, Cijis, a government-funded civil organisation)

versus an estimated 2,108 private centres (Conadic, 2019a). Only half of the private centres are registered with the National commission against addictions (Comisión nacional contra las adicciones, Conadic), which is, among other functions, the authority responsible for the monitoring of drug treatment centres. Of the 1,045 registered centres, only 348 are recognised by Conadic, which means that they have been evaluated and supervised. Of these, 99 are for men and women, 34 for women only and the rest for men only (Conadic, 2019b). Cijis are also mixed. As in the case of prisons, therefore, women are mostly treated in mixed centres. The sizeable dominance of unregistered and unsupervised residential treatment centres translates into a myriad of methods, living conditions, and often abuses. Most centres, colloquially known as *barns* (*granjas*) or *annexes* (*anexos*), are places where physical punishment is common, together with psychological ill treatment, forced labour, sexual abuse and killing. For drug users forced to live in these centres indefinitely, not waking up the next day is a concrete threat. Unfortunately, academic research on this topic is scarce, as venturing into these centres is risky.

As explained in the introduction to this article, the following pages are based on field work carried out between February and November 2019 as part of a research project that the author developed for the University of Chiapas and Equis Justice for women. The interviews with women and girls were carried out individually or in groups, depending on the women's choice. Both in prison and treatment centres, privacy was guaranteed and the conversations took place in confidential settings. The interviews centred on two

main topics: the development of dependent drug use in relation to interviewees' life stories, and interviewees' experiences in residential treatment.

In terms of drug use, the data reflect national trends, with alcohol and tobacco being the first drugs used and marijuana the first illegal one (Instituto nacional de psiquiatría Ramón de la Fuente Muñiz, 2017). Drugs of impact - that is, those that cause more individual and social harm - are mainly crystal meth, heroin and cocaine-type drugs. All drug use, with one exception, begins in childhood (the lowest ages being six and nine) and adolescence. Family members (mainly fathers and brothers) are the main vector of introduction to drug use. For example, Marta was given cocaine by her father, a federal police officer, when she was 12, so that "no one could fool her when she grew up". Most women have families with precedents of alcohol abuse.

Of the 43 women and girls, 21 reported sexual abuse. The main perpetrators were uncles, stepfathers, fathers, grandparents and cousins. A total of 23 had children. That was the experience of Sarah, who was abused by her older cousins when she was eight and until she was 11, every Sunday afternoon, right after mass. Or Tamara, who was abused by her grandfather and then sent to a juvenile detention centre after she stabbed him to death at the age of 16. *Cat (Gato)* was raped by her grandfather beginning when she was three years old and then by her father at the age of 16. Sexual violence is not usually reported, and when it is female children are usually not believed. None of the multiple forms of violence these women suffered as children led to consequences for the perpetrators. They

did, though, for their victims. These women's relationships with drugs are intrinsically related to their life stories and gender (M. Romero Mendoza *et al.*, 2018).

The following cases provide an example of the narratives that shape the findings of the research presented here. The first is the case of Alejandra, an incarcerated woman at the time of the interview. The second is that of Sol, a young adolescent who worked as a killer for a drug cartel and was detained against her will in a private treatment centre.

### 3.2 Alejandra and Sol

"You have had a very difficult life...", I state, after more than 40 minutes of listening to her, feeling that a piece was missing. "After a situation that happened to me... I changed. I was happy..." she says looking down, "I was happy, happy..." she reaffirms, her mind recollecting memories from a time in her childhood. "Did someone hurt you?" I ask. Her story finally begins.

Alejandra (Ale) was thirteen and she lived in a village in Chiapas, a poor state in the south of Mexico. She lived with her grandparents and her siblings. Both her parents lived in other Mexican states. One morning she was walking to school. She usually walked with a school mate, her platonic love. But that day he did not show up. Two neighbours appeared. They hit her ankles with a stick and forced her to walk with them to a nearby field. She called for help, but nobody came. "They did everything they wanted with me", she said, raping and beating her for hours. When they let her go, they urged her not to tell anybody and threatened to rape her sisters if she did. They started standing in front of her house every day, checking on



her, forcing her into fearful silence. After a few days, she shared what happened with her grandmother. Yet even after her family told the police, nothing happened. She went back to school a few days after that, changing the way she went back home, trying to avoid them. But one day the same two men intercepted her. They took her to a house and kept her captive, raping and beating her. "There were kids in the room", she said, perhaps the men's sons or nephews, and they would say to them: "Look and learn how to treat women". After three days, they released her.

That was the story that changed Ale's life. Her adolescence and youth were marked by drug abuse and detention in a juvenile penal centre. She was accused of being an accomplice in a homicide, and turned to prostitution to obtain money to pay for drugs. Yet she needed more drugs to find the strength to sell herself again. When I met her, she was in pre-trial detention in the female section of the medium-security prison El Amate, being held for robbery with violence.

Sol was 15 years old when I interviewed her. She was kept in an *anexo*. Her family brought her there by force and she was dragged inside, with violence, by the *anexo's guards* (inmates who acquire some degree of authority within the centres' vertical regime of control). She feared for her life: on the one hand, Fito, a *military man* or *former police man* in charge of the centre's security - as the women and girls I spoke to described him - could punish her and her fellow inmates for giving an interview. On the other, she knew that the drug cartel she used to work for might attempt to murder her: "I left the cartel; there is no way out of the cartel, only

death".

Her drug use began when she was six, with inhalants. She grew up in the red zone of a city in northern central Mexico, with her mother, a sex worker. Then her mother moved to Tijuana, on the northern border, where she started working as a *company lady* for a drug cartel. Sol's father worked for a rival drug cartel on the other side of the border, in Ciudad Juárez. Sol was raped by her stepfather when she was four and then again, at the age of eight, by her mother's boss. He forcibly enrolled Sol to sell drugs, hire other women for the cartel and, later, to become a hitwoman, a *sicaria*.

### 3.3 Compulsory treatment and gender-based violence

Both Alejandra and Sol, and most of the women and girls I spoke to, shared a common life experience that can be summarised as follows: first, as children, violence is perpetrated against them within their family, mainly in the form of sexual and physical violence, neglect, and verbal violence. When they attempt to share details of these episodes of sexual violence they are not believed; on the contrary, they are accused of being liars or blamed for provoking their stepfathers or other male perpetrators. Other reactions - usually from their mothers - include battery. Two main scenarios develop before them: becoming involved in a cycle of gender-based violence in the context of relationships with older men, drug-use settings, and institutional settings (police stations, prisons and drug treatment centres); this usually leads to multiple pregnancies - as teenagers first and adult women later - and, sometimes, sex work, partner-induced sex exploitation and

crime. They might also end up living on the street. In either case, fleeing from violence opens up new means of abuse.

During the first part of the interviewees' narratives, drugs are clearly a coping mechanism against the pain caused by neglect and abuse in the household and in intimate partner relationships. When dependence develops and life starts revolving around drugs, their reference points - mainly family - fall apart and riskier situations occur, such as living on the street, sex work and exposure to criminalisation and incarceration. At this point, compulsory treatment comes into play, and women, once again, as in the case of women incarcerated for drug offences, are isolated in male-dominated spaces where plural forms of gender-based violence against women take place. Patriarchal structures, namely violence against women, and patriarchal culture, reproduce themselves in drug-using circuits as well as in treatment centres.

People are held in the treatment centres compulsorily for an indeterminate length of time. Selma, for instance, was held in a drug treatment centre for a full year without ever setting foot outside. It is a very gloomy, smoky place, too small for all the people living in it, with no ventilation or natural light. Because of her good conduct and achievements with regard to her treatment, she was allowed to go home to visit her young daughter. She went to the United States, near the border with Mexico, where her family lived. There she met her cousin, with whom she used to smoke methamphetamine before going into treatment. She smoked again. Despite the fact that she was reunited with her daughter, and that she had used the drug again, she dutifully returned to the

drug treatment centre. Selma's return to the centre should have been seen as a major accomplishment in her recovery. The centre, however, found out that she had relapsed, and relapsing is considered a condition of drug dependence. So she was sanctioned: she had to sit for weeks on the *bench of the relapsing users*, on display for the entire centre. This happened four months before I interviewed her in August 2019. She explained to me that her relapse implied that her previous record of treatment had all but never existed. "I have to accept that I have been here for four months, not one year and four months".

The length of the treatment is decided by the owners themselves based on an arbitrary evaluation of the process of recovery, while aiming for abstinence. Patients - usually referred to as *inmates* - are generally brought there by their families against their will and left in the hands of the owners, who isolate and make a living out of a secluded population of drug users on an obligatory path to abstinence. In other cases, drug users are picked up - practically kidnapped - by a centre's staff and forced into vehicles to be transported to the centre. Such *collectors* are known as *the Celestial patrol*. Personally, after interviewing Selma I felt an urgent need to escape. Never had I felt such a sense of imprisonment, not even in the top security section of a female federal prison.

Besides sexual violence, which does not seem to occur in the centres I visited, other forms of gender-based violence and discrimination affect women, especially in mixed centres. These can be divided into three forms: *discursive*, *structural*, and *normative*.

Discursive gender-based violence is reflected in how a centre's personnel refers to women who use drugs: more problematic than men, trying to attract men's attention for sexual purposes, individually responsible for drug dependence and its consequences. Girls and women are guilty of their drug consumption, structural conditions being completely dismissed and unaccounted for in the dependence diagnosis. Drug use is seen as an individual problem that people must resolve themselves through treatment and seclusion, aiming for abstinence. This discourse is applied to men as well; in the case of women, however, *personal failure* is reinforced by the transgression of gender axioms. Women users are doubly labelled and stigmatised, facing even further discrimination when they are mothers.

Patriarchal structures are reproduced in treatment centres' gender systems. For example, in a mixed treatment centre in the state of Baja California, the director, a former drug user himself, had married one of the female inmates, who is now sub-director. Women in mixed centres often need to find themselves what I define as *a dominant male* to make them their property, so that other users or staff do not try to openly sexually objectify them. In horizontal relationships among competing masculinities and their interaction with vertical patriarchal sexual domination over women, women are forced to *choose* a sexual partner that will take them out of the realm of *disposable sexual object* to the legitimate place of *woman of someone*.

In that same centre in Baja California, while men were allowed to go out to carry out *services* for the centre - basically

collecting money in the street or working for free in bakeries and other similar establishments or warehouses - women could never leave the centre. The reason given was that women had to be *protected*, mainly from themselves, since they were believed to sexualise themselves to seduce men.

Gender discrimination beliefs detrimental to women are reproduced in other practices. In two public mixed treatment centres I visited, men and women can have no contact with one another and have to follow clothing regulations that do not provoke sexual behaviours. For example, women cannot wear shorts, skirts or dresses. When verbal, written or oral interchanges happen between men and women, women are usually accused of inciting the men. One female patient told me that on one occasion she left her dorm in the middle of the night to go to the toilet and that she was wearing tight leggings. The day after, she received a warning and was told, "You are trying to get yourself raped". This woman had been a victim of sexual abuse since she was three years old.

#### 4. Conclusions

This text has focused on two groups of women in detention: incarcerated women and women in residential drug treatment centres. It has analysed, within the theoretical framework of gender, how gender, development and drug policy intersect. It has argued that the current system of drug control is part and parcel of patriarchal structures and that the interplay of drug policy and gender systems that are detrimental to women establishes the conditions for gender-based violence against women and

girls. It does so by promoting the prosecution and incarceration of people accused of non-violent, minor drug offences, and by a discursive and practical framework of the stigmatisation and criminalisation of people who use drugs. Drug policy creates a platform for the trafficking and sexual and labour exploitation of women and children, in their families and communities, as well as by organised crime and state institutions. By fostering a system of law enforcement to the detriment of a public health approach, current drug policies have unleashed a human rights crisis that mainly affects disadvantaged populations in developing countries and drug users. Interwoven with gender systems based on the *differential valence of sexes* as discussed above, disparities manifest themselves in the feminisation of poverty and violence against women. Both elements are underlying causes of women's involvement in drug offences and dependent drug use, and hinder development and women's empowerment, as well as the achievement of gender equality.

The international drug policy arena has taken notice of these issues in recent years.

As stated in the introduction, in 2012, twelve Un agencies published the Joint statement *Compulsory drug detention and rehabilitation centres* in which they call for the closure of compulsory drug detention and rehabilitation centres and the immediate release of people arbitrarily detained (United nations, 2012). In 2020, another joint statement was published, *Compulsory drug detention and rehabilitation centres in Asia and the Pacific in the context of Covid-19*, in which "United nations entities urgently appeal to Member states to

permanently close compulsory drug detention and rehabilitation centres and implement voluntary, evidence-informed and rights-based health and social services in the community as an important measure to curb the spread of Covid-19 and to facilitate the recovery and reintegration of those in the centres back into their families and communities" (United nations, 2020). Even though the statement refers to drug detention and rehabilitation centres in Asia and the Pacific, the situation it describes and the demands it outlines apply to compulsory drug treatment in general.

In March 2016, the Commission on narcotic drugs approved the resolution *Mainstreaming a gender perspective in drug-related policies and programmes* (Un Cnd, 2016). Despite the existence of the two previous resolutions on women, this one distinguishes itself by being integral in its approach. The text recognises women as users and points out barriers to access to treatment. It also stresses women's involvement in trafficking - mainly in the lowest positions of criminal organisations and often occurring through deceit and coercion - and highlights the importance of women as agents in drug policy, calling for women's active involvement in "the development and implementation of national drug-related policies and programmes" (Un Cnd, 2016, p. 3). Among other actions proposed by the resolution are i) to collect and share quantitative and qualitative data, disaggregated by age and sex, related to the world drug problem; ii) to prefer non-custodial measures when sentencing or deciding on pre-trial measures for a pregnant woman or a woman who is a child's sole or primary carer; and iii) "to



increase the coverage of existing programmes and to ensure access to those programmes while providing training and supervision for all relevant health and social care professionals working with women, including in prison settings” (Un Cnd, 2016, p. 4).

Also, in the final document of the Un General assembly, 2016, there is a specific reference to mainstreaming gender perspectives.

Collecting sex-disaggregated data, promoting the use of alternatives to incarceration for women who are pregnant or primary caregivers, improving and broadening women’s access to treatment and including affected women in drug policy’s design, implementation and evaluation are all fundamental steps that should be encouraged.

Most importantly, releasing people, and particularly vulnerable groups should be a priority of public policies aimed at reducing the negative impacts of incarceration.

The tenth anniversary of the Bangkok rules and the impact of social distancing and lockdown as a consequence of Covid-19 should act as reminders and prompters of the need to reduce women and girls’ incarceration and arbitrary deprivation of liberty *per se* and in relation to drug policy.

However, preventing arbitrary detention and implementing alternatives to incarceration will only have a cosmetic impact if they are not part of a wider spectrum of urgently needed transformations in the international system of drug control and its

implementation, rhetoric, indicators and practices. A *deep evaluation*<sup>4</sup> (C. Bacchi, J. Eveline, 2010) should replace the current practice of gender analysis in drug policy, to ensure the transformative power of gender mainstreaming and to eradicate the reproduction of patriarchal structures. Such an approach should start at the core of the international system of drug control and its institutions, which should lead the way for nations to undertake the same paths.

Furthermore, it is paramount that women who use drugs, drug use communities, professionals, and civil society organisations working on related issues, foster and become part of alternative, stigma-free, empowerment-oriented narratives and practices around gender, the use of drugs, women’s needs and strengths, gender-based violence, and caring responsibilities. The active participation of women who use drugs is not only ethically desirable, it is indispensable to the development of tools that i) effectively respond to the diverse situations of women and drug use, ii) address women’s needs, and iii) acknowledge and build on their strengths, providing orientation, strategies and practices for women who use drugs in general, with an intersectional approach.

Given the current status of violence against women and structural inequalities in most developing countries, it is obvious that current drug policy is not the only or even the main cause of violence against women and girls and that even deep changes in the way the drug conventions are implemented would not tackle background gender systems. If, however, gender inequality is not addressed properly by the international system of

drug control as part of a *scrutiny from within*, drug policy will remain a strong component of patriarchal structures, and a handy rhetoric and practical tool to reproduce women's symbolic and concrete detention. It will also remain an obstacle for the release of people during health-related emergencies.

## Notes

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<sup>2</sup> This article is a reviewed version of Giacomello Corina (2020), *The gendered impacts of drug policy on women: case studies from Mexico*, in *Drug policy and development*, <https://doi.org/10.4000/poldev.3966> (accessed 1 November 2020).

<sup>3</sup> The *Single Convention on narcotic drugs* (1961) as amended by the 1972 *Protocol*; the *Convention of psychotropic substances* (1971); and the *United nations Convention against Illicit traffic in narcotic drugs and psychotropic substances*, of 1988.

<sup>4</sup> Bacchi develops the methodology of deep evaluation as an *ex ante* policy analysis that consists of developing “a form of policy evaluation that encourages critical scrutiny of conceptual premises, models of implementation and conventional forms of evaluation within a proposed or existing policy” (C. Bacchi, J. Eveline, 2010, p. 16).



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# The social revolution of fraternity against the virus of identitarian ideology

*Patrizio Gonnella<sup>1</sup>*

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## 1. The virus of identitarian ideology

The individual, political and social effects of the coronavirus will probably be understood when the pandemic is over and largely digested. What world will we inherit? Will sovereignists also need a resuscitator and oxygen? Will financial globalisation resume its race towards the annihilation of local markets? Will the welfarist model once again find a place, as would be natural, in the public project of social democracies? Will inter-generational and international social solidarity, shattered by decades of brutal policies based on social exclusion and by neo-liberalist choices that have set the young against the old and indigenous against foreigners, return to be considered a value to be pursued? Will the delicate balance between health and economy be treated with greater kindness and reasonableness than in a past steeped in monetarist greed and savage privatisation? Will human rights be removed from superficial discourses, rhetorical speeches and celebratory praises and turned into unshakable rocks able to withstand the test of time? Will freedom of movement be

reconsidered on a universal scale? Will mass incarceration still be the only criminal policy on both sides of the Atlantic ocean? Will collective and mimetic desires for violence and repression still govern the public agora?

A few months after the beginning of the pandemic that forced us to live in a condition of partial compression of our traditional liberal conquests, we have unfortunately been able to more or less realise that it will not be a virus with club-shaped spikes that will suddenly bring us back our lost solidarity. The virus, however, has so far had some merit. It has, for example, confused the theorists of political and punitive sovereignty. It has eroded anti-solidarity certainties that until some time ago seemed unquestionable. It has not overturned the identitarian paradigm, it has not interrupted the long nationalist and racist wave, but it has shuffled the cards. Identity is always a bad thing. In the name of identity, rights are denied, doors are closed and human beings are excluded from life opportunities worth living. The identitarian obsession is the evil of contemporary societies. The individual



response to the virus and the policies to contain the epidemic are profoundly different. There are those who, although positive, are asymptomatic, those who get away with a little fever, those who need oxygen, those who end up in intensive care and those who die. Faced with the obligation not to leave the house, some are all in all happy sublimating their Oblomov syndrome, some become anxious, some have claustrophobic attacks, some panic. We are all different, a result of biology and biography. We are all different. Identity - at the registry office as in life - is individual, it is never collective.

Identitarian ideology is the most serious social-political disease in recent decades. Not only has it been the disease, but also the poisonous, nationalist and xenophobic treatment of the processes of economic and financial globalisation. Identitarian ideology feeds on the same neo-liberal cancer cells that have produced metastasis in the soft body of globalisation. At the time of the protests in Seattle in 1999, in Naples in 2000 and Genoa in 2001, a large and stratified ecological, libertarian, Catholic and progressive movement contested the risks and dangers of globalisation, without being fascinated by the anti-globalist neo-nationalist sirens. It is possible to be cosmopolitan without being neo-globalist. Unfortunately, that large and composite movement was brutalised by the repressive action of governments and the complicity of violent and marginal sectors of the movement itself. Violence produces violence, in an inextricable vicious circle that multiplies itself as if it were an epidemic, and has the ultimate effect of making the State's violence, which is serious because it is political, plastically legitimate.

