

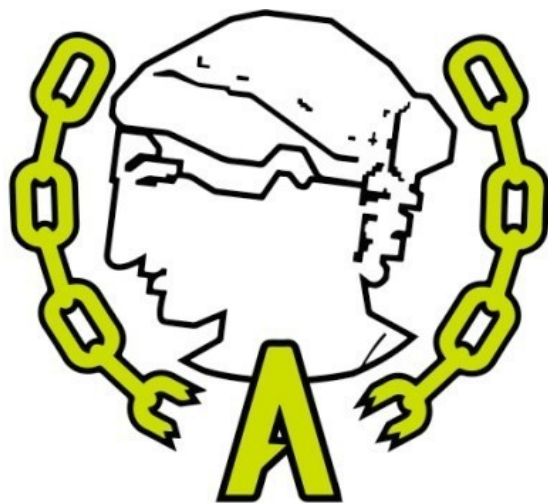
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**Have prisons learnt from Covid-19?
How the world has reacted to the pandemic
behind bars**



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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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The Covid-19 pandemic: the urgency to rethink the use of pre-trial detention¹

Laure Baudrihaye-Gérard²

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 infection³. 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)⁴. 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 detention⁵. 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 arrests⁶.

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 population⁷. 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 staff⁸. 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 defence². 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 them¹⁰. 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 proceedings¹¹ (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 Wales¹². 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

¹ 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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³ 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 (accessed 16 October 2020).

⁴ 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).

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

⁶ 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).

⁷ 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 (accessed 16 October 2020).

⁸ 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).

⁹ 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).

¹⁰ 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).

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

¹² 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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