

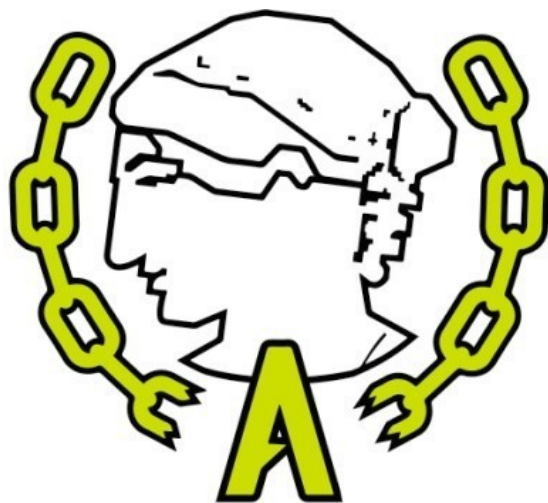
ANTIGONE

Anno XV
N. 1

**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

RIVISTA «ANTIGONE»

Semestrale di critica del sistema penale e penitenziario

Sito: <http://www.antigone.it/rivista/>

a cura dell'associazione Antigone onlus

SEDE LEGALE E OPERATIVA: via Monti di Pietralata n. 16, 00157 Roma

Tel.: 06 4511304; - Fax: 06 62275849

Sito: www.antigone.it; e-mail: segreteria@antigone.it

ANTIGONE EDIZIONI

ISSN 2724-5136

DIRETTORE RESPONSABILE: Claudio Sarzotti (Università di Torino)

CO-DIRETTORE: Stefano Anastasia (Università di Perugia)

COMITATO SCIENTIFICO: Cecilia Blengino (Università di Torino); Giuseppe Campesi (Università di Bari); Amedeo Cottino (Università di Torino); Alessandro De Giorgi (San José State University); Luigi Ferrajoli (Università di Roma Tre); Paolo Ferrua (Università di Torino); Carlo Fiorio (Università di Perugia); Francesco Maisto (Magistrato); Alberto Marcheselli (Università di Torino); Antonio Marchesi (Università di Teramo); Pio Marconi (Università di Roma La Sapienza); Luigi Marini (Magistrato); Dario Melossi (Università di Bologna); Giuseppe Mosconi (Università di Padova); Mauro Palma (PC- CP, Consiglio d'Europa); Livio Pepino (Associazione Studi Giuridici Giuseppe Borrè); Tamar Pitch (Università di Perugia); Ivan Pupolizio (Università di Bari); Franco Prina (Università di Torino); Eligio Resta (Università di Roma Tre); Iñaki Rivera Beiras (Universitat de Barcelona); Marco Ruotolo (Università di Roma Tre); Alvise Sbraccia (Università di Bologna), Francesca Vianello (Università di Padova), Loïc Wacquant (University of California, Berkeley).

REDAZIONE

COORDINATORI: Daniela Ronco, Giovanni Torrente

CORPO REDAZIONALE: Costanza Agnella, Perla Allegri, Rosalba Altopiedi, Carolina Antonucci, Federica Brioschi, Chiara De Robertis, Giulia Fabini, Valeria Ferraris, Patrizio Gonnella, Susanna Marietti, Simona Materia, Michele Miravalle, Claudio Paterniti Martello, Benedetta Perego, Simone Santorso, Vincenzo Scalia, Alessio Scandurra, Daniele Scarscelli, Valeria Verdolini, Massimiliano Verga.

IN COPERTINA: Immagine del Carcere di Milano San Vittore realizzate da Pietro Snider per Next New Media e Antigone nell'ambito del progetto Inside Carceri, <https://www.flickr.com/photos/insidecarceri/8197490558/>

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

TABLE OF CONTENTS

<i>Preface</i> , Susanna Marietti, Alessio Scandurra	7
PART ONE - A PRISON WORLD OVERVIEW with the contribution of the European Prison Observatory and the American Civil Liberties Union	15
BELGIUM - <i>So far, so good? Health and prisons in Belgium during Covid-19 pandemic</i> , Elena Gorgitano, Adriano Martufi	17
BRAZIL - <i>Covid-19 and prisons in Brazil: conditions and challenges</i> , Bruno Rotta Almeida, Elaine Pimentel, Patrick Cacicedo	27
BULGARIA - <i>Covid-19 and the prison system in Bulgaria</i> , Krassimir Kanev	34
FRANCE - <i>The pandemic crisis and opportunities for lasting change in French prisons</i> , Cécile Marcel	40
GERMANY - <i>Covid-19 shows substantial problems in the German prison system</i> , Melanie Schorsch, Christine Graebisch	47
GREECE - <i>Isolation for protection. Facing the Covid-19 pandemic in Greek prisons</i> , Ioanna Drossou, Nikolaos Koulouris, Theodora Pantelidou, Sophia Spyrea	55
HUNGARY - <i>Much ado about nothing. Banning visitation did not prevent the virus spreading into Hungarian penitentiaries</i> , Zsófia Moldova	62
ISRAEL - <i>A matter of absence: the Ministry of Health and Covid-19 in Israel's prisons</i> , Anat Litvin, Dana Moss	68
ITALY - <i>Coronavirus and Italian prisons: a success story?</i> , Federica Brioschi	75
PORTUGAL - <i>The management of Covid-19 in Portuguese prisons</i> , Vera Silva	85
SIERRA LEONE - <i>Covid-19 responses to mitigate the impact of the virus in Sierra Leone's prisons: an overview</i> , Lydia W. Kembabazi, Isabella Cordua	91

SPAIN - <i>Coronavirus management in Spanish and Catalan prisons</i> , Alejandro Forero Cuéllar	99
UNITED KINGDOM - <i>Covid-19 in prisons: the view from England and Wales</i> , Matt Ford	106
UNITED STATES OF AMERICA - <i>United States' failure to respond to the Covid-19 crisis in prisons and jails</i> , Udi Ofer	116
PART TWO - THE PANDEMIC AND PRISON: REFLECTIONS AND INSIGHTS	126
<i>The Covid-19 pandemic: the urgency to rethink the use of pre-trial detention</i> , Laure Baudrihayé-Gérard	128
<i>The Covid-19 pandemic highlights the urgent need to decriminalise petty offences in Sierra Leone and beyond</i> , Isabella Cordua, Joseph Bangura	139
<i>Pandemic and democracy: for a global constitutionalism</i> , Luigi Ferrajoli	151
<i>Assessing strategies to prevent and control Covid-19 in prisons in the initial emergency phase of the pandemic</i> , Matt Ford	160
<i>How the pandemic has aggravated the gendered impacts of drug policies on women who use drugs and incarcerated women for drug offences in Mexico</i> , Corina Giacomello	171
<i>The social revolution of fraternity against the virus of identitarian ideology</i> , Patrizio Gonnella	190
<i>Policy responses to Covid19 in prison. Testing the (in)action of European institutions during the pandemic</i> , Adriano Martufi	198
<i>Health and prison</i> , Aldo Morrone	212
<i>University and prison. A complex but unavoidable (more than ever in time of Covid-19) institutional and cultural interweaving</i> , Iñaki Rivera Beiras	225
<i>Prisons, health and drug control in the time of Covid-19</i> , Gen Sander	242
<i>In the United States, the Coronavirus devastated prisons and jails, exposing the violence and indifference of the country's mass incarceration system</i> , Alice Speri	257
AUTHORS	272



Pandemic and democracy: for a global constitutionalism¹

Interview with Luigi Ferrajoli²

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

¹This 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.

²**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).