The vaccine against globalisation is certainly not the identitarian response or violent street rebellion. Nationalist identitarian ideology is based on social exclusion, inequality, discrimination based on ethnicity, status and census. The answer to neo-liberalist globalisation is not violence against things and people but the non-violent cosmopolitanism of ideas and rights, the overcoming of the myth of sovereignty, with solidarity and inclusive universalism. The excesses of the free market and nationalism should be contrasted with non-violent indignation and mass solidarity. The same solidarity which, despite the spread of the virus, we have not yet been able to see reappearing in our shattered societies. The pandemic has taught us that we are all different, but all in the same situation of risk. It has shown us the injustices of a market that does not allow free access to treatment and vaccines. It has made us understand how important it is to invest in the universal social and health care system, in territorial health policies, in employment in the service sectors and public employment. It is unbelievable that if the world stops for one month the economy falls to pieces producing mass unemployment. Something is wrong with this system that needs to run to survive. But we cannot expect individual scared citizens to become aware in a solitary way of the need to regain lost cosmopolitan solidarity. This objective, however, should be precisely that of intermediate social bodies and democratic, ecological, Christian-social or, generally speaking, left-wing political forces.

## 2. Insecurity and virus

In recent years, the actions of left- and right-wing governments have been

indiscriminately characterised by security policies. Individual security has been elevated to a fundamental right despite the absence of such a constitutional norm. Security is a subjective condition. Faced with the virus that travels around cities or what happens in certain neighbourhoods or public parks, the perception of risk changes from subject to subject. Much will depend on life experience, age, gender, private and public stories, and the media. To feel individually safe means to feel free from dangers, risks, difficulties, unpleasant events, or something similar. Security policies have traditionally been entrusted only to repression agencies (police, courts, prisons) taking for granted that security means the absence of crime. During the lockdown in Italy, we have seen a significant reduction in all crime rates (except for cybercrime or mistreatment in the family), yet individual feelings of insecurity have not changed. The risks of contracting the disease have only led to a change in the object of fears and dangers. The cards have been reshuffled, as have the hierarchies of personal problems and collective anxieties, which have subsequently turned into perceptions of insecurity.

Security policies in the era of neo-liberal identitarian ideology have been anti-solidarity policies, aimed at social exclusion, based on the paradigm of war. War has been declared on drugs, zero tolerance has been proclaimed, walls have been raised against migrants.

The post-pandemic solidarity challenge should be the one that cancels the old one-dimensional concepts of security while characterising and qualifying it as a composite and articulated security: social, health, welfare, work, food, human.

Making a person feel safe in a holistic way means offering him/her care, attention, income, work, and also protection from risks of aggression. Insecure life at the time of the virus has produced a pause in the policies of intolerance. It is easy, very easy to go back. Instead, in a sort of ecological, nonviolent and welfarist reconversion of public priorities, the old warlike, useless, inhuman, selfish model of security that has nothing to do with people's deep security needs must be deconstructed. It is necessary to avoid being overwhelmed by that anti-pedagogical axis between political forces and the people which, overcoming all technical, scientific, statistical, cultural and social mediation, has intended to satisfy securitarian drives, not inspired by human solidarity.

### 3. Empathy and imprisonment

All around the world, we have been for some time prisoners in our homes, forced to taste fragments of detention. Until now, however, this global and permanent state of imprisonment has not translated into greater sensitivity and empathy towards those who are suffering periods of incarceration in prisons. Tastes of deprivation of liberty experienced by almost the entire population of contemporary democracies have not been able to make them more empathic about the unnatural and pathological essence of the prison condition. Being locked up at home, at least up to now, has scarcely favoured the public consolidation of less cruel and divisive ideas of humanity. The Manichean way of distinguishing human beings between good people (deserving dignity and solidarity) and bad people (prisoners, from whom it is legitimate to take away dignity, solidarity and even

health since, all things considered, they have brought on themselves the condition of imprisonment) remains prevalent. For empathy to produce solidarity effects there is necessarily a need for strong, authoritative mediation by socially legitimate pedagogical agencies. The political parties (also on the left), not recently and probably not only in Italy, have given up this function, probably no longer having the ideological strength or moral credibility. Instead, they have fed a slippery and demagogic vicious circle on social and traditional media, which sees them in direct and permanent connection with individual citizens, users and followers. Solidarity and human empathy with prisoners are therefore not naturally produced. They require the high intermediation of those who explain, rationally and emotionally at the same time, that punishment is always suffering and that any division between friends and enemies (criminals) is outside desirable human coexistence, as well as being illegal, unjust and immoral. The only person who tried to play the role of mass social mediator was Pope Francis.

#### 4. The theology of fraternity and dignity in Pope Francis

On 3 October 2020, Pope Francis made public the Encyclical *Fratelli tutti*, on fraternity and social friendship. The word *security* appears twelve times in the Encyclical letter, never to endorse old concepts of repressive inspiration.

Some examples of the use of the word *security*: “There is a kind of *local narcissism* unrelated to a healthy love of one’s own people and culture. It is born of a certain insecurity and fear of the other that leads to rejection and the desire to

erect walls for self-defence. Yet it is impossible to be *local* in a healthy way without being sincerely open to the universal, without feeling challenged by what is happening in other places, without openness to enrichment by other cultures, and without solidarity or concern for the tragedies affecting other peoples. A *local narcissism* instead frets over a limited number of ideas, customs and forms of security; incapable of admiring the vast potential and beauty offered by the larger world, it lacks an authentic and generous spirit of solidarity. Life at the local level thus becomes less and less welcoming, people less open to complementarity. Its possibilities for development narrow; it grows weary and infirm. A healthy culture, on the other hand, is open and welcoming by its very nature; indeed, a culture without universal values is not truly a culture”. Or: “We also need to ask ourselves how sustainable a stability based on fear is, when it actually increases fear and undermines relationships of trust between peoples. International peace and stability cannot be based on a false sense of security, on the threat of mutual destruction or total annihilation, or on simply maintaining a balance of power (...). Fear and resentment can easily lead to viewing punishment in a vindictive and even cruel way, rather than as part of a process of healing and reintegration into society. Nowadays, in some political sectors and certain media, public and private violence and revenge are incited, not only against those responsible for committing crimes, but also against those suspected, whether proven or not, of breaking the law (...). There is at times a tendency to deliberately fabricate enemies: stereotyped figures who represent all the characteristics that society perceives or

interprets as threatening. The mechanisms that form these images are the same that allowed the spread of racist ideas in their time”.

Pope Francis’ fraternal social theology contrasts enmity with friendship, destabilises the criminal law of the enemy, replaces revenge with reasonableness and false security with solidarity. Fraternity is also a legally relevant proposal. It destabilises identitarian law and proposes a right that is not content to guarantee only a few (the local, the honest, the Christian) as its vocation is cosmopolitan. The sense of fraternity led Antigone to violate the cruel law of men who would have wanted to prevent her from burying her traitorous brother Polynices, taking responsibility for it. Hers, like that of Pope Francis, is not a familistic fraternity, but a universal human fraternity. A few months before the publication of the Encyclical letter, on 10 April 2020, Pope Francis placed prison, with its profound injustices and irremediable contradictions, at the centre of the television globe. Prisoners, former prisoners, children of prisoners, parents of prisoners, innocent and guilty inmates, victims of prisoners, judges of prisoners, guards of prisoners recounted the penalty of imprisonment. They were all protagonists of the Paduan prison community who were given a universally amplified megaphone. That multi-voiced story, in Italy alone, had about eight million viewers. One of the voices selected by Pope Francis whispered her experience to the believers as follows: “As a prison educator I see people entering jail deprived of everything: stripped of all dignity because of the crimes they have committed, stripped of all respect for themselves and for others. Every day I see

how they become more and more dependent behind bars: they need me even to help write a letter. These are the unsettled lives entrusted to my care: helpless, frustrated by their weakness, frequently deprived of even the ability to understand the wrong they have done. At times, however, they are like new-born babies who can still be formed. I sense that their lives can start over in another direction, definitively turning away from evil. My strength, however, is fading day by day. Encountering daily all this anger, pain and hidden malice ends up wearing down even the most experienced of us. I chose this work after my mother was killed in a head-on collision by a young drug addict: I decided to respond immediately to that evil with good. But even though I love this job, I sometimes struggle to find the strength to carry on. In so sensitive a service, we need to feel that we are not abandoned, in order to be able to support the many lives entrusted to us, lives that each day run the risk of ruin”.

Before her, a life-sentenced prisoner benefitting from an alternative measure had told his story as a former criminal prisoner because of the Mafia: “Many times that cry, *Crucify him, crucify him!* is shouted out in court-rooms and in newspapers. It is a cry I even heard against me: I was condemned, together with my father, to a life sentence. My crucifixion began when I was a child: when I think back, I see myself huddled up on the bus that took me to school, side-lined because of my stutter, with no friends. I started to work when I was young, without having a chance to study: ignorance prevailed over innocence. Then bullying stole what was left of childhood from this boy born in Calabria during the 1970s. I am more like



Barabbas than Christ, yet the harshest condemnation remains that of my own conscience: at night I open my eyes and I desperately search for a light that will shine upon my story”.

As Pope Francis had already written in a speech in 2014 addressed to the International association of penal law, scholars and jurists have a mission that must lead them to rise up as embankments against penal populism and its victims. On the day of the religious and cathartic rite of the crucifixion of an innocent man, Pope Francis breaks with Catholic tradition and his good manners, and puts, in the midst of a pandemic and freedom crisis, at the centre of the square the dignity of the *bad* man, who prison tramples on and continually puts at risk. Dignity, as Hannah Arendt and Stefano Rodotà have authoritatively written, is the right to have rights, the foundation of all human rights and fundamental freedoms. Human dignity, in its Kantian version as well as in the writings of Cesare Beccaria, is an inalienable and irrepressible right: it is the non-degradation of the person to object. It is not bound to one's own social behaviour but is inextricably linked to being a person in a biological and biographical sense. Prison inevitably hurts people's dignity. It is necessary to be aware of this. And the intellectual and moral integrity of any educator - such as the penitentiary educator, the Pope, the university professor or school teacher - cannot omit it. To have it quietly reminded, the immense audience of Catholic believers on the day of the ceremony held in a completely empty St Peter's Square has a particular value, in the sense that it aims at building empathy - for too long forgotten - between the hitherto

free people towards those who are still imprisoned. Has this warning helped to produce the game of identification and reduce the securitarian pressure that produces mass internment? Pope Francis tried this by showing loyalty to himself and his intuitions and decisions. Last but not least, when he decided to abolish the penalty of life imprisonment in the Vatican penal code with a *motu proprio* and included in it the crime of torture, defined in full compliance with the contents of the 1984 Un Convention. When Pope Francis speaks to the masses via worldwide broadcast or when he speaks to the few criminal law experts, he does not change the content of his rhetoric, although he cares to be a good disseminator by simplifying his language when necessary. However, he exposes himself in the role of an anti-populist pedagogue, knowing that penal populism produces widespread, unjust and classist imprisonment and that this, in turn, is inevitably detrimental to human dignity. The principle of *cautela in poenam* should induce judges and investigators to be more reasonable in inflicting prison sentences. Who knows if the experience of home detention has made them at least more cautious? Perhaps it was to them that Pope Francis mainly addressed the selection of the protagonists of the *via crucis*.

5. Social state-penal state,  
public-private, cosmopolitanism-  
sovereignty

It is not clear whether or not the health tragedy has taught us that to effectively tackle the risks of the pandemic we need more welfare state, personal services, public care for the elderly, supranational cooperation and state research. The penal state inherited from Reagan in the '80s,

and exploded also in Europe, made everything more complicated because the pandemic forced us to realise that not only did we need to lighten the burden of prison, but also that there were other priorities and that there was a desperate need for monetary liquidity, which could not be wasted in repressive security policies. During the hardest months of the pandemic, in Italy, the possibility of dying from the coronavirus was 416 times greater than of dying from a crime. It is now a matter of translating the statistical data, the perceptions of the few into the awareness of the majority thus sweeping away the penal populist rhetoric that, together with the liberalist one, has dominated the recent political scenario. Without the presence of public health care facilities investing in intensive care (unprofitable for the giants of private health care), without the public management of residences for the elderly and all justice services including prison services, without a cosmopolitanism of research and knowledge we would be swarmed by coffins in an incurable and hopeless universal contagion.

## Notes

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# Policy responses to Covid-19 in prison. Testing the (in)action of European institutions during the pandemic

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## 1. Introduction

The present contribution provides a tentative inquiry into the way European institutions have responded to Sars-CoV-2 (Covid-19) in prisons during the early months of the pandemic in 2020. This article deals with two distinct sets of institutions, as it covers both the initiatives adopted within the Council of Europe and the measures taken by the European union. The response of these institutions is assessed in light of their respective competences with regard to the prison system. While the Council of Europe has a long history of penal activism, with an extensive record of standard setting in the area of prison law and policy (D. van Zyl Smit, S. Snacken, 2009; P. Poncela, R. Roth, 2006), the European union has been a much less proactive player in this field. The reasons for its limited focus on prison matters lie in a dubious legal basis within the Treaties and the subsequent difficulty to adopt policy and legislative measures impacting the prison system.

The notion of *response* to the pandemic is

borrowed from the burgeoning literature on Covid-19 and prisons (C. Heard, 2020; L. Abraham, T. Brown, S. Thomas, 2020, p. 742). It includes both mitigation strategies to reduce the spread of the disease within prisons (such as the suspension of visits and other activities to enhance social distancing) as well as preventive strategies, such as the adoption of early or provisional release schemes to reduce prison density and prison population (P. Tournier, 2000, p. 6; A. Maculan, D. Ronco, F. Vianello, 2013, p. 42). Significantly, most of the scholarly analyses have developed along the lines of the World Health Organization's guide – published in March 2020 – which called for “strong infection prevention and control measures, adequate testing, treatment and care” (Who, 2020, para 1). These guidelines are underpinned by the idea that “prisons and other custodial settings are an integral part of the public health response to Covid-19” (S. Kinner *et al.*, 2020, p. 188).

Arguably, Who's guidelines (along with similar instructions issued by national bodies such as the Center for disease control and

prevention in the Usa) provided a first and authoritative guidance to orient institutional responses within the prison system. This goes to show the relevance of studying institutional approaches to prison policy, especially in the context of a significant upheaval such as Covid-19 pandemic. Accordingly, this article does not take stock of single correctional measures taken by prison administrations in the member states. Rather, we stress the importance of studying the overarching patterns in a policy response to the pandemic. In doing so, this article contributes to the literature on European prison policy (S. Snacken, D. van Zyl Smit, 2013, p. 1; G. Cliquennois, H. De Suremain, 2017, p. 165) by pointing out the specific features underpinning the European response to Covid-19 in prison. Our hypothesis is that emergence of a serious public health crisis might reshape the patterns of policymaking. The pandemic can therefore be characterised as an exogenous variable which may steer or alter the development of such policies.

In the first section we outline the policy response within the context of the Council of Europe. This is articulated in a number of legal and policy documents issued by some key Council of Europe's institutions. We carry out an analytical reading of the guidelines and principles they lay down, by placing them against the background of the European convention on human rights. In the second section, we provide an overview of the policy reactions developed within the context of the European union. While discussing the limited contribution offered by Eu institutions, the article analyses critically the effects of the pandemic response on Eu cooperation in criminal matters. We

conclude by highlighting the pandemic as a key variable for European policy. Arguably, while having transformative effects for standard setting in the field, the impact of the pandemic also highlights the endurance of some key patterns within European prison policy.

## **2. The Council of Europe: key texts and principles**

The Council of Europe has a long history of standard setting in the penal field. Since the late 1960s its organs have been issuing a long string of non-binding texts in order to steer the penal policy in the member states. The key actors in this development are the Committee of ministers and the Parliamentary assembly of the Council of Europe. The Committee of ministers, in particular, has been the real motor of Council of Europe's policymaking during the last few decades, by promoting the adoption of international conventions, including the all-important European convention for the prevention of torture (Ecpt). The Committee of ministers has also actively contributed to European penal policy by enacting recommendations. These are non-binding instruments addressing member states' governments and national bureaucracies. Recommendations, albeit deprived of legal effects, have proved truly influential as they are adopted unanimously by representatives of member states (usually civil servants and national experts) and thus reflect a European consensus within a given area (P. Poncela, R. Roth, 2006, p. 37).

The policy making process in the penal field relies heavily on the work of specific advisory bodies. The Committee of ministers is advised by the European

committee on crime problems (Cdpc) which oversees and coordinates all Council of Europe's activities in the field of crime prevention and crime control. In recent years, the Cdpc has entrusted a group of appointed experts, the Council for penological cooperation (Pc-cp or the Council), the task of proposing and drafting recommendations in the field of penal policy. The nine members of this organ have come to play a crucial part in fleshing out the key tenets of European policy, by providing detailed rules to guide the action of prison and probation administrations across Europe. Similarly, the Committee on the prevention of torture (Cpt) builds on the work of experts with diverse backgrounds to carry out its visits in the member states and ensure the respect of the Ecpt. The Cpt's tasks include the adoption of reports laying out standards concerning the treatments of prisoners (J. Murdoch 1999, p. 105; D. van Zyl Smit, S. Snacken, 2009, p. 13).

Unsurprisingly, the Pc-cp and the Cpt have been among the first bodies of the Council of Europe to enact guidelines focussing on the effects of the pandemic in prison. The activity of both organs reflects a distinctive feature of European prison policy, namely the combined influence of human rights law and evidence-based findings (S. Snacken, D. van Zyl Smit 2013, p. 12). The initiatives taken by the aforementioned institutions constitute the backbone of Council of Europe's policy response to Covid-19 in prison and therefore warrant a closer scrutiny. After looking into the specific provisions included in the selected texts, one should reflect on the principles underpinning them. This requires a short digression

through the case law of the European Court of human rights (Ecthr) and its key findings on the role of human rights in prison.

## 2.1 An evidenced-based approach to the crisis: the Pc-cp

The Pc-cp can be credited for adopting the most comprehensive set of initiatives to address the spread of Covid-19 across European prisons. By late April, the nine Council's experts had published a first statement with an overview of relevant documents and best practices to deal with the pandemic. The statement provides important advice to prison and probation services (as well as other relevant stakeholders) in the member states (Pc-cp Wg, 2020a). Two aspects are worth considering. Firstly, the document has a normative component in that refers to existing statements by other Council of Europe's bodies (including the Secretary general, the Commissioner for human rights and the Cpt) and draws extensively on some key principles and recommendations expressed in the European prison rules and other Committee of minister's recommendations concerning the right to health of prisoners. Secondly, the statement is underpinned by a preliminary survey of existing practices, in a way that reveals the pragmatic disposition of the Council's members (*what works* attitude).

In its statement, the Pc-cp appears keen to underscore the continuity with the *acquis*, by recalling some overarching principles of European penal policy. The principle of normalisation is key in this respect (D. van Zyl Smit, S. Snacken, 2009, p. 105), as European recommendations advise against the isolation of inmates suspected of

infectious or contagious conditions, when the same measure would not be taken outside the prison environment. The Pc-cp emphasises the notion of proportionality by stating that any limitation to family visits, as a means to reduce the risk of infection, should allow for a minimum level of contact. After all, as confirmed by the recently updated version of the European prison rules, restrictions of a prisoner's rights should always be "necessary and proportionate to the legitimate objective for which they are imposed": rule 3 stipulates the principles of minimum necessity and proportionality, thereby emphasising the Ecthr's finding, under Article 3 of the European Convention on human rights (Echr), that the suffering involved by deprivation of liberty must not go beyond the inevitable element of humiliation connected with detention. The Pc-cp also reiterates that prison administrations have a special duty of care *vis-à-vis* prisoners placed in solitary confinement on sanitary or safety grounds. This group should continue to receive adequate and meaningful treatment to prepare their release and subsequent reintegration into society. This rule embodies the overarching principle of social rehabilitation, enshrined by the jurisprudence of the Ecthr (A. Martufi, 2018, p. 672; S. Meijer 2017, p. 145). The statement also reminds that, in case of death or transfer to a hospital, prison authorities have an obligation to inform a person's closest relatives in order to guarantee the respect of their right to family life (Article 8 Echr).

Interestingly, the normative component of these standards is complemented by a *what works* attitude. Accordingly, the Pc-cp

identifies some important best practices as they appear from information submitted by member states and by pan-European organisations like EuroPris (see below). Unfortunately, one can lament the fact the statement fails to mention the jurisdictions from where these practices are sourced. These are however meant to assist prison and probation administrations across Europe "in dealing with the Covid-19 pandemic while respecting the principles of the rule of law and of human rights" (M. Aebi, M. Thiago, 2020, p. 4). The approach of some national authorities illustrates attempts at coping with the pandemic through, among other things, regular and transparent communication (orally or in writing) about restrictions and sanitary measures being taken, establishment of free-of-charge phone or video-calls to replace family visits, financial compensation for prisoners' loss of income in case of inability to work, replacement of recreational or sport activities by additional Tv or other electronic entertainment options and additional out-of-cell activities (C. Heard, 2020, p. 10) and, finally, strict limitation of transfers to be executed only for "carefully estimated security reasons".

More recently, in a follow-up statement, the Pc-cp, while acknowledging some positive trends (e.g. the increased use of technology or the greater involvement of inmates and their families in the enforcement of safety measures), has expressed criticism about what it sees as worrisome tendencies that the pandemic might have triggered or exacerbated. While the use of new technologies in prison should be regarded as a positive development for maintaining contacts



with the outside world, the Pc-cp warns that remote training and educational activities as well as remote visits with family, lawyers and others should only be regarded as *complement* to face-to-face contacts. In other words, virtual means of contact should not be used as a substitute to meaningful in-person interactions. Although some of the new technologies adopted during the crisis are likely to be placed on a permanent footing (C. Heard, 2020, p. 12), arguments like security or cost-effectiveness in the use of such tools should be weighed against “the importance of preserving direct positive human contact and interaction between staff and offenders for helping achieve desistance from crime” (Pc-cp Wg, 2020b, p. 2).

In a similar vein, the Pc-cp has called for a limited use of solitary confinement on health and safety grounds (e.g. as a means of quarantining prisoners infected with the disease). Any such measure should be temporary and proportionate to the severity of the crisis, its impact and time span. Periods of solitary confinement should be ended as soon as the cause for their introduction has ceased to exist. Besides recalling the principle of proportionality, the Pc-cp has invited prison authorities to accompany the adoption of confinement-like measures with “counterbalancing activities”, including in-cell educational training and recreational activities. The Council’s stance seems to build on empirical evidence confirming the harms of solitary confinement, which affects physical and mental health through social isolation and sensorial deprivation (C. Haney, 2018, p. 285; S. Shalev, 2014, p. 27). It is a well-documented fact that the negative implications of solitary confinement may

hamper rehabilitation efforts and reduce chances of a prisoner’s reintegration into society (F. Coppola, 2019, p. 222). The Pc-cp thus keeps faith to the Council of Europe’s commitment towards a penal policy underpinned by social rehabilitation as a key rationale for punishment.

## **2.2 An authoritative guide to coping with the pandemic in prison: the Cpt**

Contrary to the far-reaching framework designed by the Pc-cp, the Cpt’s stance is narrower and reflects this organ’s mandate as the watchdog of the Ecpt (J. Murdoch, 2006b, p. 125) with a particular focus on enhancing the condition of prisoners. Yet famously the Cpt’s supervisory activity has contributed to flesh out the prohibition of inhuman and degrading treatment stemming from Article 3 Echr by providing valuable findings to the Strasbourg Court when adjudicating on claims of ill-treatment (G. Cliquennois, S. Snacken, 2018, p. 7). It is against this background that one should read the *statement of principles* issued by the Cpt on 20 March 2020. The influential role of the Cpt in providing substance to Convention’s guarantees should be borne in mind as the stance taken in respect to the pandemic in prison will most likely orient future recommendations to the member states and may impact the Court’s interpretation of Article 3 Echr.

To begin with, the Cpt reiterates the broad scope of its intervention which applies to all places of deprivation of liberty, including police detention facilities, penitentiary institutions, immigration detention centres, psychiatric hospitals and social care homes. Interestingly, the Cpt includes among the settings where deprivation of liberty may



take place “various newly-established facilities/zones where persons are placed in quarantine” (Cpt, 2020, p. 1). Arguably, the lawfulness of this form of detention can be derived from Article 5.1(e) Echr which refers to deprivation of liberty in order “to prevent the spreading of infection diseases”. This provision should however be interpreted strictly so as to allow detention only when the disease in question is dangerous for public safety and in so far as deprivation of liberty is the “last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest” (Ecthr, judgment 25 January 2005, *Enhorn v. Sweden*, 56529/00, § 43). When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.

More substantially, the Cpt reminds the absolute nature of the right not to be tortured or subjected to inhuman and degrading treatment. As has been noted (N. Mavronicola, 2015, p. 721), despite its absolute nature, the Ecthr has consistently accepted that (custodial) punishment may carry an unavoidable level of suffering. Whether detention inflicted in specific circumstances would amount to inhuman or degrading treatment ultimately depends on the conditions which may exacerbate the suffering inherent in detention. These include an individual’s state of health, age, or other circumstances. The outbreak of Covid-19 poses new threats to the legitimacy of custodial sentences and measures, which should be carried out in a way that respects the person’s dignity. This illustrates the importance of analysing the Cpt’s statement in that it provides new criteria to assess specific

circumstances where the incarcerated person’s dignity may be put under strain.

In this connection, the Cpt highlights that all restrictions imposed on detained individuals to prevent the spread of Covid-19 should have a legal basis and be necessary, proportionate and respectful of human dignity. The Cpt places particular emphasis on the need for these measures to be restricted in time. In addition, while restating the importance of Who’s guidance in dealing with the disease in prisons (e.g. by enforcing physical distancing and providing Ppe to members of the staff), the Cpt takes a more holistic approach. Especially in instances where prison facilities are overcrowded, it is *imperative* that relevant authorities consider the use of alternatives to deprivation of liberty (such as of alternatives to pre-trial detention, commutation of sentences, early release and probation). National authorities should also reassess the need to continue involuntary placement of psychiatric patients, discharge or release to community care, wherever appropriate, residents of social care homes and refrain as much as possible from detaining migrants. The approach taken by the Cpt deserves to be highlighted. In effect, the Ecthr has never gone so far as to recognise an obligation to grant early release and/or alternatives to detention on health grounds as a corollary of Article 3 Echr (P. Voyatsis, 2014, p. 178). This, in contrast, seems to be the orientation taken by Cpt to deal with a prison system hit by the pandemic as “close personal contact encourages the spread of the virus”. The Cpt’s authoritative stance is amenable to influence the Court’s understanding of this Convention’s guarantee whenever called

upon to rule on complaints of alleged violations in the context of Covid-19 pandemic.

Conclusively, the Cpt calls on the member states to pay attention to vulnerable and/or at-risk prisoners, such as older persons or prisoners with pre-existing conditions, by conducting Covid-19 screening and securing rapid referral to intensive care units when needed. In the context of its mandate, the Cpt also reiterates the importance of some fundamental safeguards to avoid the risk of ill-treatment of persons in custody. These include key procedural guarantees such as access to a lawyer, access to a doctor, and notification of custody. Importantly, the Cpt reminds that states should continue to grant access to independent monitoring bodies (such as National preventive mechanisms and the Cpt itself) to carry out prison oversight, even in places where persons are kept in quarantine. It is understood that monitoring bodies observe the *do no harm* principle, in particular when dealing with older persons and persons with pre-existing medical conditions.

### 3. The European union: coordination and judicial cooperation

The European union has long been a marginal actor in the area of penal and prison policy. Arguably, this inaction has less to do with a lack of interest than with some serious legal hurdles restricting the exercise of a legislative competence in the field of criminal sentencing. While the Treaty of Lisbon has finally enabled the Eu to enact legislation in the area of criminal procedure and substantive criminal law, it did so by placing a certain number of constraints on the Eu legislator. Article

82(2) of the Treaty on the functioning of the Eu (Tfeu) attributes the power to adopt, by means of directives, minimum rules to facilitate the mutual recognition in a number of pre-determined areas. These concern the rights of victims, the admissibility of evidence and the rights of individuals in criminal procedure. This provision seems to rule out any power to adopt rules with respect to post-trial/post-sentencing phase (according to a narrow understanding of the notion of criminal proceeding). In addition, Article 83 Tfeu stipulates the competence for the Eu legislator to adopt minimum rules regarding “the definition of criminal offences and sanctions” (P. Asp, 2013, p. 56; H. Satzger, 2019, p. 115), thereby excluding the power to lay down rules on the administration of sanctions. The term *definition* seems to refer exclusively to the statutory indication of the sanctions incurred *in abstracto*.

Despite these significant hurdles, recent case law of the Court of justice of the Eu (Cjeu) has shown that prison conditions are relevant in shaping the relationship of mutual trust between judicial authorities in the different member states (Cjeu, decision 5 April 2016, Aranyosi-Căldăraru, C 404/15 et C 659/15 Ppu). Arguably, the lack of minimum rules on the treatment of prisoners may negatively affect the functioning of *mutual recognition* instruments such as the European arrest warrant (T. Marguery, 2018, p. 706). Unsurprisingly, the European Commission has recognised that detention issues come within the purview of the Eu as “they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust”, but also in that the “Eu has certain values to uphold”

(European Commission, 2011, p. 3). Accordingly, the European Parliament has called the Commission and other Eu institutions to take the necessary measures in their fields of competence to ensure respect for and protection of the fundamental rights of prisoners “including the adoption of common European standards and rules of detention in all member states” (European Parliament, 2017). The Council of the Eu, in turn, has recently invited member states to rely on an increased use of non-custodial sanctions and measures (Council of the Eu, 2019).

More broadly, the role played by the Eu has been mostly one of coordination and support. The Eu institutions (spearheaded by the Commission) have sought to enhance their cooperation with the relevant bodies of the Council of Europe in the field of prison policy by financially supporting their activities, for instance via direct grants under the Justice programme aimed at the operation of an Eu Forum of independent prison monitoring bodies (National preventive mechanisms) or financing the collection of the Council of Europe’s annual penal statistics (Space). In addition, the Eu Commission has been supporting prison-related initiatives through its financial programmes and sustained the establishment of pan-European professional organisations such as the European organisation of prison and correctional services (EuroPris) and the Confederation of European probation (Cep), while increasing the dissemination of best practices.

Throughout the early months of the pandemic in 2020, the professional organisations funded by Commission (along with other independent groups like

the European prison observatory) have offered a relevant input by sourcing useful information on the measures taken at the national level. EuroPris, in particular, has established itself as a reliable source of information, by issuing several reports on prison administrations’ responses to Covid-19 and through regular updates and country-specific overviews on their website. The existence of a previously established network of professionals across the member states has arguably facilitated the exchange of information. Similarly, the Secretariat of the European judicial network (Ejn) has been compiling information regarding international cooperation in criminal matters and the repercussions of the Covid-19. The information provided by these organs and agencies has been consistently relied upon by other Eu institutions while designing their response.

The European Parliament has recently adopted a resolution calling the member states “to safeguard the rights and health of all persons in prisons, in particular their rights to medical assistance, visitors, time in the open air and educational, professional or leisure activities” (European Parliament, 2020, p. 16). While this act is obviously devoid of legally binding effects, it builds on the Parliament’s long-standing commitment to promote the protection of fundamental rights of prisoners (G. Cliquennois, S. Snacken, p. 8). The adoption of the Resolution draws on the analysis provided by the Parliament research service (C. Cirlig *et al.*, 2020, p. 1) and acknowledges the high risk of Covid-19 outbreaks as a result of the difficulty to enforce social distancing and sanitation rules in prisons. The Commission and Council’s efforts in

designing an overall policy response have been much more limited, thus reflecting a strict adherence to competence hurdles described above. Didier Reynders, the Eu Commissioner for justice, has however called on the member states to draw on Who's guidance to tackle the spread of the disease in prisons (European Commissioner for justice, 2020). The impact on the penitentiary system has also been a topic of formal discussion during the last Justice and home affairs Council of the Croatian presidency in June 2020.

Conversely, both the Commission and the Council have been quick to react in order to reduce the impact of Covid-19 on judicial cooperation in criminal matters. As reported by Eurojust and the Ejn (Eurojust, Ejn, 2020) by late March the combined effect of lockdown measures and the suspension of judicial proceedings had brought judicial cooperation to a halt. More worryingly, however, the deteriorating conditions of prisons and health systems across the member states may expose individuals subject to surrender or transfer proceedings to inhuman or degrading treatment. As indicated above, the guidelines issued by both the Pc-cp and the Cpt seek to discourage the transfers of prisoners. To tackle this new reality the Commission has established – in close cooperation with Eurojust, the European judicial network and the General secretariat of the Council – an European arrest warrant (Eaw) Coordination group to enable a swift and efficient exchange between member states in surrender proceedings. Arguably, as suggested by Commissioner Reynders, this new instrument, while created to face the Covid-19 crisis, might also be “useful for other situations where a fast exchange

between member states is required, for example in reaction to judgments of the Cjeu, having a direct impact on the smooth functioning of the Eaw” (European Commissioner for justice, 2020).

The Council, in turn, has included the impact of Covid-19 in its current reflection on the future of the European arrest warrant. A current draft of Council conclusions titled “The European arrest warrant – current challenges and the way forward” contains a section on strengthening Eaw surrender procedures “in times of crisis”. This document, unlike previously mentioned texts on the status of persons deprived of liberty, seems less concerned with the rights of arrested and detained individuals and more with the effectiveness of judicial cooperation instruments. In this respect, it proposes to further a “profound and prompt” digitalisation of cross-border judicial cooperation. It also proposes to institutionalise the exchange of information facilitated by the Eaw coordination group through the creation of an ad hoc electronic platform. One can lament, however, an alarming lack of scrutiny of the negative repercussions of transfer and surrender proceedings in the course of a generalised health crisis. As recently pointed out by a number of Members of the European Parliament within the Parliament's Libe committee while proposing amendments to a motion of resolution on this subject, the lack of common rules on detention conditions across the Eumay only be further exacerbated during the pandemic, with detrimental impact for mutual trust between judicial authorities in the member states.

#### 4. Conclusion

This paper has sought to assess the policy response to Covid-19 in prisons at the European level by means of an in-context reading of legal and policy documents issued by the institutions, respectively, of the Council of Europe and the Eu. We conceptualised the pandemic as an exogenous variable to current policymaking in Europe, thereby addressing its impact on the existing patterns thereof. This analysis partially confirms the existence of consolidated features of what could be described as European prison policy. As far as the Council of Europe's bodies are concerned, the outbreak of a public health crisis confirms the long-standing attitude to combine a normative approach based on human rights with evidence-based knowledge as means to improve the treatment of prisoners. Institutions of the Eu, in turn, have been more reluctant to take action on this front. Such reticence can be thought to reflect the stringent limitations posed by the lack of a clear legal basis to enact policy and legislation with regard to prisons. In both settings, however, the crisis has provided useful opportunities to expand on the existing set of principles and norms. The Pc-cp and the Cpt have made the bold move to affirm a human rights-based obligation of enforcing alternatives to detention as a way to reduce the risk of contracting the disease in prisons. The emergence of the public health crisis may have also triggered a development within the Eu, with a more ambitious role played by the Parliament and new institutional arrangements to facilitate exchange of prison-related data between Eu institutions and the member states.



## Notes

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## Health and prisons

*Aldo Morrone<sup>1</sup>*

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### 1. The virus of inequalities

Covid-19 has revealed the deeply sympathetic character of the human being. At the same time, however, it has highlighted the inequalities, the social and gender disparities, and the infinite variations of differences among individuals, societies, nations and continents (A. Ambrosio, 2020).

One of the problems concerned the cuts in the health system and the different access to care: insufficient beds, masks, tests and ventilators. Our economic system must be changed at its foundation: we need to invest in welfare, education and health care.

In this emergency context, we find a National health service that was already collapsing when the pandemic hit. This can be seen through the numbers. On the one hand, there was almost no investment in research - only 0.2% - on the other, between 2012 and 2019, 759 hospital wards were closed down (minus 5.6%) and there are 2.3 beds per 1,000 inhabitants, compared to 2.4 in Spain, 3 in France and 5.5 in Germany. Regarding health personnel, in Italy, there

are 5.6 nurses per 1,000 inhabitants, unlike Germany (12.6), France and the United Kingdom (7.9). The number of doctors has been absurdly decreasing for many years: 3.5 doctors per 1,000 inhabitants. Intensive care units, on the other hand, have availability of 2.6 beds per 1,000 inhabitants (while in Germany 6.0; France 3.1 and Spain 2.4). In our country, finally, there are 25.2 Mri and 30.6 Cat machines per million inhabitants; in France 110 Mri and 183 Cat scanners.

Meanwhile, the numbers of the pandemic continue to grow and the spread of the virus continues to accelerate. There are now more than 36 million infections in the world, while the number of deaths exceeds one million. It is no longer just a health crisis, but also an economic, social and in many countries even political crisis. The pandemic is developing at double speed and this also explains the difference in perception among citizens: in the countries that were first affected it has slowed down, but in the world, it is growing faster and in very populated areas.

The virus, in addition to highlighting the consequences of a social-health system reduced to its bare essential, has once again shed light on the issue of inequality also in terms of health. This issue must be brought back into the discussion at the end of the emergency if the constitutional right to enjoy good health is to be truly protected for all.

It is not true, in fact, that in the face of illness we are all equal. We have never been. It is not true that we all run the same risks and have the same opportunities to be treated. Particular social categories, more fragile than others, are and have been more at risk. Even deaths have not been the same. Elderly people with previous illnesses have been more at risk. Not all working classes have been able to benefit from remote working. Labourers, precarious workers, uncontracted workers, were at greater risk than those who had the comfort of a managerial role and became even more impoverished. But the current health emergency has discriminated against and penalised above all women who have been and still are in the front line, forced to work three times as hard at home. For them, there has been no distinction between personal and working life. They have suffered even more than before from male violence.

Among the social groups most at risk, prisoners occupy a prominent position. Prison facilities are epicentres for numerous infectious diseases (F. Dutheil, J. B. Bouillon-Minois, M. Clinchamps, 2020) due to three macroscopic factors:

1. inevitable close contact in structures that are often overcrowded, poorly ventilated and unhygienic;

2. poor access to the health service;
3. very rapid spread of pathogens among inmates, visitors and staff, inside and outside the prison community (internal-external communication).

For this reason, these *non-places* are an integral part of the public health response to Covid-19 (B.F. Henry, 2020; S.A. Kinner et al., 2020).

## 2. Health in prison before Covid-19

With the Decree of the President of the Council of Ministers of 1 April 2008, an attempt was made to implement the transfer of health competence from the Ministry of Justice to the National health system. The situation reported after ten years has proved to be complex. In 2019 there was only one general practitioner in each prison for every 315 prisoners, for a total of 1,000 general practitioners and on-call doctors in about 200 Italian penal institutions. Too few to guarantee adequate service. 70% of doctors are temporarily employed. Of course, the number varies from prison to prison depending on the capacity of the facility, but on average there is one doctor for every 315 prisoners. In some cases, there is not even a general practitioner (Ansa, 2019).

The experience of detention is in itself already a health risk, due to the degraded conditions of facilities, cells and communal areas, overcrowding and high turnover of prisoners and therefore the increased risk of contracting infectious diseases.

It should be borne in mind that living conditions in prisons, which are particularly inadequate to cope with a

pandemic of this magnitude, can act as highly stressful factors and aggravate an already critical situation due to forced isolation in an equally forced cohabitation context (A. Camposeragna, 2020).

Among prisoners, there is a higher:

1. prevalence of Hiv, Hcv, Hbv and tuberculosis compared to the free population, mainly due to the criminalisation of drug use and the detention of people who use drugs (the prevalence of Hiv infection among prisoners is 4.8%, compared to 0.2% of the general population; the incidence of tuberculosis is 23 times higher than that of the general population);
2. likelihood of contracting diseases even in healthy individuals.

The increase in risk concerns not only infections such as Hiv and Hcv, but also the possibility of becoming addicted to psychotropic substances or of developing mental disorders, to a greater extent than the incidence of the same pathologies in the general population. This is a matter of public health: sooner or later the majority of those deprived of their freedom are reintegrated into free society (P. Tozzo, G. D'Angiolella, L. Caenazzo, 2020). Their reintegration as healthy persons is a constitutional right and a civic duty.

In 2014, a multi-centre clinical trial was carried out in several penitentiary institutions in six central-northern regions: Tuscany, Veneto, Latium, Liguria, Umbria and the Salerno Health authority in Campania, showing the health conditions of about 16,000 detainees in 57 prison institutes (about 30% of penitentiaries). 70% of the sample was affected by some pathology, with

differences in gender (men 67%, women 75% and transgender 95.7%) and age (18-29 years 58.4%, 30-39 years 63.9%, 40-49 years 70.9%, 50-59 years 76.7%, >60 years 82.6%). More than 40% of the patients recruited had a psychiatric pathology (anxiety, neurotic disorder or adaptation reactions, depression). Many were addicted to drugs (24% of the total sample, with cocaine being the most widely used substance). They were followed by diseases of the digestive system and, at 14.5%, diseases of the teeth and oral cavity.

There is a high concentration of infectious diseases (hepatitis C, hepatitis B and HIV), which affect 11.5% of the sample. Suicide attempts and self-harm acts are alarming: 5% had performed a self-harm act at least twice in the last year (Ars Toscana, 2015). Despite the high consumption of tobacco in the prison population (71% smokers compared with 22% of the general population in Italy), respiratory disorders are among the rarest in prison, as the average age of prisoners is relatively low. Therefore, prison health care is mainly geared towards the treatment of addictions and mental disorders, and frequent diseases in the prison population such as hepatitis, Hiv, tuberculosis and sexually transmitted diseases (S. Gainotti, C. Petrini, 2019, p. 138).

More recent studies, which photograph the entire national situation, indicate a very high percentage of hepatitis C patients, the infection most present in the prison population in Italy, also due to the high presence of drug users. Between 25% and 35% of Italian prisoners suffer from hepatitis C (between 25,000 and 35,000 prisoners a year). To these must be added 6,500 active carriers of the hepatitis B



virus. There are about 5,000 Hiv carriers, declining in comparison to 15 years ago thanks to the use of antiretroviral medications. Their prevalence has fallen from 8.1% in 2003 to 1.9% today (Ekuo News, 2020). The figure is certainly positive in terms of health, including psychological health. In fact, the fear of Hiv and Aids and the social stigma associated with seropositivity (or the suspicion of infection) have negative effects on individuals and undermine the success of responses to the same pathologies, discouraging prisoners from voluntarily accessing the Hiv test or those positive from requesting health care services. In combating stigma and discrimination related to Hiv and Aids in prison, it is therefore important to protect the rights of inmates living with Hiv and to increase the effectiveness of services, as well as to reduce risk behaviour through effective internal awareness-raising and training campaigns among inmates (R. Lines, 2007, pp. 26-27; G. Ciccarese et al., 2020, p. 390).

As far as the elderly Italian prison population is concerned, a 2017 study on the prisons of Bari, Taranto, Foggia, Lecce, Bergamo, Cremona and Mantua found that 64% of the sample was not in optimal health. Among the most frequent pathologies, 23.4% suffered from cardiac pathologies, 12.8% from dysmetabolic pathologies (diabetes), and 9.6% from pathologies requiring surgery (C.A. Romano, *et al.*, 2020).

### 3. Prison and Covid-19

Is prison pathogenic? Can a place in itself make someone sick? Is it possible to be mentally healthy in prison? These are socio-cultural questions that

anthropologists and scholars have long tried to answer. Often it is the effects of the environment that fatally affect individual inmates. Victor Serge wrote that a prisoner, even after the first hour in prison, is a mentally deranged person (V. Serge, 1980). The Who also confirms psychic disorder as the most frequent pathology in prison, while from a strictly national point of view we find more than one prisoner out of 4 in psychiatric therapy, with an average of 27.6%. In some prison establishments almost all prisoners are in psychiatric therapy, according to data reported in Antigone's XVI report. A picture of Italian prisons before Covid-19. These are worrying elements: in the Spoleto prison, 97% of inmates were in therapy, in Lucca 90% and Vercelli 86%. The presence of psychiatrists in these prisons was guaranteed for an average of 7.4 hours per week for every 100 prisoners, while psychologists were present for an average of 11.8 hours per week for every 100 prisoners. In 19 of the institutes visited by Antigone, there was a mental health ward (Antigone, 2020b).

The Covid-19 health emergency started in a precarious context, where numbers are not encouraging. The possibility of complying with one of the most important safety regulations, social distancing, clashes with the very serious and atavistic problem of overcrowding. According to Antigone's reports, the pandemic began with a prison population rate of 130.4%, in some cases even 12 prisoners per cell while in others there was a violation of the criterion of 3 square metres per prisoner (Antigone, 2020b). A situation that has been persisting for years, since in 2013 the Strasbourg Court condemned Italy for inhuman and degrading treatment

precisely because of its dramatically overcrowded facilities. One last figure: at the outbreak of the new coronavirus, there were 61,230 prisoners compared to a prison capacity of 50,931. The prisons of Taranto, Larino and Latina were the prisons with the highest risk of infection.

In a panorama like this it is useful to remember the four articles of our Constitution which are absolutely relevant in the experience of Italian prisons (here in official translation of the Italian Senate):

article 3: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country";

article 13: "Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void";

article 27: "Criminal responsibility is

personal. A defendant shall be considered not guilty until a final sentence has been passed. Punishments may not be inhuman and shall aim at re-educating the convicted. Death penalty is prohibited";

article 32: "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent".

The principle of equivalence of care is a concept present in numerous national and international declarations on the rights of prisoners and is, as has been pointed out recently, inherent in the idea of the right to health as an inalienable right of every person, regardless of their condition of freedom or detention, as it is enshrined in article 32 of the Constitutional charter (S. Gainotti, C. Petrini, 2019).

No one can be obliged to a certain health treatment except by order of law. Under no circumstances may the law violate the limits imposed by respect for the human person.

The Basic principles for the treatment of prisoners, adopted by the General assembly of the United nations with resolution 45/111 of 14 December 1990, recall that: "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. 2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

#### **4. Women and foreigners in prison. Some data and some criticalities**

Female imprisonment has always been much lower than male imprisonment. According to data published by the

Department of prison administration, as of 30 September 2020 there were 2,279 women detained in prisons in Italy out of a total of 54,277, just over 4% of the prison population. Such a small percentage can be attributed to the decrease in entries following the measures taken to contain coronavirus infection in prisons, which have affected women more than the average number of prisoners. In fact, there were 2,702 female prisoners out of a total of 61,230 on 29 February 2020 (4.41%), but in two months their number fell by 478, marking an all-time low and a reversal of the growing trend since 2015. Only four institutions in Italy are exclusively for women, while there are 44 female sections in male prisons: 519 female prisoners in the former, 1,705 in the latter (Antigone, 2020a). In addition, women are often locked up in old wards that previously hosted male detainees. There is a lack of space dedicated to women's activities and gender issues, also specifically related to health. Not only from an Italian perspective, most women are imprisoned for drug-related crimes, so they serve short sentences. In terms of management, there is a strong turnover that creates problems linked to the fact that prisoners awaiting trial have reduced opportunities to access work programmes, to maintain contact with their families and also with other prisoners. All these aspects should be rethought in terms of services and reshaped.

A minority in the minority is represented by women over 50, a category that requires special treatment for a number of causes ranging from menopause to other factors, mainly health-related. There is still no systematic plan to discuss these issues and identify effective and efficient

strategies.

One of the most widespread categories of detainees is that of foreigners, who play a fundamental role in the correctional systems of the countries of the European Union. On average, more than 30% of women locked up in European institutions are foreign nationals and most are serving drug-related sentences.

As far as foreigners held in Italian prisons are concerned, according to the data of the Ministry of Justice, as of 30 September 2020 there are around 17,600. In 2016 in Italy 33.8% of prisoners were foreigners, compared to a European average of 22.6% (F. Fabi, C. Rossi, 2019). As has been pointed out, the phenomenon is closely linked to the considerable increase in migration flows and the inevitable repercussions on criminality, as well as to the method used by the Italian legislator in dealing with immigration in negative and emergency terms (G. Caputo, D. Di Mase, 2013). Crimes are mostly related to drugs. The latest Antigone report illustrates a European reality in which only Cyprus (43.5%) and Estonia (36%) had higher percentages of foreigners in the total detained population. France and Spain had 23% and 28% respectively (Antigone 2020a).

The problems of a managerial and organisational nature are directly proportional to the multiplicity inherent in the very concept of *foreigner*, which does not take into account the thousands of nationalities and cultures that today inhabit prisons all over the world. It means to face, in an era of globalisation and strong mobility like the one we are living in, different customs and habits, different communication systems, verbal

and non-verbal, substantial lack of emotional and civil reference points. One element that is perhaps underestimated is the training of the prison police itself: is it really directed towards a multicultural approach as befits a system, such as the increasingly international and multi-ethnic prison system?

The differences highlighted are elements that certainly make integration dynamics within penitentiary institutions problematic, and in constructive rehabilitation terms make the implementation of programmes aimed at reintegration and social integration more difficult. (G. Caputo, D. Di Mase, 2013). Add to this the high percentage of irregular immigrants who often receive their first care in prison. This poses practical problems in terms of therapy: it means starting to treat socially important pathologies, such as HIV infection, without knowing whether or not the therapeutic process can actually continue at the time of release.

### 5. In prisons during Covid-19

In Italian prisons, there were no epidemic outbreaks. On the contrary, the data pictured a number of infections in line, if not lower, than in other European countries.

According to the National guarantor of the rights of persons detained or deprived of liberty, as of 1 May 2020, 159 cases of Covid-19 had been recorded among Italian prisoners and 215 among prison staff. It must be said, however, that there is a problem of lack of public data on the number of tests carried out on prisoners.

The strategies implemented to preserve penitentiary facilities - potentially *epidemic*

*bombs* (M. Cingolani, L. Caraceni, N. Cannovo, P. Fedeli, 2020) - run along *their and out* dichotomy: regulation of sociality (already precarious) inside and limitation of contact (also very delicate) with the outside.

Structural and contingent reasons have made it almost impossible to comply with traditional containment measures: physical distancing, voluntary quarantine for suspicious cases, health isolation for those found positive. Add to this, the almost total lack of protective material: masks, disinfectants, gloves, etc. (T. Burki, 2020; M. Cingolani, L. Caraceni, N. Cannovo, P. Fedeli, 2020). Extraordinary measures have been implemented, both for prison staff and inmates, which, while on the one hand, have further limited the rights of citizens housed in prisons, on the other, have undermined the particular balance of the entire national penitentiary system. The protests that broke out throughout Italy in the middle of the Covid-19 pandemic are in everyone's memory. Despite internal regulations of the Department of Prison Administration, life in prison has not yet resumed, family visits have been greatly reduced and are conducted with a glass partition and intercom as in the 41-bis regime.

In this context, the condition of psychiatric and drug-user prisoners, who have considerable difficulties in receiving treatment even if they are seriously ill, should be highlighted. These people would need to be elsewhere in order to have access to the most comprehensive treatment. Instead, they are unable to have diagnostic and therapeutic continuity with psychologists, psychiatrists and social workers. Surveillance Judges too must always respect the health protection of



prisoners, regardless of their sentences.

Unfortunately, we are witnessing more and more suicides both by inmates and prison officers, as in the case of the episode that occurred on 4 August when an officer took his own life: he was on duty in the Latina prison, one of the most overcrowded in Italy, and is the fourth suicide among prison officers. The suspension of visits by relatives and family members, as well as of all external and recreational activities, proved to be an obligatory measure of collective protection, creating, if we are willing to find a positive point in this context, also a *technological challenge*, with the purchase of mobile devices and the activation of videoconferencing channels with which inmates were able to get in touch with their families and their lawyers in a controlled manner. Since 8 March, visits have been replaced by telephone calls and video calls on various digital platforms. The introduction of these technological tools has not been uniform. In some facilities, smartphones purchased on purpose have been used. This is a sign: no one had ever posed the problem of Internet in prisons. As Ornella Favero, director of *Ristretti orizzonti*, explained, “video calls were a beautiful thing because there were people who didn’t have family visits even before [the pandemic]. So, they were able to see distant relatives again: some saw their mother after years, maybe because she lives in another part of Italy or more often abroad” (Il Post, 2020). The hope is that this novelty, born in a moment of crisis, will allow the rethinking of the critical issues within prison facilities and will be the driving force behind a digital renewal that will bring these institutions up to date with the times,

even when we are out of the pandemic.

In the medical field, this does not mean that telemedicine should be permanently used: technology cannot replace contact between doctor and patient. The risk is always abuse (J. Gunn, 2020). However, the use of technological platforms such as telemedicine can be a good way to follow the evolution of a pathology after the first visit has been performed live with direct contact with the sick person.

Government initiatives have not led to a suitable solution to resolve problems. One possibility would be to focus more strongly on a decarceration plan that releases those prisoners serving short sentences for non-violent offences, those near the end of their sentence and those in poor health. These measures could achieve the goal of reducing the prison population by around 9,000/10,000 prisoners, thereby improving the situation in prisons. This would be fair both for those who work there and for prisoners. Action should be taken as soon as possible as the alternative will be unrest in prisons and an increase of sick prisoners. Only in this way could there be a restart inside prisons, offering dignity and health to all.

## 6. Conclusions: what to do?

Fyodor Dostoevsky said that the degree of civilisation of a nation is measured by entering its prisons (P. Tozzo, G. D'Angiolella, L. Caenazzo, 2020).

Besides solving the ancient problems of the Italian prison system, starting from a new idea of *space*, it is necessary to return to the relationship between doctor and patient and rethink it in the light of the relational dynamics of listening and welcoming. Narrative medicine can play

an important role in this sense, not only in the field of *treatment* in the most *material* sense of the term. Reception and dialogue can in fact, under certain and favourable conditions, provide fundamental support, especially where very frequent problems such as those of a psychological nature arise.

Healthcare staff should never lose sight of the overall health of the detained person: the first duty towards every element of the prison is of a clinical nature. The 1979 Oath of Athens of the International council of prison medical services makes this clear: "We, the health professionals who are working in prison settings, meeting in Athens on September 10, 1979, hereby pledge, in keeping with the spirit of the Oath of Hippocrates, that we shall endeavour to provide the best possible health care for those who are incarcerated in prisons for whatever reasons, without prejudice and within our respective professional ethics".

In operational terms, the protection of the health of those incarcerated or deprived of their liberty must obviously pass through a greater availability of specific treatments: a vaccination campaign should be followed by a critical-epidemiological study of the individual penitentiary realities. At the same time, the investment must be of a socio-cultural nature. Investing in the person, in the strengthening of his/her identity and in his/her training in a perspective that must abolish paternalism and be placed in the perspective of listening and sharing, to achieve a global growth that includes the enrichment of skills. Overall, it is true that the number of prison graduates has progressively increased over the years: in 2005 the number of prison graduates was 565,

compared to 705 in 2019; but it is also true that the total number of illiterate prisoners has increased, from 852 in 2005 to 1,054 in 2019.

Investing in the training of the person within the prison and insisting on a renewed culture of legality also, given the times, within schools, with specific awareness campaigns: preventive measures that therefore include the provision of information, education, screening campaigns and against behaviours considered at risk (G. Niveau 2007; S. Gainotti, C. Petrini, 2019). Moreover, a transcultural rather than multicultural perspective must be adopted in the training of prison staff, who are increasingly in contact with inmates from all over the world.

There is the need for a view that goes beyond the present moment, that is projected into the future. It is often forgotten that most prisons host men and women who, after serving their sentences, will return to civil society. Institutions should ensure that all prisoners have access to adequately paid work and to literacy, educational courses, language courses for foreigners and vocational training tailored to the needs of the labour market. It would be important for prisoners to maintain links with the outside world, for example through the press and media, or by following particular artistic or cultural activities, so as to encourage positive reintegration.

From a strictly operational point of view, the pandemic experience has shown the potential of technology also used for alternative purposes. On a socio-economic level, the exploitation of these opportunities can operate in the positive



direction of overcoming that digital divide often referred to as political discrimination between rich and poor.

Being healthy is not only a question of having normal haematological or laboratory parameters. Health is a much more complex reality and prison is the least healthy place in the broadest sense of the term.

Ensuring the protection of everyone's health is a duty and the effectiveness of the next vaccination campaign for Covid-19 will also depend on its universality, as we read in the manifesto letter that Muhammad Yunus - Nobel peace prize winner in 2006 - addressed to world leaders months ago.

Perhaps the coronavirus has torn Maya's veil and is now the mirror that reflects our inability to respect all living things, to pay attention to everything around us. We have ultimately lost that mystical sense in the face of the infinite beauty of the planet. We know that this pandemic will not be the last. There are over 1.6 million unknown viral species in mammals and birds, 700,000 of which would have the potential to trigger a new zoonosis, a new leap of species ready to bring us to our knees again. We are not yet able to take care of the whole of *creation*. We consider people, animals and forests raw materials for our survival. Humanity is struggling to realise that the attention to the planet must be the same as we doctors have for the human body, which is the same for everyone. We lack the solicitude and tenderness of a free embrace. If we want to guarantee the health of a country, we must start from the most marginal, the most fragile, because they are the most at risk. It is not just a question of solidarity

or civilisation: it is a scientific choice, a clinical idea, an epidemiology idea and an idea of health policy because a country where people are sick is destined to economic underdevelopment, as well as aridity of the soul.

## Notes

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# University and prison. A complex but unavoidable (more than ever in time of Covid-19) institutional and cultural interweaving

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## 1. The criminal (and prison) system as an object of study of the sociology of penal control

The Covid-19 pandemic has dramatically brought to light the critical aspects of mass incarceration systems all around the world, stressing their failure to guarantee the fundamental rights of detained people, first of all the right to health. The health crisis has prompted to reflect further on the role that the university, as a place of production of critical knowledge, can and must have in promoting the protection of the rights of a category at risk such as that of people in the custody of public authority. In this article I will report some significant experiences in that direction and propose some reflections on the topic.

As is well known, in states governed by the rule of law the penal system is responsible for the exercise of legal-punitive control in the social order. It has a monopoly on the ability to produce binding rules and to ensure compliance with them. Its authority is based on the concentration in its hands of all

means of physical violence. However, as Roberto Bergalli wrote, the exercise of this violence, presented as legitimate, is not in itself sufficient to guarantee the obedience of the subjects or reaching a certain social order. It is indeed necessary that the members of the community voluntarily submit to the precepts of its laws. However, this requires that they believe in the legitimacy of the state's rules. The monopoly of the exercise of physical force must therefore be exercised according to a criterion of legal-rational legitimacy that allows citizens to submit to impersonal laws. Legal-criminal control, Bergalli points out, applying certain categories of Max Weber, can only be understood when criminal law guarantees and protects public interests: the so-called common good (R. Bergalli, 1999).

It is necessary to begin from this Weberian perspective, Bergalli suggests, to analyse the so-called penal system in its two dimensions: static and dynamic. To analyse the former, it is necessary to examine the moment of legislative production, which makes it possible to know the interests that can

condition such production. The second is accompanied by the need to analyse the instances of interpretation and application of the criminal system, namely the organisation and action of law enforcement agencies, criminal jurisdiction (and, in general, the administration of justice) and prison (and, more generally, prison institutions). This type of theoretical and cultural analysis has sometimes been used in the field of research to go beyond the mere study of *legal* prison - the one conceived in the legal norms, which establish how the penitentiary institution *should be* - and to focus on the *real* prison - and to know *how this is*, how concrete life in penitentiary institutions takes place (L. Ferrajoli, 1989, 1999, 2004). Among the works that the sociology of criminal control has dedicated to the analysis of these instances, I would like to focus on those that have prison as their object, because I believe that what I have indicated as the necessary development of a *critical penology* should be further deepened (I. Rivera Beiras, 2008 and 2009, 2017). The critique of prison treatment programmes - defined by Bergalli as penitentiary fallacy (R. Bergalli, 2003) and criticised by Massimo Pavarini in 1999 as an exponent of *penitentiary reformism* - has highlighted the impossibility of understanding the functioning of these instances without taking into account the history and the economic, cultural and political transformations of the societies in which they operate.

By taking this into account, it is possible to understand that the agencies of the penal system really belong to the structure in which they are called to operate, revealing their role in the very reproduction of the

social order. Or, better, it is possible to understand the role of the state in the exercise of the legal-criminal control at the heart of our society.

To exemplify this, and regarding the work carried out within and by the University of Barcelona, I must point out that twenty years ago, at the beginning of 2001, a group of professors, researchers and students decided to create the Observatory of penal system and human rights as a research centre of the University of Barcelona (hereinafter, Ospd). The Ospd, among other fields of research, has strongly focused its work on the study and monitoring of the penitentiary system, intended as a last resort employed by the penal system. Thus began a strong commitment to safeguarding the fundamental rights of people deprived of their liberty, following a path that had been (relatively) followed by other professors in other countries and that, at the intersections between abolitionism and reformism, had led to the study of the history of collective social actions in European prisons over the last half-century (I. Rivera Beiras, 2010). It is worth knowing some precedents of this alternative cultural-political tradition.

## 2. Prison research carried out by society and university. A short European overview<sup>2</sup>

There are not many accounts of interest or accredited commitment of the university to *the prison problem*. Unfortunately and in general, with a few exceptions, the lack of interest that the prison world has had from the political and cultural authorities has also manifested itself in the university institution. Not even in the law faculties has significant attention been paid to the



problems that have to do with the application and execution of custodial sentences. Traditional *penalism* (despite its very name alluding cognitively to the study of punishment), has continued to focus on the study of crime, without dedicating significant space to the study of punishment, or so-called penology, or criminal execution, or prison law, all terms that still today translate a (gnoseological) debt that legal culture has yet to pay.

However, there are some examples of the opposite in some contexts and at different times. We recall the participation of emblematic teachers in social movements for the fight against prison and/or for the fundamental rights of people deprived of their liberty in the Scandinavian and Nordic context, the participation of eminent abolitionists in the early days of the formation of organisations such as *Krim, Krom o Krum*, in the 1960s (T. Mathiesen, 1974; I. Rivera Beiras, 2010)<sup>3</sup>.

In this critical direction, it is worth mentioning, in particular, the involvement of the very Michel Foucault, in France, in the so-called *Groupe d'information sur les prisons* (Gip), of which he is co-founder together with the historian Pierre Vidal-Naquet and the journalist Jean-Marie Domenach. The Gip aimed to investigate and denounce the poor living conditions in prisons and, as in the Scandinavian movements, to give a voice to prisoners and former prisoners of French society. The movement was very critical of the criminal justice system, highlighting how it turned petty offenders into crime professionals. The Gip was very active in holding press conferences and also in participating in protests related to prison riots and their repression, such

as those concerning the Toul prison in December 1971. All this resulted in discredit, both from the police force and from cultural and political spheres, but also led to widespread participation in the Gip, a group that came to have more than three thousand active members, representing an important precedent for what would later be called social movements for the rights of people deprived of their liberty. In the course of his study of criminal justice, Foucault investigated the problems of punishment, the death penalty and the origins of detention systems, leading to the publication in 1975 of *Discipline and punish. The birth of the prison*. As is well known, in this work Foucault examines the evolution from corporal punishment and capital punishment to the prison system that began in Europe and the United States at the end of the 18<sup>th</sup> century. The link between intellectual and academic interest in the prison universe found in Foucault (but not in the university institution as such) a considerable materialisation.

In the British cultural sphere, in 1968 the *National deviance conference* (Ndc) was founded, a group of radical British criminologists oriented from within the university to give a clear response to the conservative tradition of British criminology. From this group a few years later (in 1973), after an internal elaboration, Taylor, Walton and Young's work *The new criminology. For a social theory of deviance* was born, which would become a sort of *manifesto* of the critical criminology that was emerging at that time. In this countercultural context, and particularly concerning the prison problem, two movements dedicated to the

defence of prisoners' rights emerged: Rap (*Radical alternatives to prison*), in 1970, and the Prop (*Preservation of the rights of prisoners*). In this regard, van Swaaningen points out that the establishment of the Rap collective in October 1970 was the logical extension of the academic *National deviance conference* (R. van Swaaningen, 1997, p.138), which strongly challenged British detention facilities.

Regarding the Netherlands, van Swaaningen points out that, in a certain sense and in a similar way to what happened in other European countries, numerous collectives emerged in the 1970s, between the university and social action spheres. Although the author observes a subsequent decline in their incidence, in the second half of the 1980s activism kept existing despite going through transformations. In this sense, he mentions the existence of four representative movements, which presented some differences, both for ideological and strategic reasons, as well as for their very composition: *Coornhert Liga* (mainly composed of academics), *Voices* (whose essential aim was the search for alternatives to the criminal justice system), *Bwo* and *D&S* (real movements composed of prisoners). Despite these differences, the abolitionist perspective was common to all four.

The German cultural context also experienced a considerable movement ferment of prison criticism, with the appearance and activities of *Krak*, which echoes many issues raised by *Krom* in Scandinavia, especially intellectual and academic ones. Van Swaaningen adds that in his Introduction to the translation of Thomas Mathiesen's *The politics of abolition*, Karl Schuman establishes a link

between the lessons of German anti-detention activism and the works of Mathiesen and Foucault. In particular, he emphasises the existence of a common philosophy readable *between the lines* in the works of Mathiesen and Foucault, which leads to the social function of prison in maintaining discipline within the working class of a given society. Consequently, both authors should be read together. Faced with such a statement, the opportunities to change the state of the art would not be many<sup>4</sup>.

As far as Italy is concerned, again in the seventies, Bergalli underlines how three well-defined and very rich traditions came together in this country: one Catholic, one lay and one Marxist; "each of them with its own background, they have made an invaluable contribution to the consolidation of cultural richness and freedom" (R. Bergalli, J. Bustos Ramírez, T. Miralles, 1983, pp. 238, 239). This freedom, interrupted only in its external expressions during Fascism, generated a *culture of resistance* of unprecedented intensity in those years.

Towards the end of the 1960s, numerous expressions converged in Italy, giving rise to a very particular context in which the numerous collectives who fought for the promotion of prisoners' rights and against the very existence of prison were to be located. Indeed, the great workers' and students' struggles of 1968, together with the importance achieved by the trade union movement in the general management of the country and the prestige acquired by the left (which won over various regional and local administrations), created a climate in which numerous projects in the field of social control, promoted and guided by the

grassroots organisations themselves, were implemented. Bergalli pointed out that it was at this time that structures were created for the prevention and treatment of deviance which, guided by the principles of decentralisation, attempted to give an integral vision of the various phenomena of social marginality, from the problem of the elderly to that of women, from that of the mentally ill to that of the disabled and prisoners and, in general, to that of all people characterised by their separation from the world of production (R. Bergalli, J. Bustos Ramírez, T. Miralles, 1983, p. 240). It is sufficient to say, in this regard, that one of the first institutions to be questioned in Italy was the mental asylum. Under Franco Basaglia's guidance, a group of psychiatrists came not only to criticise the logic of the asylum but also to doubt the very existence of mental illness and to understand it as a product of society and relations of production, in which a device for controlling those who are outside these production processes is introduced.

In this climate, one of the problematic institutions has been the prison. Here we will highlight only the aspects that gave rise to the expression and movement known as "freeing oneself from the need for prison".<sup>5</sup>

As is well known, in the second half of the seventies, the important bibliographic production around the prison, starting from the classic *The prison and the factory*, by Dario Melossi and Massimo Pavarini, just to mention one of the seminal works, opened a very wide and fruitful cultural path. Shortly afterwards (in the mid-1980s), the publication *Antigone. Bimestrale di critica dell'emergenza* appeared, which later became an association and

which, at the intersection between civil society and the university, has been playing a very important role in the research and monitoring of the prison system in Italy for about three decades (Antigone, 2000a; Antigone, 2000b).<sup>6</sup>

Outside Europe, the Argentinian experience and the role played by the University of Buenos Aires (Uba) since 1983 after the restoration of the democratic regime following the civil-military dictatorship deserve a special mention. A group of professors, from that moment on, has managed to get the Uba to promote a project that was gradually consolidating (not without resistance from the Federal prison department) consisting of the construction of classrooms inside some prisons, such as Villa Devoto, aimed at the installation of the so-called *Polo universitario*, where inmates could go to gradually undertake courses of study in law, psychology, computer science and other disciplines, with a reproduction of the university space inside prisons (*Centro universitario Devoto*, 1992)<sup>7</sup>.

### 3. Spain. University, civil society and commitment to the prison situation

In the case of Spain, first through an association and then through the Observatory of penal system and human rights of the University of Barcelona, a little over 20 years ago we created the project *Abrir la cárcel*, with which a group of teachers decided to approach some prisons in Catalonia to develop cultural and academic activities. We then thought about the important role that other public institutions could play in establishing channels of circulation and communication between people deprived of their liberty and the community. In this context, we felt that it was particularly

important to obtain the university being able to enter prison. We were then convinced that this *intersection between institutions* could lead to positive results, including: the education of the prison population that would have allowed diversification in access to culture; the construction (with all its symbolic meaning) of *free spaces* inside the prison where university dynamics could be reproduced (teacher-student duo) without the presence of prison officials (reconfiguring the university *class* inside the prison); the possibility of allowing prisoners leave to be present, together with other students, in university classrooms; finally, the possibility of really taking advantage of *prison dead time* to carry out activities that are not absorbed by the punitive-reward logic of the classic correctionalist models.

Thus, towards the end of the 1990s, a group of teachers and young researchers<sup>8</sup> founded the *Associacions espai de treball universitari* and *Asociación contra la cultura punitiva y de exclusión social*, managing to get the then Catalan Prison administration to approve the *Abrir la cárcel* project, which included a series of seminars that we held during the 1999-2000 academic year<sup>9</sup>.

In a first phase, the project was developed in the Brians penitentiary centre in a multi-purpose space that was set up to allow the presence of almost two hundred inmates from different sections who attended classes together; they were not separated by gender and there was no need for supervision by an officer during the period of academic activity, without any disturbance to order or incidents of any kind. Despite the favourable reception of the prisoners, the resistance of sectors

of the trade union movement within the prison system led to the termination of the project (and later also to the resignation of the prison director). Despite the attempt of the then Vice-rector for Research of the University of Barcelona, Marius Rubiralta, to reactivate the paralysed project, it was not possible to continue it. The immediate consequence of that incident was the creation of the Observatory of penal system and human rights which, as a research centre of the same university, was created to carry out the work of monitoring an institution like the prison that had shown an opacity and resistance that surprised (negatively) the university authorities of the time, who trusted us enough to create the Ospdih. This was the real reason for the creation of our research centre, which realised almost prophetically the Foucauldian intuition that where there is power, possibilities of resistance can arise.

In addition to all this, still in the Spanish context, it can be pointed out that in this period many steps were taken towards greater coordination at the national level of the various actions of social movements and professionals, researchers and activists committed to the rights of people deprived of their liberty. Some of them can be listed in a very synthetic and descriptive way.

From the point of view of the emergence of a means of expression of social movements, it is worth mentioning the publication of the journal *Panóptico*, which brought together many organisations, allowing them to have a publication that would channel and spread their campaigns, strategies and issues<sup>10</sup>.

It is also worth mentioning at first the creation of the *Coordinadora de solidaridad*



*con las personas presas*, and afterwards the *Coordinadora para la prevención de la tortura* ([www.prevenciontortura.org](http://www.prevenciontortura.org)), collective platforms in which many organisations committed to the defence of human and social rights have participated, and which have carried out important work in recent decades, mainly in denouncing the most serious violations of the fundamental rights of prisoners (death, torture, ill-treatment, etc.), work that has cost them on several occasions interdictions, denunciations and criminalisation of their members (Á. Elías Ortega, 1993).

It can therefore be said that the social movements that have been working for years in defence of prisoners' rights, together with the contribution of some (very few) university research groups and (some) commissions of bar associations active in this field, have increasingly achieved some important objectives, showing a certain degree of articulation and consolidation of these bodies and groups, which have always worked with scarce resources and with many problems and resistance. This can be seen both regarding the denunciation of violations of the fundamental rights of prisoners and in the presentation of concrete proposals and recommendations for the eradication of institutional violence.

The issue of ill-treatment and torture in places of deprivation of liberty (especially prisons, juvenile centres, police stations, detention centres for foreigners and military facilities) has been at the centre of many concrete actions and strategies over the last two decades (R. Bergalli, I. Rivera Beiras, 2006). Without wishing to make an exhaustive list, which would go well beyond this article, it is possible to group them as follows:

- The campaign launched at the time to obtain the signature and ratification by the Spanish state of the Optional protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment of the United Nations (Un). As is well known, this protocol has been an unprecedented innovation in the fight against torture, allowing national bodies - independent of the three branches of government - to work under the protection of the Un, with the power to enter these places of detention and to reveal any violations of the Convention against torture. As is well known, this Protocol was finally signed, ratified and published by the Spanish government years ago, and then began its implementation process, in respect of which social organisations have always remained vigilant, especially regarding the action of the Ombudsman, who was designated as the National preventive mechanism against torture.
- The publications of the dossiers *Deaths in custody*, promoted by the *Coordinadora de solidaridad con las personas presas* and presented annually. They have produced quantitative results on deaths in detention institutions that can no longer be ignored (*Coordinadora de solidaridad con las personas presas*, 2005).
- The submission of parliamentary questions, promoted by political groups sensitive to petitions and claims by the *Coordinadora para la prevención de la tortura*, the motions that resulted from the questions asked in the Spanish parliament, the

political, legal and social proposals for the prevention and fight against torture in detention centres (*Coordinadora para la prevención de la tortura*, 2005).

- In particular, the constant work of the *Coordinadora para la prevención de la tortura* is to be highlighted (both in its Spanish national dimension and in its specific work in Catalonia) regarding the annual publication of reports on torture, ill-treatment and deaths in prison, which have become a very important national and international reference (especially with the Committee for the prevention of torture of the Council of Europe).

#### 4. The importance of international monitoring and reporting

In this overview of the different mechanisms aimed at channelling the demands of people deprived of their liberty, implemented by universities and social organisations, some mention should also be made of the international sphere, which in this case is limited to the European continent (we are not entering here into an analysis of similar mechanisms present in the Americas or within the Un). In this regard, it may be important to better specify some concepts: what kind of deprivation of liberty are we talking about? It is indeed a broader concept than that which takes place in the prison environment.

We can recall the words of Mauro Palma, written when he was President of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (hereinafter Cpt), who warned that “the area of deprivation of liberty is wider than we

might think. It includes, above all, prison, which is the place to which the very idea of deprivation of liberty immediately leads us; a place that is still everywhere opaque, even though many national systems provide for the possibility to access it to people who play an institutional role. But the area of deprivation of liberty is not limited to prison alone. It includes the many different police holding cells and barracks of the various police forces provided for by national systems; it includes places of interrogation, whether formally qualified or not. It includes detention centres for irregular immigrants present on the territory - in many cases euphemistically called *reception centres*-awaiting identification or the execution of expulsion orders; it includes places at the borders (even in stations or airports) where people declared inadmissible are waiting to be returned to their country of origin. It includes places of compulsory health treatment and, in almost all European countries, also psychiatric hospitals and places of involuntary hospitalisation or designated to host abandoned children” (M. Palma, 2006).

For all these reasons, and continuing with the analysis that Mauro Palma makes on the *space of rights* in Europe, it can be recalled that the structure of the protection of rights in Europe is based on two pillars:

- one of a jurisdictional nature, related to all the rights declared in the Convention and to all persons, free or detained. This pillar is affirmed through the European court of human rights. The Strasbourg court has the task of verifying any violations and, consequently, imposing a sentence



on the state responsible. It acts as a supranational court, based on an appeal by a citizen of one of the member states who claims to have been deprived of one of the rights protected by the Convention and who has unnecessarily gone through national legal channels to obtain a remedy in response to what has happened. This is a judicial body which acts not on its own initiative, but following a complaint, after all domestic remedies have been exhausted and, consequently, not in the immediacy of the facts but after an inevitable lapse of time (M. Palma, 2006).

- The other, of a preventive and monitoring nature, is specifically related to the area of deprivation of liberty. This second pillar is the European Committee for the prevention of torture and inhuman or degrading treatment or punishment. As stated by Mauro Palma, since the early 1980s it has been considered to integrate the monitoring system provided for by the Convention with a subsequent body, not of jurisdictional but rather preventive nature, aimed at avoiding situations of ill-treatment or torture. A body that could act on its own, even in the absence of a complaint by an individual, and that had all places of deprivation of liberty under constant observation. This provision was the basis for a new European Convention, centred on Article 3 of the previous one and with the objective of its implementation. It was opened for signatures by states on 27 November 1987. It is the Convention for the

prevention of torture and inhuman or degrading treatment or punishment. Ratified by states at the time of their accession to the Council of Europe, the Convention provides for the establishment of a Committee, composed of one member from each state, elected by the Committee of Ministers for a four-year term of office, which visits the states that have acceded to it, either through regular visits or through *ad hoc* visits when required by a particularly critical situation. The Committee has freedom of access to people and information; it is not a judging body but prepares a report for the national authorities in which it lists the recommendations and monitors their implementation in an ongoing dialogue with the national authorities (M. Palma, 2006).

However, despite the *a priori* and *a posteriori* mechanisms of action described, and the importance of the field of international denunciation, we must admit that protection is insufficient, that on many occasions the system of visits is slow and that there is a lack of willingness on the part of member states to comply with their international obligations when there is even no resistance to internal interference in the field of human rights in prison institutions.

##### **5. Towards a greater degree of articulation: the creation of the System for recording and reporting institutional violence (Sirecovi)**

Continuing with this chronological evolution, it should be noted that four years ago, within the framework of the Observatory of penal system and human

rights of the University of Barcelona, a *System for the registration and communication of institutional violence* (Sirecovi) was designed, to make the work of prison monitoring initiated and carried out by the university over the last two decades more rigorous.

We understood that it was imperative to visit and inspect the prison by the university and that a register of institutional violence suffered by those subject to arbitrary, disproportionate or deviant punishment, in flagrant violation of the principle of legality, had to be established. The task of registration and warning was to be our academic imperative. What is it, and how does Sirecovi work? In short, it is a device that receives complaints about situations of institutional violence through letters, telephone calls and visits (from prisoners, family members, lawyers, Ngo members, etc.). Once we receive a communication, we immediately go to interview the alleged victim, as well as the management of the centre and, if possible, its health officials. After duly informing the private person of the personal freedom of our mission, they can sign a document allowing us to give notice and alert the prison administration, the Ombudsman, the National preventive mechanism against torture, national social organisations, the European Committee for the prevention of torture, the Un Special rapporteur on torture, the World organisation against torture, or other stakeholders to whom we communicate the details of the cases identified so that they can take an interest in the alleged victims.

Sirecovi is, therefore, a useful tool to channel and send reports of torture and

ill-treatment taking place during the deprivation of liberty which, once known and duly verified by its members, can be transmitted to the relevant national and international authorities so that each of them, according to its mandate, can take appropriate measures. Sirecovi should therefore be seen as a system that seeks cooperation with national and international authorities, as well as social organisations, and to complement their efforts to strengthen a culture of respect for the rights of persons deprived of their liberty and to contribute to the protection of victims of institutional violence. The implementation of the instruments adopted by Sirecovi pursues the following objectives:

- To strengthen institutional efforts aimed at the protection and rehabilitation of the victims of institutional violence.
- To improve cooperation and articulation between human rights organisations working on the prevention of torture, increasing their potential.
- To formulate recommendations for public policy decisions and to promote democratic reforms based on up-to-date, reliable and systematic information on risk situations that generate greater vulnerability in prisoners.
- To build comparative knowledge on the conceptualisation and extent of torture and cruel, inhuman and degrading treatments.

The effective operation of Sirecovi is based on the development of various tools:

- A central case register, at the Catalan

level.

- The communication and warning and case monitoring system.
- An interactive map (of the Catalan territory) freely accessible that allows understanding the dimension of institutional violence to be mapped.

At the end of 2018 we presented the first biennial report, in which a monographic and separate space was reserved for three different situations:

1. the regime of solitary confinement in prisons (which in Spain continues to go well beyond the maximum 15-day limit set by the Mandela Rules of the United Nations);
2. the right to health (both physical and mental);
3. the problem of the right to defence and legal assistance of persons deprived of their liberty in prisons, especially as prisoners.

All the cases referred to are recorded in the System's register. Those for which victims have expressed their consent are also published on the freely accessible map. In total, in absolute figures, more than 500 cases have been registered in the System over the last four years for the territory of Catalonia.

Following the presentation in public meetings, press conferences and on Tv3 of the works mentioned, unfortunately, several complaints have been filed by federations of prison officials from three unions<sup>11</sup>, who accuse us of defamation of their bodies.

This response is an example of the current intolerance and denialism that continues to prevail when working, in-depth, to denounce institutional violence and/or abusive detention conditions. Of course, all the material we investigate and denounce is not only public but is also duly verified and presented before international organisations that investigate what has been communicated to them. Attention to the direct victims of such violence and the families who suffer from it, despite attempts at criminalisation, will continue to be the academic task we will stick to.

With the outbreak of the Covid-19 pandemic, and despite the resulting restrictions on visits to prisons, Sirecovi has continued to work by adopting different methodologies that now allow us to have a dynamic picture of the evolution of coronavirus incidence in prisons (throughout Spain), published and regularly updated on our website ([www.ospdh.ub.edu](http://www.ospdh.ub.edu)) and which gives attention to the basic needs of prisoners in the face of the health emergency (I. Rivera Beiras, 2020). The work presented in this publication by Professor Alejandro Forero gives an account of this latest phase of the work.

These reflections, as shown, are intended to contribute to the essential discussion on the opportunity and limitations of developing a genuine policy for reducing the harm caused by deprivation of liberty. The university and the scientific and academic community have a task of research and civil commitment that is still awaiting effective implementation, beyond the experiences indicated here. The challenge is immense, but as we have seen there are many ways to promote and

protect the rights and channel the demands of people deprived of their liberty. To that effect, this presentation aims to call on political and academic leaders so that, at last, in a determined and committed way, they work with the social agents in the search for instruments to safeguard these rights. The struggle for civilisation is at stake in this tension, and the academic world must not continue to be absent from it.

## Notes

<sup>1</sup> **Iñaki Rivera Beiras**: is PhD in Penal Law and Criminology and Director of the Observatory of the Penal System and Human Rights of the University of Barcelona.

<sup>2</sup> Due to the limited space, only a brief and panoramic description will be given here. For detailed information on the European social and academic abolitionist movement from the post-war period onwards, see I. Rivera Beiras, 2010.

<sup>3</sup> Bergalli points out that it was undoubtedly in these countries that concrete proposals and alternatives to traditional criminological thinking began to be formulated. To explain in what context some of these proposals were formulated and, specifically, those dedicated to the field of imprisonment, the author states that “it is right to point out that the Institute of Criminology at the University of Oslo (Norway), since its foundation in 1954 by John Andenaes, within the Faculty of Law, but even more so since Nils Christie became its director, has been working with a different angle. Its first works are little known because their scope was limited to those who knew Scandinavian languages. But as the *Scandinavian Studies in Criminology* were published, the alternative orientations within contained spread (...). The most famous work published so far is contained in Thomas Mathiesen’s *The Politics of Abolition*, in which the author analyses the movements and groups of prisoners in Scandinavian prisons who claim their human rights and the possibility of forming trade unions in order to be able to fight for the protection of the rights granted to them” (R. Bergalli, J. Bustos

Ramírez, T. Miralles, 1983, pp. 231, 232).

<sup>4</sup> Some members of Krak stressed that the possibilities for strengthening activism in this field depended heavily on the use of the press and journalistic dissemination, both the traditional left-wing one and bourgeois media. Therefore, everything possible had to be done to publish news about prisons, to amplify events happening within the facilities, the problems of their workers, etc., with the intention of gradually changing public opinion through this informational and cultural struggle.

<sup>5</sup> “Freeing oneself from the need for prison” was an expression coined within the Italian debate and referred to a group of democratic psychiatrists whose first initiatives were aimed at segregated penal institutions, in a perspective that could be defined as *institutional abolitionism*.

<sup>6</sup> As Patrizio Gonnella pointed out, Antigone is an association founded at the beginning of the 1990s that originated from the magazine with the same name against emergency legislation and promoted, among others, by Massimo Cacciari, Stefano Rodotà, Mauro Palma and Rossana Rossanda. In particular, since 1998 Antigone has been authorised to enter all Italian prisons. About 100 observers, divided by region, can visit Italian prisons and then report to the public what is happening. All the information is collected in a report on detention conditions published every year. Since 2013 Antigone has been allowed to enter prisons with cameras. A few years ago, it published a webdoc, *insidencarceri.com*, which shows life in prison through images and narratives (overcrowding, violence, health, work...).

The videos had more than a million views in a short time. Antigone is also involved in the preparation of draft laws and the definition of possible lines of proposed amendments to approved laws; it promotes information and awareness campaigns on human rights and the fight against torture, also through the publication of the biannual magazine *Antigone*. The association is a national reference point for the European Committee for the prevention of torture (Cpt) and is constantly engaging with the realities of other European countries (P. Gonnella, 2016).

<sup>7</sup> It was not easy to maintain this project, which has been contested on several occasions by the Federal prison service, which proposed its dismantling. This provoked a national and international campaign in favour of maintaining it. It was very important that both Argentinian and foreign professors carried out academic activities within the project. On more than one occasion, Massimo Pavarini and I, together with other colleagues, went to strengthen the permanence of the Devoto university centre with lectures, seminars and book presentations.

<sup>8</sup> Among them, Roberto Bergalli, Miquel Izard, Mónica Aranda, Iñaki Rivera and Pep García Borés.

<sup>9</sup> The lessons were based on the fundamental rights of people deprived of liberty, psychology, music and hygiene.

<sup>10</sup> In the two issues in which the magazine *Panóptico* was published (the first issues were produced by the *Salhaketa* association in the Basque Country and the last ones by the Observatory of penal system and human rights of the University of

Barcelona), it became, sometimes more *de facto*, an important reference of the *movement*.

<sup>11</sup> Criminal charges have been filed by the trade unions *Comisiones obreras*, Csif and Acaip-Ugt.



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# Prisons, health and drug control in the time of Covid-19

*Gen Sander<sup>1</sup>*

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## 1. Introduction

The unprecedented and global public health crisis brought about by the rapid spread of Covid-19 has not only dramatically affected the lives of billions of people around the world, but has also placed into sharp relief existing health and social disparities and the need for urgent and radical reforms. As Covid-19 began to spread like wildfire through prisons worldwide, these settings in particular, along with those who live and work within them, came into the spotlight. Their plight sparked impassioned debates on the role of incarceration, punitive drug policies, and systemic discrimination in fuelling the pandemic, as well as the relationship between prison health and public health. Heeding calls from international actors to reduce overcrowding and release prisoners, hundreds of governments began committing to, and implementing decongestion schemes to try to contain the spread of the deadly virus. Months later, however, it is obvious these schemes have been deeply flawed and largely failed to deliver on their promises, revealing

governments' preoccupation with punishment over public health - even during a global pandemic. At the same time, those remaining in or returned to prisons continue to be profoundly impacted by the extreme and often disproportionate restrictions imposed in response to the pandemic. These restrictions have in some cases limited their access to essential health services, including harm reduction services, and have led to conditions falling far below humane standards.

## 2. Health in prisons

Prisons and other places of detention are high risk environments for the spread of infectious diseases like Covid-19. Compared to the general population, people in detention face heightened and unique vulnerabilities, including experiencing a higher prevalence of preexisting health conditions, such as Hiv, hepatitis C, diabetes, high blood pressure, as well as substance use and mental health problems. Prisons are often poorly ventilated and unhygienic, while access to fresh air is severely restricted

and health care services are extremely limited, difficult to access and often of poor quality. In over 64% of all countries, prisons are also shockingly overcrowded, making it virtually impossible to practice physical distancing or self-isolation<sup>2</sup>.

With over one third of prisoners returning to their communities every year (S. Enggist *et al.*, 2014), and staff and visitors filtering in and out of prisons on a daily basis, there is a high degree of mobility between prisons and the larger community. The relationship between prison health and public health is therefore an intimate one. Indeed, there are countless documented cases of diseases such as Tb, Hiv and hepatitis C spreading like wildfire through prisons and - inevitably - into the general population (M. Ndeffo-Mbah *et al.*, 2018). Decades of systematic neglect and underfunding of prison health, combined with overcrowding and rigid security processes mean that few, if any prisons, are equipped to provide timely diagnosis and treatment of prisoners in normal conditions, let alone during the current global public health crisis (S.A. Kinner *et al.*, 2020).

With over 11 million people currently imprisoned around the world (Penal reform international, Thailand institute of justice, 2020), it is no wonder prisons quickly became epicentres for the spread of Covid-19, posing unprecedented challenges for governments and prison authorities. Not only did this expose the public health risks of poor and overcrowded prison conditions worldwide, but also called attention to the huge number of people in detention for non-violent offences, and to the punitive and racist policies that drive incarceration.

### 3. Mass incarceration and the *War on Drugs*

Of the 11 million people currently behind bars worldwide, close to half a million people are incarcerated for mere drug possession, with an additional 1.7 million incarcerated for other drug offences, many of which are non-violent (Un system coordination task team on the implementation of the Un system common position on drug-related matters, 2019). That means that about 21% - or over 1 in every 5 prisoners worldwide - are being held on a drug charge, and this does not take into account the staggering half a million people who are held in involuntary drug detention centres across Asia alone (K. Lunze *et al.*, 2018). These figures raise serious concerns over the role of punitive drug policies in driving incarceration, prison overcrowding and the overrepresentation of people who use drugs in prisons and other places of detention worldwide.

The role of the war on drugs and the criminalisation of people who use drugs in driving the Hiv epidemic inside and outside of prisons worldwide has been well documented (Global commission on drug policy, 2012). While some very limited measures have been taken to address this and other epidemics among prison populations, including the very sparse provision of harm reduction services within some prisons for people who use drugs, these measures continue to fall far short of what is required (Harm reduction international, 2020b). They also ignore the root causes of the problem, namely the punitive and racist policies that drive incarceration and make it harder for people to access health and social services. The same is once again

true in the context of Covid-19.

Covid-19 has not only placed a spotlight on the intersection between drug control, incarceration and prison health, but it has also cracked wide open the structural and systemic racism and discrimination that permeates the criminal justice system, and how all of these issues converge to create the perfect conditions for Covid-19 to thrive. Indeed, while Covid-19 sweeps across the globe, so too do protests against violence and racism by the police, highlighting the enduring legacy of racist and punitive policies, including the drug war, in fuelling ill-health and carceral systems worldwide (B. del Pozo, L. Beletsky, 2020). Not only are racial minorities disproportionately affected by Covid-19 and its social and economic impacts (T. Kirby, 2020), they are also much more likely to be stopped, searched, arrested, convicted, and harshly sentenced for drug crimes than their white counterparts all over the world (Working group of experts on people of African descent, 2019). The colliding and disproportionate impacts of Covid-19 and the drug war on the health and well being of racial minorities are a stark reminder that enduring racial disparities and race-based outcomes are directly related to policy priorities that are grounded in discrimination and racial stereotypes (Working group of experts on people of African descent, 2019).

#### **4. Responding to Covid-19: prison decongestion measures**

When Covid-19 was identified as a global pandemic in March 2020, international actors from around the world began calling on states to enact emergency measures to address and contain the

spread of Covid-19 in prisons (Un High commissioner for human rights, 2020; Unodc *et al.*, 2020). Recognising that alternatives to deprivation of liberty were imperative in situations of overcrowding and even more so in cases of emergency (Commissioner for human rights of the Council of Europe, 2020), a chorus of voices urged governments to limit arrests, promote alternatives to punishment and incarceration, and urgently release prisoners with underlying health conditions, older persons, and those charged or convicted for minor or non-violent offences, including drug offences (D. Puras, 2020). Governments the world over heeded these calls and began committing to and implementing decongestion schemes. This generated hope that much needed reform might be possible, one that reconsiders the legal architecture of drug policy and policing around the world, as well as the necessity and proportionality of criminalisation and incarceration, and chooses instead to prioritise health, racial justice and human rights. Months later, it has become glaringly obvious that this has so far been grossly misconceived.

According to research conducted by Harm reduction international, 109 countries and territories adopted a variety of decongestion schemes between March and June 2020 in an effort to curb the potential spread of Covid-19 within prisons (Harm reduction international, 2020a). The main measures introduced included early releases, often through sentence commutation, pardons, diversion to home arrest and release on bail/parole (Harm reduction international, 2020a). Eligibility for release from prison was largely determined by length of sentence



remaining, age, and preexisting health conditions. By 24 June 2020, these schemes had resulted in the release of approximately 639,000 people, a mere 5.8% of the global prison population (Harm reduction international, 2020a). While this was a welcome initial response, efforts have fallen far short of the significant political commitments made in the name of public health at the peak of the pandemic. Moreover, it is now clear that the effectiveness of these schemes was obstructed by serious design and implementation flaws, bureaucratic hurdles and a lack of political commitment, ultimately revealing an overarching preoccupation with punishment over public health (G. Girelli, 2020).

In terms of release criteria, type of offences was worryingly found to be a significant and recurring criterion for *exclusion* from release in many countries. People convicted of violent crimes, drug offences, terrorism, and political prisoners were largely excluded from early release (Harm reduction international, 2020a). Not only does this reveal the arbitrary nature of these decisions, but it also demonstrates that - even in the face of a global pandemic - many countries continue to prioritise punitive approaches to drugs and other social and health issues over individual and public health. At least 28 countries - over 25% - explicitly excluded people detained for certain drug offences, regardless of whether they met other eligibility criteria (Harm reduction international, 2020a). Sri Lanka was particularly restrictive, in that it excluded from eligibility not only individuals convicted of drug possession and trafficking, but also prisoners *addicted to*

*drugs* (Y. Perera, 2020). In 19 countries, people in pre-trial detention were explicitly excluded; while in some countries, such as Albania and Turkey, decongestion measures only considered prisoners with a final sentence, thus excluding incarcerated individuals who should be presumed innocent (Harm reduction international, 2020a). At least 10 countries excluded prisoners who did not have a fixed home address. Although justified in some cases as a means of preventing homelessness, this stipulation further disadvantages and marginalises some of the most vulnerable prisoners. It also ignores longstanding and serious problems with the re-entry process, including lack of housing and employment opportunities (Harm reduction international, 2020a; M. Fikru, 2020).

In some countries (including Belgium, Columbia, Costa Rica and Iran) release measures were or continue to be temporary, meaning that prisoners have to or are expected to return to prisons when the emergency is over (Harm reduction international, 2020a). In Iran, for example, the country held up as a shining example of successful prison decongestion, thousands of prisoners were called back to prison in late spring, many without following proper quarantine procedures (Abdorrahman Boroumand centre for human rights in Iran, 2020). Not only is this shortsighted, especially considering the second wave of Covid-19 currently sweeping across the world, but it misses an important and unique opportunity to swiftly address prison overcrowding.

Implementation of decongestion schemes has been poor in many countries. In the UK, for example, although the government committed to release 4,000 prisoners in

April, only 242 were released as of 17 July 2020, of whom 50 were compassionate releases of vulnerable prisoners, pregnant women and mothers with babies (Uk Ministry of Justice, 2020). In Mexico, none of the people released from prison were freed pursuant to the amnesty law adopted in response to the spread of Covid-19, but rather through pre-existing mechanisms because of some an oversight mechanism was never put in place. In Cambodia, the Interior minister announced plans in May 2020 to release around 10,000 individuals from the country's heavily overcrowded prisons - however, at the time of writing it still remains unclear whether anyone has been freed (Amnesty international, Cambodian league for the promotion and defence of human rights, 2020).

Despite a few isolated examples of efforts to reduce arrest and detention, most countries continued to arrest people during the emergency, including for non-violent crimes and other offences that posed no threat to the public, such as non-violent drug crimes (Harm reduction international, 2020a). In Iran, for example, drug use accounted for 7,702 arrests between June and August 2020 in the Tehran province alone (Abdorrahman Boroumand centre for human rights in Iran, 2020). On top of the fact that there is no evidence that incarceration reduces drug use and trafficking, such arrests inevitably interfere with decongestion efforts, and invalidate the thousands of early releases and pardons specifically issued for that purpose (Abdorrahman Boroumand centre for human rights in Iran, 2020).

Finally, there appear to have been very few measures put in place to protect the

health and well being of those urgently released back into the general community. Recently released prisoners are particularly vulnerable and require wraparound services, including access to essential health services and housing security. Sudden release, combined with a limited functioning of community-based services during Covid-19 times has made, at least initially, referrals and liaison difficult. This type of disjunction can result in the disruption of treatments like Opioid agonist therapy (Oat)<sup>3</sup> and of comorbidities such as Hiv and hepatitis C, with severe effects on individual and public health (A. Ghosh, 2020). Early into the pandemic, the Un Special rapporteur on the right to health and other Un experts called for effective measures to be put in place, and adequately funded, to ensure that those released from prisons and other detention settings have continuity of care, access to adequate housing and health care in the general community (D. Puras, 2020).

Nevertheless, reports are now emerging from civil society around the world revealing the scale and impact of these calls being ignored. In Iran, for example, many individuals from disadvantaged socioeconomic backgrounds were not linked to adequate financial, harm reduction, and housing support post-release from prison (M. Alavi *et al.*, 2020). Furthermore, among many people without stable housing, the closure of parks following lockdown limited their access to water and sanitation facilities (M. Alavi *et al.*, 2020). In India, scores of people released from prison were forced to walk, hitchhike or cycle hundreds of kilometres to get home and faced stigma and discrimination from their families,

communities and current or potential employers (P. Pundir, 2020). On top of these vulnerabilities, people who use drugs being released from prison also face an increased risk of opioid overdose arising from decreased tolerance to opioids and/or erratic access to Oat, which would be particularly acute during lockdown. While no information could be found on rates of overdose among people who use drugs recently released from prison through decongestion schemes, the general lack of planning to ensure their safety and wellbeing, as well as the shocking scarcity of naloxone for prisoners' on release under normal circumstances (Harm reduction international, 2020b), suggest that an increase in opioid overdose deaths during this period is likely. Indeed, generally speaking, opioid overdose deaths have surged in both Canada and the United States during the pandemic, with the United States recording a national jump of 18% in March, 28% in April and 42% in May (A. Coletta, 2020; W. Wan, H. Long, 2020).

### 5. Impact of Covid-19 responses on conditions of detention

For the millions of people who remain inside prison or were called back to prison after being temporarily released, there have been significant changes to their conditions of confinement, as well as to the limited services that are generally available to them. For many, prison lockdowns have meant even more extreme restrictions on their lives, leading to conditions in several countries falling far below a humane standard.

In many countries, a complete lockdown was imposed in prisons, with people

confined to their cells for 23 hours a day, sometimes more. The suspension of all prison visits, along with recreational and occupational activities, were often rigidly imposed, sometimes in a blanket fashion, while a commitment to video calls often went unimplemented meaning individuals could not even maintain contact with their legal representatives and families. Routine inspection visits were also suspended, while the use of restraints and solitary confinement were extended. In many countries jury trials were suspended and court hearings were delayed (T. Hewson *et al.*, 2020). Resource and staff shortages disrupted the ability to maintain even a basic regime where people could use the toilet, shower or make a phone call, let alone access essential health services. These measures have had a devastating impact on the mental and physical health of people in prison. They have also lead to rising tensions (Office of the correctional investigator of Canada, 2020) and an increase in prison riots; in Italy, prison riots emanating from Covid-19 restrictions resulted in the death of 13 prisoners, most from overdosing on drugs allegedly taken from prison clinics during the riots (National guarantor for the rights of persons detained or deprived of liberty, 2020). They have also intensified the risk of human rights abuses. As aptly pointed out by the Joint committee on human rights in relation to the human rights implications of the Uk government's response to Covid-19, legitimate questions remain as to whether the severe restrictions imposed in prisons were proportionate and whether lives could have been protected by other, less restrictive means, including through more extensive and responsibly managed early release schemes (Joint committee on

human rights, 2020).

#### 6. Provision of harm reduction in prisons in times of Covid-19

Like in the broader community, the redeployment of resources and staff to support Covid-related health services disrupted other critical health services, including harm reduction services, in prisons. As highlighted by numerous public health and human rights bodies and experts, states have an obligation to continue to provide essential health services to prisoners, including harm reduction measures, during the pandemic (D. Puras, 2020). Yet civil society reports reveal that some prisons currently do not even have doctors, while lack of funding threatens the continued availability of medicines in others (Eurasian harm reduction association, 2020).

Information on the availability and accessibility of harm reduction services in prisons is notoriously scarce, and the situation is no different in the era of Covid-19. This is a serious problem that continues to require urgent action. The little information currently available on the provision of harm reduction in prisons during Covid-19 reveals no real trends; the situation simply varies from country to country. In some countries, services appear to have continued despite other Covid-19 related restrictions being imposed. In Georgia and Estonia, for example, civil society reports that Oat has continued to be provided to prisoners on a regular basis without any problems documented (Drug reporter, 2020). Similarly, in Bosnia and Herzegovina, Oat reportedly continues to be available, but the use of masks and disinfectants have become a requirement to use this service

(Eurasian harm reduction association, 2020).

In other countries, services have either been abused, interrupted or suspended. In Moldova, a country heralded as one of the best in the world in terms of harm reduction provision in prisons, the provision of Oat has reportedly been suspended in two prisons because authorities have distributed the medication among themselves, and interruptions in the availability of antiretrovirals have also been reported (Eurasian harm reduction association, 2020). In Lithuania, guards are reportedly threatening to revoke prisoners' access to methadone as a means to assert control and suppress conflicts arising during the lockdown (Drug reporter, 2020). Civil society also report that the provision of Oat was suspended in prisons in Kyrgyzstan (Eurasian harm reduction association, 2020). In Canada, restrictions were imposed on almost all programming in prisons in March 2020. Yet according to the Correctional Service of Canada, the *Prison needle exchange program* (Pnep) continued in the prisons where it was already being provided, while its promised rollout has remained suspended since March (B. Graveland, 2020). Even before the lockdown, many - if not most - people in prison who inject drugs were not accessing the programme because of its inherently flawed nature, which includes approvals by health and security staff, as well as the institutional warden, before individuals can participate<sup>4</sup>. While it has been difficult to gather reliable data on Pnep uptake since March due to strict limitations on prison visits, civil society maintains it is safe to assume that numbers remain very low due to significant



restrictions on programming that occurred at the onset of the pandemic, on top of the confidentiality concerns and other barriers to access which have yet to be addressed<sup>5</sup>.

In some other regions, harm reduction services appear to have been adapted to safeguard the health of people who use drugs in prison. In Scotland, for example, where approximately 25% of the people in prisons receive a daily dose of Oat (methadone), a decision was taken early on to switch to the use of depot buprenorphine (Buvidal) for all people currently on methadone in prison serving sentences of six months or longer (G. Smith, 2020). Available as 7-day or 28-day injection, depot buprenorphine helps to ensure continuity of Oat while the Covid-19 restrictions are in place and minimises contact with frontline healthcare staff. Ministers and the Scottish Government's Health finance planning and assurance group agreed emergency funding of up to £1.9 million for Health boards to cover the cost of transferring methadone administration to Buvidal in prisons for an initial four month period (May-August 2020), and a step-by-step approach was put in place to ensure a careful transition for those who require it (Scottish Government, 2020). Similarly, in the Australian state of New South Wales, a suspension of prison visits resulted in a reduction of illicit drugs available in the prison, which led to an increase in demand for Oat among prisoners. While some people were already receiving depot buprenorphine (Cam2038) before the lock-down following a successful trial in late 2019, everyone else receiving a different form of Oat during lockdown was transferred onto depot buprenorphine

to reduce the resources needed for Oat delivery and increase availability of staff for other clinical activities (J. Roberts *et al.*, 2020). Although these approaches are commendable in many ways, the exclusion of people serving shorter sentences or not currently on Oat but who might now wish to be in Scotland appears arbitrary and is more than likely a violation of their human rights.

According to widely accepted international standards on the treatment prisoners, states have an obligation to provide a standard of care that is at least equivalent to that available in the broader community, commonly known at the *principle of equivalence*. Some experts, however, have rightly questioned whether the aim should not be equivalence of care, but rather equivalence of objectives and results, which would require a higher standard of care for prisoners (R. Lines, 2006). This idea is particularly relevant in the current climate, which has served to accentuate the unique risks that people in prisons and other detention settings face.

## 7. Conclusions

The Covid-19 pandemic has exposed for all to see the particular vulnerabilities of people in prison, as well as the shocking conditions they are forced to live in. It has clearly demonstrated how intimately connected prison health is to public health. It has also laid bare the fact that people who use drugs and racial minorities are not only disproportionately represented in prisons globally, but also disproportionately impacted by Covid-19. These uncomfortable truths have forced a spotlight onto the role of incarceration, punitive drug policies, and systemic discrimination in fuelling the pandemic,

and other health and social crises, revealing just how fundamentally flawed punitive policies like drug enforcement are, as well as criminal justice systems the world over. With decongestion schemes rolled out globally in an effort to curb the spread of the virus, doubts were cast on the necessity and proportionality of incarceration in the first place, raising hopes that this may be an entry point to consider and begin putting into place much needed reforms. Indeed, the current public health crisis has provided a once-in-a-century opportunity. An opportunity to recognise, as anthropologist Thurka Sangoramorthy points out, “how the deepening disparities generated in the context of Covid-19 are not anomalies, but rather systematic, productive, generative and valuable to the operation of governing bodies and the management of populations” (T. Sangaramoorthy, 2020).

Unfortunately, the significant shortcomings of the decongestion measures make it patently clear that governments have missed this opportunity and continue to prove unable to prioritise individual and public health over punishment, one more piece of evidence that major structural reforms are needed, rather than just piecemeal measures. And the disproportionate response to Covid-19 in prisons confirms that holistic and human rights-based considerations and approaches often continue to be eclipsed by heavy-handed approaches. Tackling the current global health crisis requires much more than just a health and safety response; it requires both short and long-term solutions that involve fundamentally rethinking ineffective and harmful policies. Punitive and

discriminatory drug laws and policies that currently fuel mass incarceration and intensify global inequality, sickness, poverty and exclusion must be urgently reformed. Alongside this transformation must be a fundamental overhaul of the criminal justice system, including defunding the police and urgently addressing the crisis of prison overcrowding. Resources currently invested in drug enforcement, which have for far too long crowded out proven measures to address drug-related harms, must be urgently reallocated to dedicated systems of care and support which strive to promote dignity, human rights, and racial justice. These may seem like big demands in a system structurally built to oppress some and benefit others, but they are essential. Covid-19 presents a rare opportunity to live up to the challenge to adapt to a new reality and build a better world, and it must be seized and acted upon before it is too late.



## Notes

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<sup>2</sup> World prison brief, Institute for crime and justice policy research, Birkbeck University of London, *Highest to lowest - occupancy level (based on official capacity)* [https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All) (accessed on 16 September 2020).

<sup>3</sup> Oat (also referred to as Ost, Otp or Mmt) is the prescription of an opioid agonist substance with similar pharmacological action to the drug of dependence. It present a lower degree of risk than opioids purchased on the street. Examples of Oat include methadone and buprenorphine, which are on the Who's list of essential medicines, and are two of the most widely used, evidence-based treatment for opioid dependence around the world.

<sup>4</sup> See the statement by 70 organisations Canada-wide (2019), *Correctional service of Canada must fix fundamental flaws with prison needle exchange program* <http://www.aidslaw.ca/site/wp-content/uploads/2019/08/PNSP-2019-Organizations-Statement-2.pdf> (accessed 24 September 2020).

<sup>5</sup> SandraKa Hon Chu (22-23 September 2020), *Personal communication, on file with author.*

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# In the United States, the Coronavirus devastated prisons and jails, exposing the violence and indifference of the country's mass incarceration system

*Alice Spierl*

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## 1. Introduction<sup>2</sup>

There is fundamental flaw in the models that officials have used to project the curve of the coronavirus outbreak as it rips across the United States. Those models were based on other countries' experiences with the virus — from China to Italy — and do not account for a uniquely American risk factor: mass incarceration.

There are currently 2.3 million people incarcerated in Us jails and prisons. The Us accounts for 4 percent of the world's population and 21 percent of its prisoners. While incarcerated people have been released in trickles across the country as the Us has become the global epicenter of the pandemic, those releases are hardly making a dent in the density of prisons and jails, and they pale in comparison to the tens of thousands of people freed by other countries with far lower incarceration rates. As of the end of September, at least 995 men and women in the Us have died after contracting the virus behind bars — a figure that is climbing by the day<sup>3</sup> and remains

“dramatically underreported”, according to experts who have been tracking it. The official number of positive cases reveals little beyond how few incarcerated people were being tested as the virus tore through the country. In the handful of facilities with higher test rates, most people were found to be positive. Early on in the pandemic, eight of the 10 largest outbreaks in the Us were in prisons and jails.

But mass incarceration is not only causing people to die of Covid-19 behind bars. As corrections facilities become hot spots, the virus is also rapidly spreading into the surrounding communities. A model released in April by the American civil liberties union (Aclu) suggests that when jails are accounted for, estimates of the death toll are off by at least 100,000. And that's for jails alone—not prisons or immigration detention facilities.

It's not hard to imagine why prisons and jails have quickly become the epicenter of the epicenter.

“There's no such thing as social distancing in prison”, a man incarcerated in a New York

state maximum security facility wrote to me. “How can an incarcerated individual maintain social distancing in a population of over 2,000?”, he added. “With 240 men to a block, minus the guards? With every man dwelling on all sides of one another, constantly?”.

“This is a time bomb”, another incarcerated man wrote. “The mess halls and lines traveling to and from, among other places, are areas of mass density. They have cut down the amount of people per table, but we’re still less than 2 feet apart”.

“I am sure you can imagine that the jailhouse is in the worst state it has been in anyone’s memory”, added the man, who has spent the last 25 years in prison. “In this particular warehouse, it seems like every day we hear of someone in the cell sick, taken to a section of cells for the sick, placed in the medical department’s isolation, or taken to an outside hospital”. The prison had finally started to provide inmates with face coverings, though not real masks, and hand sanitizer, he noted. Hand sanitizer is usually banned in prisons as contraband, a lawyer said on call with journalists, “because it has alcohol in it, and I guess they think that people are going to drink it”. The fact that some prisons have since relaxed the rule is a sign of how dire the situation got, and how little officials actually did to stop the virus.

The psychological toll, too, is even more staggering behind bars. “I haven’t been this stressed out since I was on trial”, a third man wrote to me, before listing all the loved ones who were falling ill as he sat in prison unable to be with them. “It’s the fear of calling home and finding out someone else I held close to the heart

passed away. It’s the fear of never being able to see someone I love ever again and not being able to pay my proper respects”.

## 2. Everything is an undercount

For the past six months, Sharon Dolovich and a team of volunteers have been tracking the *tsunami* sweeping through the country’s prisons and jails. Early on in the Us outbreak, when prisons’ first response to the threat was to shut down visits, Dolovich, a professor at the University of California, Los Angeles School of Law, started a spreadsheet to keep track of each facility’s Covid-19 policies. Prisoners’ rights lawyers were scrambling to help their clients. Dolovich made the document public “so people don’t reinvent the wheel”, she told me. “People were writing demand letters and starting to do court filings to go to court and try to get people released. Not everybody had to do it for themselves—I could share”.

As the virus spread, the spreadsheet quickly grew into a more ambitious project — and the most complete picture we have of how the crisis is impacting jails and prisons across the country. Dolovich started hearing from former students, advocacy groups, and strangers offering to monitor releases, juvenile detention centers, and requests filed with each facility, among other information. When state corrections departments began to post regular updates about positive cases and deaths, many in response to mounting public pressure, a group of volunteers started recording the data daily to track the growth of cases over time. They also scoured news reports and tapped into other resources to provide data that was sometimes more up to date than the official tallies.

“Everything we are seeing is undercounted”, Dolovich emphasized. “It’s in the interest of the prison systems to pretend these people are not dying from Covid”.

Born as a crisis response tool, the project also aims to document the pandemic in the country’s prisons and jails before officials have an opportunity to rewrite its history. “One of the things that we’re predicting is that after the initial emergency has passed, the number of people who died during this period and the number of people who are reported to have died from Covid are going to be very different”, Dolovich said. “I think jails and prisons are going to pretend that people died from other things”.

As incomplete as the data might be, UCLA’s Covid-19 behind bars project is breathtaking for the scale of the catastrophe it captures. It is also an indictment of a criminal justice system that both enables so much death and fails to account for it. In addition to 995 deaths, the UCLA project has documented at least 131,929 coronavirus cases among incarcerated people, as well as at least 27,421 cases, and 42 deaths, among corrections staff. At least 17 people have died in the custody of US Immigration and customs enforcement, though critics suspect the agency is severely underreporting virus-related deaths. No government agency has compiled or made public this collective data.

Part of the reason there’s no official comprehensive dataset tracking the impact of the coronavirus in the US prison system is because there is no unified system, but rather a tangle of federal, state, and local jurisdictions. “It’s always been a

decentralized fight, state by state, county by county”, said Dolovich.

That presents both a massive challenge and an opportunity, added Dolovich. Because there is no centralized body overseeing Covid-19 responses in prisons and jails, advocates have been lobbying hundreds of officials across the country, while armies of lawyers have been working around the clock on behalf of individual clients and entire classes of people. They have filed motions with dozens of courts arguing for relief that can range from diversion to lower sentences to compassionate release. “The level of advocacy effort and involvement is actually astonishing and inspiring right now”, Dolovich said. “There’s no easy levers. So people are basically slamming their heads against the wall and trying to see if there’s any kind of weakness they can take advantage of to help their clients”.

“We’ve had 40 years of a legal system that’s been crafted with the effect of making it extremely hard to provide any kind of meaningful constitutional relief for people”, she added. “We respond to any kind of social crisis with incarceration, and what we’re seeing now is the fruits of those efforts”.

The fragmentation of the US criminal justice system — a sprawling, decentralized bureaucracy with thousands of jurisdictions and powerholders — has long served to hide the full cost of mass incarceration. Comprehensive data on those the US deprives of their freedom is virtually impossible to obtain in a timely fashion, if at all. The coronavirus crisis has laid bare this systemic failure more than ever. The country’s more than 3,000 jails, in particular, function like fiefdoms.

While state corrections departments oversee prisons, and the Bureau of Prisons runs federal facilities, jails operate under the authority of thousands of local officials. Only a handful of states collect data from their jails.

“There isn’t centralized reporting, responsibility, or accountability”, said Insha Rahman, director of strategy and new initiatives at the Vera institute of justice, which has long sought to fill in the gaps in official data and launched a tracker monitoring Covid-19 responses across the jail system. “It’s actually literally going county by county to get that information”.

“It’s so hard to know what’s happening across the entire country”, echoed Udi Ofer, the director of the ACLU’s Justice division. “We don’t have one criminal justice system in the United States, we literally have thousands of criminal justice systems. It’s so decentralized that every jail, every prison is its own universe”.

The ACLU model attempted to account for the “uniqueness of every jail and community”, said Lucia Tian, the organization’s chief analytics officer, adding that their model was the combination of “over 1,200 individual models with tailored information from those particular jail systems and counties”. The model predicted that, with highly effective social distancing in place, accounting for jails would increase US Covid-19 deaths by 98 percent — from a projected 101,000 to 200,000. With less effective social distancing, jails could bump up the death toll by 188,000, for a predicted total of 1,177,000.

The UCLA project tracks jails too — though only a few jail systems are making coronavirus data readily available to the

public, mostly in larger cities where scrutiny is highest. Those jails have been devastated by the virus. At Rikers Island, in New York City, where at least three inmates and nine corrections staff have died, the reported infection rate at one point reached 10 percent of the jail’s population. At Cook County jail in Chicago, where six inmates and two staff have died, almost 900 inmates and staff tested positive early in the pandemic.

In prison, age is a significant risk factor for tens of thousands of people: there are nearly 200,000 incarcerated people over the age of 55, a number that has spiked by nearly 300 percent over the last 20 years. That’s indicative not just of how many people the US incarcerates, but also for how long. About 40 percent of people in prison have at least one chronic health condition such as asthma or diabetes, which makes those individuals particularly susceptible to serious illness with Covid-19.

But if people in prison tend to be older and sicker, people in jail move in and out at much higher rates, making those incarcerated in jails especially vulnerable to catching the virus and more likely to spread it. There were 10.7 million jail admissions in 2018 alone — and each admission puts police officers, guards, and other staff, in addition to the incarcerated, at risk of exposure. “Social distancing is even worse in jails, because jails are meant to be temporary holding facilities”, Ofer said. “People tend to live in dormitory-style rooms with bunk beds 2 feet apart, if that. There’s absolutely no social distancing in jail, it’s kind of a one-two punch”.

The situation at Rikers and Cook County



offers a bleak foreshadowing of mass deaths to come across the jail system, particularly in rural areas where health care access is already a chronic issue and jails often fill in for a lack of services. A report released in April by Data for progress warned that rural communities are particularly vulnerable in a pandemic. In those communities, jails are often filled with people who have substance abuse problems or are too poor to post bail. Worse, the report warns, rural jails “are frequently located in counties that lack hospital capacity to handle the coronavirus pandemic”. In Mississippi, Montana, North Dakota, and West Virginia, for instance, more than one-third of people held in jails are in counties with no Icu (Intensive care units) beds.

“We know rural America is at least a couple of weeks behind the curve”, said Rahman. “But when it comes, it’s going to be devastating. It will be worse than Rikers”.

### 3. Death by incarceration

The solution, health experts and prisoners’ rights advocates have been saying all along, is simple: prisons and jails should release far more people as quickly as possible. “Mass incarceration was a public health crisis before Covid-19, but the pandemic pushed it past the breaking point”, said Ofer. “We need governors and prosecutors and judges, and we need the president of the United States, to act immediately and dramatically to reduce jail and prison populations to stop the spread of Covid-19, not only in jails and prisons, but in the broader community”.

But as calls for people to be released have echoed across the country, and some states, like Vermont, have taken decisive

action, many law enforcement officials have resisted what they called the “mass release” of incarcerated people. In general, jails have reduced their population at a much higher rate, about 25 percent, according to analysis by the Prison policy initiative. But prisons, the same analysis found, “have released almost no one”. Some officials have suggested that those incarcerated for *violent* crimes are unworthy of release — a distinction that has long crippled efforts at substantial criminal justice reform, even before the current crisis. “If we don’t tackle the question of people serving time on violent convictions, we can’t meaningfully stop the spread of Covid-19”, said Rahman. “That’s just not going to make a meaningful dent”.

Still, Us officials are hanging on to mass incarceration even as its devastating impact becomes ever clearer. In Louisiana, rather than releasing people, officials have isolated the sick in a section of the Louisiana State penitentiary, commonly known as Angola, that had been shut down following a long history of human rights abuses. In New Jersey, officials promised that hundreds of people would be released — but weeks later only a handful had been freed, and at least 37 people had died in prisons across the state.

One of them was Tiffany Mofield. A 43-year-old woman, Mofield died of coronavirus complications in a New Jersey prison after officials moved her from an area of the prison where she was quarantined for Covid-19 symptoms into solitary confinement even though her symptoms persisted. Her family learned that from me, after another woman incarcerated at the facility contacted me to tell me that she had witnessed her death.

Mofield died on April 29 at the troubled Edna Mahan correctional facility for women after begging to be let out of a locked shower, saying “she could not breathe”; the woman, Michelle Angelina, wrote to me through a prison email service. Mofield had spent about two weeks quarantined in an infirmary after becoming ill with symptoms consistent with Covid-19, but she was moved out even though “she was clearly not better, as she was visibly short of breath and extremely lethargic”, said Angelina, who is housed in the same administrative segregation unit where Mofield died.

“She died right in front of my neighbor's door and just diagonally from my door, about five feet away”, said Angelina, who declined my offer for anonymity to protect her from retaliation. “Many inmates are frightened for our lives and safety as a result of us witnessing Ms. Mofield die”.

Mofield's death underscored the devastating impact the coronavirus was having as it spread through prisons and jails, where the health of incarcerated people was often neglected before the current crisis. “They are more concerned about ensuring that inmates serve every day of their punishment than they are about inmates' health and well-being”, said Angelina. “That is why they sent Ms. Mofield back to the unit before she was fully well. Ad-seg is a punitive unit”.

Mofield first passed out in the shower shortly after returning to the unit, said Angelina, who described the shower as a “converted mop closet”. Women are taken to the shower handcuffed to a belly belt and then locked inside, where there is no emergency call button, she said. The night she died, Mofield once again passed out in the shower “after begging for about five

minutes to be let out”, said Angelina. “No staff responded in a timely fashion”. When someone finally did come, Mofield was almost unconscious and was carried to a wheelchair where she became unresponsive. Angelina said that several officers “tried their very best” to revive Mofield, following an automated defibrillator's instructions and performing cardiopulmonary resuscitation until paramedics arrived on the scene. Mofield died “just before they got her on the ambulance gurney”, Angelina said.

“It is the daily flaws in how the facility is operated from an administrative position that caused the circumstances that led to Ms. Mofield's death, not the officers' fault”, stressed Angelina. “Inmates should not be locked in showers, should not be handcuffed to go to and from the shower, and should not be left to wait with no assistance in hearing range in a locked shower, begging for help because they can't breathe”.

At the time of her death, Mofield was nearing the end of a five-year sentence for an attempted bank robbery. She was a mother of three and grandmother of four, whom friends remembered on social media as “the life of the party” and a “neighborhood hero”. Her daughter, Shatifia Cooke, told me that her mother “was very big on family” and that her mother's symptoms “were ignored”. Had her mother been taken seriously, she added, “she would still be here right now”.

“Even while being locked up she still made the best out of her situation, making everyone laugh, helping everyone get through their time away from their family”, Cooke wrote.” Many people look down on people that are in jail thinking they are all bad people or that they did



something really bad — but no, that wasn't my mother”.

“She had people out here that loved and cared about her and we not stopping until we get answers”, she added. “We going to make a change with this one we gone show these people that these inmates are somebody and their health and lives matter too”.

#### 4. Anatomy of a prison outbreak

The story of Tiffany Mofield's death is one of dozens that incarcerated men and women have sent me over messages from prison over the last several months, blowing the whistle on prison conditions at an enormous personal risk. Because officials guard the narrative of what happens inside prisons fiercely, those messages have often been the only way to reconstruct how the Us sprawling mass incarceration system failed so badly to protect the men and women whose lives it controls. The story of how a Kansas prison became one of the largest Covid-19 hotspots in the country captures that failure starkly.

The men incarcerated at the Lansing correctional facility, a state prison in northeastern Kansas, first heard about the Covid-19 pandemic from the news or from relatives on the outside. There were no known cases in the state — but at the prison, dozens of men had begun to fall ill, some severely.

Rachad Austin was counting down the days left in his four-year sentence, but as news of the virus continued to trickle in, he grew increasingly worried. He had a collapsed lung due to a gunshot wound — and sometimes he suffered from chest pains and had difficulty breathing. Dozens of people around him were beginning to

show symptoms, “and next thing you know, they're passed out”, Austin told me on a call from prison. “It was a really scary time. We were all wondering what was going on”.

Sherman Wright was also worried. Like some 40 percent of those incarcerated in the Us, he had asthma and diabetes, making him particularly vulnerable to complications from Covid-19. At 56, he was also one of nearly 200,000 people over the age of 55 incarcerated in the Us — another factor that contributed to his vulnerability. Wright's sister, Cynthia Crawford, at first thought he'd be safe in prison, where Wright was 32 years into a 66-years-to-life sentence over three robberies he had committed in his youth. “I thought, well, they're confined so how can it get to them?”, she told me. “But it did. And when it did, my worry went from 10 to 100, and as it progressed I hardly got any sleep. I worried about him every day, I woke up with him on my mind”.

Worried families soon started calling the prison, but officials did not publicly acknowledge the threat posed by the virus until mid-March, when they shut down visits and encouraged inmates to wash their hands more frequently — hardly the mundane task in prison that it is outside. By the time three staff members tested positive, on March 31, most men incarcerated at Lansing suspected that they, too, had been exposed to the virus — and yet it took prison management nearly a month to start testing them in large numbers. When they did, they found that some units of the prison had as much as a 75 percent rate of positive tests. “We all knew we were positive”, said Austin. “This was not the situation anyone would want

to be in — but we were trapped”.

By the end of May, both Austin and Wright had indeed tested positive — as had nearly 900 others of the prison’s 1,700 inmates. Four incarcerated men and two staff members had died, and the prison had become the 14<sup>th</sup> largest cluster of coronavirus cases in the country and the largest in Kansas. As pressure on officials had mounted along with the number of cases, Gov. Laura Kelly had promised in early April that some vulnerable people would be released to home confinement. But weeks into the process, only six inmates in the entire state had been freed, and none from Lansing. Kelly, a Democrat who had campaigned in part on the promise to reform the state’s overburdened prison system, said releasing people “is very complicated, legally” — though critics noted she had the legal authority to do so.

The story of how the pandemic unfolded at Lansing reveals many missteps by state and prison officials who consistently underplayed the threat posed by the virus: delaying testing, transferring and mixing exposed people, and initially failing to distribute and require masks even as cases surged. And the situation at Lansing was made worse by chronic issues in the Kansas prison system, which was already plagued by severe overcrowding and staff shortages. But as was the case in many prisons across the country, the outbreak at Lansing was also largely avoidable, and officials ignored a series of warnings from staff, families, and attorneys and for weeks failed to take significant action to stop the virus.

“It was clear what was going to happen”, Jennifer Roth, a Kansas public defender, told me. “All you had to do was look at

other prisons and jails across the country, and what medical professionals and other scientists were saying. It was clear what could happen, and then it did happen”.

By the time the prison moved to more aggressively contain the spread of the virus — after a riot had broken out in one of its units over a lack of masks — it was too late.

“They took too long”, said Roth.

“I think they honestly just didn’t care what was going on with us because we’re inmates”, said Austin, who was released in July at the end of his sentence. “They didn’t want to deal with it”.

Gov. Kelly’s office did not respond to a request for comment. A spokesperson for the Kansas Department of Corrections did not answer detailed questions, but wrote in a statement that “just as others have around the country, we are facing this unique challenge which placed previously unimaginable stress on our system”.

“The Lansing correctional facility is in the Kansas City metro area where the first cases of Covid-19 were experienced in Kansas”, the spokesperson added. “And being first at a time when public health officials, using currently available science, were not yet aware of asymptomatic persons, masks were not recommended, testing supplies were limited at best, and social distancing was a new concept for everyone factored into our response”.

“As the science and recommended guidelines changed, we adapted quickly and implemented recommended changes”.

### 5. Intentional ignorance

On March 7, Kansas officials reported the state’s first case of Covid-19 in Johnson

County, not far from Lansing. There are several other prisons and jails in the area, and staff moved frequently between them and around nearby Kansas City.

But nearly a month later, with cases surging in the state and Kansans under a stay-at-home order, very few people were wearing masks at Lansing correctional facility. Kayla Donley, Rachad Austin's fiancée, had called the prison to ask whether she could mail him one, and she told prison staff that she was required to wear a mask at the hospital where she worked, even though her job kept her at a far greater distance from people than inmates and guards were from each other. But the prison staffer she spoke to told her she couldn't mail the mask. Austin could cover his face with a T-shirt, she said the staffer told her, but he might face disciplinary action if he did.

"It's like they didn't even care", said Donley. "I feel like no one knew what was going on at Lansing during this time, and they brushed it off and acted like it wasn't a big deal. None of them took it seriously".

Those incarcerated at the prison weren't the only ones without masks. In the early days of the outbreak, several inmates complained to relatives and attorneys that guards were not covering their faces, even though some had been out sick with apparent Covid-19 symptoms. And David Carter, a Lansing correctional officer who quit his job in April over the prison's mishandling of the virus, said that guards had actually been discouraged from wearing masks by management. "They were told it was going to cause a panic among the inmates", said Carter. "A couple staff members were threatened with disciplinary action for wearing a mask".

Carter, who worked as a correctional officer at Lansing for 15 years, said that staff who had tested positive to the virus were required to show up for work unless they were symptomatic. He shared text messages between prison staff that appear to confirm the policy and suggest that the prison was trying to figure out how to keep staff who had tested positive separate from inmates who had not.

"I have seen a lot of ineptitude over 15 years", said Carter, who since his resignation has publicly blamed the state's corrections officials for the six Covid-19 deaths of Lansing inmates and staff. "But there was a level of intentional ignorance — like they wanted to stay in the dark about Covid-19, they just wanted to stick their heads in the sand".

"They spent about a month, maybe five weeks, just ignoring it completely", added Carter. "They didn't think it was going to be as big as it was because every level of government was science deniers that were basically saying that it's a hoax, and it's not going to happen".

But the "final straw", Carter said, was officials' decision to quarantine inmates who had been exposed to the virus in a new and already troubled facility built by the private prison giant CoreCivic and leased to the state. The move was not expected for months because the prison was not ready and the prison's staff was already stretched thin at the old facility. Then, after a riot broke out at the old facility, officials began to move more inmates to the new facility, exposing them to the virus and causing what Carter described as a very volatile security situation at the new facility, which he said was dangerously understaffed.

“The current and ever-growing atmosphere of *do more with less* has put in danger every single staff member that regularly interacts with offenders”, Carter wrote in his resignation letter. “I can no longer be associated with a facility that is a ticking time bomb”.

“The line staff are just as concerned about this as the inmates are”, he also told me. “It’s not this us versus them mentality. If there’s an us versus them, it’s the line staff and the inmates versus the ineptitude of the top, really”.

Officials justified the move to the new facility as necessary to isolate inmates. Then weeks later, after a number of positive cases emerged at a work-release facility in Wichita, more than 200 men who had lived there were also moved to Lansing. The transfers proved to be disastrous.

“I really don’t know if these decisions were made at the advice of any public health officials”, said Lauren Bonds, the legal director of the American civil liberties union’s Kansas chapter. “But we do know that there were people from Wichita who got infected because they were kind of thrown into a hot spot at Lansing, when they were really facing a much smaller risk when they were in Wichita”.

“I still to this day don’t know why that decision was made”, she added. “But it definitely has panned out that it was not in the best interest of stopping transmissions and reducing infection rates”.

## 6. Wasted warnings

Kansas officials were repeatedly warned about the devastating impact a Covid-19 outbreak could have on the state’s prisons and jails.

In the early days of the Us pandemic, a group of Kansas attorneys made fliers explaining what was known about the virus and how people could protect themselves, and asked jails across the state to post them. They had written letters to each of their clients to explain what Covid-19 was and how it spread, and they had promised them that they would do everything in their power to get them released, said Melody Brannon, one of those attorneys.

“The state government was entirely unprepared for this”, Brannon told me, noting that her federal clients, who are held in local jails, continued to be charged for soap for weeks as Covid-19 spread, and that attorneys at her office pitched in out of pocket to put money in the commissary accounts of clients who couldn’t afford to buy it. People who were sick were charged \$8 for requesting a visit at the infirmary, and then \$8 for the actual visit, she added, and that was excluding the cost of any care they might have received. “Even in good times they have such a hard time managing health care within a prison”, said Brannon. “There are so many inequities built in”.

On March 31, a group of attorneys wrote a letter to Gov. Laura Kelly that was “chock-full of science and the experiences of what was going on in other places”, said Roth, the public defender. From the very beginning, she and others called on officials to release as many people as possible, arguing that rapidly reducing the number of incarcerated people was the only meaningful way to curb the spread of the virus.

The correctional officers’ union also raised the alarm, calling on the Department of Corrections to put in place measures to



stop the spread of the virus, according to Carter. “The union was trying to get them to at least have a plan in place”, he said, noting that they weren’t even asking for additional resources like masks or other protective equipment. “They literally were just asking for a *what if* scenario to be put in place. And they refused to even do the planning”.

On April 9, the same day that a riot broke out in one of Lansing’s units, the Aclu of Kansas filed a class-action lawsuit demanding the urgent release of vulnerable inmates and those close to the end of their sentence. The Aclu argued that the prison’s response to the pandemic had been inadequate: inmates were still being charged for soap, most staff weren’t wearing masks even though the prison had finally begun to issue them, and there was no effort to maintain social distancing. “The prison’s response and the state’s response was that some of this is just inevitable in a correctional setting”, said Bonds. “And people are just going to get sick, and we can only do what we can do, and unfortunately this is as much physical distancing as we can provide, this is the best we can do”.

A judge ruled that the Aclu had failed to prove that the state’s response had been inadequate enough to violate the Eighth amendment, which prohibits cruel and unusual punishment, and dismissed the suit. When the suit was filed, there had been between 20 and 30 known Covid-19 cases in the state’s prisons. “That number wasn’t that scary”, said Bonds. “But basically as soon as our case was dismissed, we were starting to hear numbers in the hundreds. That’s how we ended up with close to 900 people testing positive and getting infected—and that’s 900 inmates,

that’s not even including the staff members who tested positive”.

In early April, the governor promised that officials were reviewing a list of inmates with close release dates and “viable plans” for reentry. More than 500 cases were reviewed as part of the process, according to Bonds, but by early May, only six people had been released. By that point, hundreds of people had been infected at Lansing.

What most frustrated Roth is that throughout the process Kelly admitted that the state’s prisons were overcrowded and that too many people were incarcerated. “She said all these things through this process, but still wouldn’t actually move on releasing people”, said Roth, who also blamed the state’s legislature for their failure to do more. “I believe they did not want to wade into having to defend releasing people”.

Kansas was hardly the only state to release a negligible number of people during the pandemic — and despite nationwide calls to reduce the risk of Covid-19 in prison by drastically reducing the number of incarcerated people, very few were actually released. That decision was dictated by politics rather than public health, critics say, partially because releasing people would likely draw further attention to the fact that far too many are incarcerated to begin with.

“If they start releasing people and it works, and there isn’t mayhem in the streets, then it really helps the argument that we are over-incarcerating in the first place”, said Brannon. “If you release people, and they find that there wasn’t a huge surge in crime, then they’re going to have to admit that there really is mass incarceration and

over-incarceration that is unnecessary, and Covid proved it. And as long as they resist and keep people in, you won't have that evidence".

Cynthia Crawford had hoped her brother, Sherman Wright, who had serious preexisting conditions, might be one of those the state would consider for early release. By that point, the families of the men incarcerated at Lansing had started receiving updates from the prison — usually when someone died, said Crawford — and when the governor had said the state was reviewing some inmates' cases for possible early release, "that gave me hope," she said.

Crawford wrote to the governor twice but never heard back. "I wrote to everybody trying to get some help", she said. Wright was serving what amounted to a life sentence because of Kansas's *three strikes* law, after he had been convicted in the 1980s for three robberies during which no one was hurt. Wright claims he stole about \$60 — earning him a sentence of more than a year for each dollar. Since its class-action lawsuit was dismissed, the ACLU of Kansas has launched a clemency initiative, filing dozens of clemency applications on behalf of the most vulnerable people incarcerated in the state, and Crawford now hopes her brother might qualify for early release that way. His first parole hearing is not scheduled until 2026.

"We were very poor", said Crawford, who for years has visited her brother every two weeks, until Covid-19 forced her to switch to video visitations. "Stealing is a crime, ok, do your time. But not your whole life".

## 7. Second wave

Days after the first Lansing guards tested

positive, the prison switched course on masks, and men incarcerated there began making masks to be distributed to staff first, and then to inmates themselves.

"They're coming out, passing out masks three months after people got sick", said Austin, who had also hoped to qualify for early release, since he had only a few weeks left on his sentence.

It's unclear why, but when the masks arrived to Lansing's C2 block, they were never handed out to the men living there. "They got locked into an office somewhere and ignored", said Carter. "And that's ultimately what set the inmates off". Austin, who didn't live in that block, said that the men there, including several who were sharing their cells with four other people, had also been denied showers. "The guys were frustrated already", he said. "They just wanted to take a shower, and they wanted face masks".

Videos of the riot — which some inmates themselves took with contraband cell phones — went viral. Nobody was seriously hurt, and when officials retook control of the block, they began to move people to the new facility at Lansing, where inmates who were exposed to Covid-19 had already been quarantined. A few days later, a smaller riot also broke out at a different prison, the Ellsworth correctional facility, apparently after a guard who had been working at Lansing was sent to Ellsworth without first quarantining. After the Lansing riot, prison staff there started going around to measure everyone's temperature, said Austin, and the National guard sent in medics to make up for the shortage of nursing staff at the prison, many of whom had also been exposed to the virus.



By that point, most inmates at Lansing were presumed to have been exposed. Those who complained of symptoms were given Tylenol and told to drink water. “They told me that unless my breathing changes, they couldn’t do anything because they knew we were all positive”, said Austin. “They were only taking the worst of the worst to the clinic. Unless you were on the verge of dying, you basically just had to deal with it”.

Austin tested positive for Covid-19 at the end of April. But the prison didn’t tell him until more than a week later, after his fiancée learned of his results during a phone call with a prison official. “They came and tested him and said they would have the results back in 48 hours and they never came back and told him anything”, said Donley. “It’s honestly sickening how inhumanely they treat these guys just because they are in prison”.

## 8. Conclusions

Long before Covid-19 spread through American prisons and jails, killing 1,122 incarcerated people and 42 corrections staff as of October 28, mass incarceration was already a public health crisis in the United States. With 2.3 million men and women behind bars, more than 20 percent of the world’s incarcerated people live in the Us, including hundreds of thousands who are aging or suffering from health conditions that make them particularly vulnerable to the coronavirus. But the way in which Us officials handled Covid-19 outbreaks at dozens of prisons is emblematic of the way they treat the incarcerated always: with cruelty and deliberate indifference. As prisons became not just hotspots for the virus, but also vectors that helped its spread in the

surrounding communities, the connections between mass incarceration and American life outside prisons were revealed with unique clarity. Yet even as public health experts cautioned that the only way to stop the spread was to release as many people as possible, the system’s devotion to harsh punishment at all costs won out in the end, and only a negligible number of people were released. Perhaps because, quoting again Kansas attorney Melody Brannon, “if you release people, and they find that there wasn’t a huge surge in crime, then they’re going to have to admit that there really is mass incarceration and over-incarceration that is unnecessary, and Covid proved it”.

## Notes

<sup>1</sup> **Alice Speri:** is a journalist currently covering criminal justice, immigration, and civil rights for The Intercept. Originally from Italy, she has reported from Haiti, Colombia, El Salvador, Palestine, and from across the United States. Alice has written extensively about jails and prisons. She was a 2019 fellow at the Ira A. Lipman Center for journalism and civil and human rights and a 2020 finalist for the John Jay College/Harry Frank Guggenheim awards for Excellence in criminal justice reporting.

<sup>2</sup> Different versions of this text, gathered herein a single article, have appeared in *The Intercept* during the last months.

<sup>3</sup> See the Conclusions here below. The most updated data can be found in the database of the Ucla's Covid-19 behind bars project [https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA\\_HkPVTk/edit#gid=1197647409](https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=1197647409)



## N. 1/2020 HAVE PRISONS LEARNT FROM COVID-19? HOW THE WORLD HAS REACTED TO THE PANDEMIC BEHIND BARS

edited by Susanna Marietti and Alessio Scandurra

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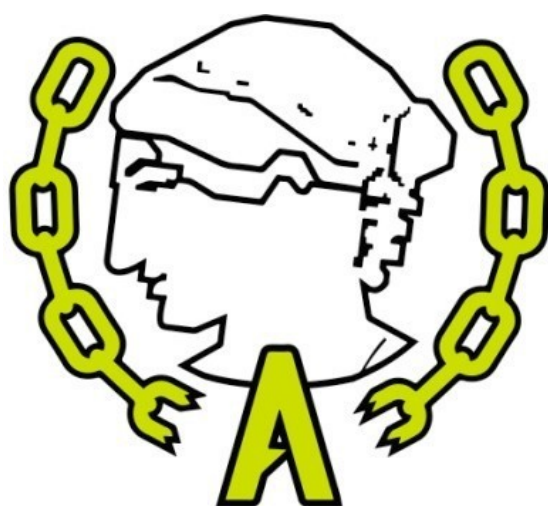
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