Editorial

Carceral Responses to the Pandemic in Europe: Casting a Light on Prison Harms, Inequalities and Pre-Trial Detention

1 Introduction

Societies, at least their humanity and respect for human rights, can be measured by how they treat the most vulnerable segments of the population, in particular in times of crisis. While the pandemic has heightened various vulnerabilities and generally exposed our everyday inequalities, the situation has been particularly dire for certain groups whose manoeuvring space for mitigating adversities has considerably shrunk. Some of the groups often mentioned in this context have been domestic violence victims, the homeless, children and the elderly (especially but not exclusively those in retirement homes), front-line workers as well as prisoners or, more generally, detainees. Pandemic, from Late Latin pandemus and Greek pandemos, etymologically suggests that it is something that affects all people, the ‘all’ (pan-) of dēmos; yet, on closer inspection, it became evident it did not affect all equally.

It was over a year ago when these issues came to the fore, however, a year later, the general pandemic situation in Europe is not as drastically different as one had hoped. Back in late spring 2020, many believed that we would most likely have to learn to live with the infection until the vaccine became available, hoping that with the advent of the vaccine (or vaccines), the path to recovery and return to ‘normal’ would be speedier. In the meantime, the vaccine has indeed been made available (albeit not equally across the world).1

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and it has made a difference; however, with the slow uptake of vaccination, which nobody could have predicted,² and new (more virulent) COVID-19 variants appearing, the cases of infection, come autumn 2021, began to rise steeply again, even in the regions with high vaccination rates.³ This led to the imposition of new, stricter measures and to lockdowns being contemplated again. We thus have and have not stepped in the same proverbial river twice (or quarc, considering the ‘fourth wave’ of infections).

The unassuaged concern for particularly vulnerable groups is therefore understandably persisting. In this paper, we inspect more closely the situation of detainees in Europe. Firstly, the state of prisons (or prisoners) in Europe is discussed, highlighting some current challenges. Secondly, harms and inequalities related to incarceration are examined, before moving to harms and inequalities exacerbated by the pandemic. Next, we look at the state or institutional responses to the new coronavirus in Europe in relation to the incarcerated, with a separate note on the special case of pre-trial detention. The paper concludes with the observation that the pandemic has thrown a new light on the old problems facing prisons, and detention more generally, which warrant a serious reform.

² Some note a particular West/East divide in this respect. While vaccination campaigns have been considered successful in the Western European countries, the countries of Central and Eastern Europe, many of which struggle also in terms of political instability and deep-seated mistrust towards the government, paint a different picture, resulting in a steep rise of coronavirus cases, deaths and strain on the already overburdened health systems. A. Furlong, ‘The lost summer: Central and Eastern Europe pays price for slow coronavirus vaccination’, POLITICO, 8 Oct 2021, available at: https://www.politico.eu/article/the-lost-summer-central-and-eastern-europe-pays-price-for-slow-coronavirus-vaccination (At the time of writing, Slovenia, which is presiding the Council of the EU, is also leading in COVID-19 infections per 100,000 people and on the brink of ‘exporting’ the patients in need of hospitalisation to the neighbouring Hungary, as the hospitals are running out of beds and lacking nurses.)

³ For example, Flanders, the Flemish region of Belgium, already achieved 87% vaccination rate mid-August, yet only a month later it turned ‘red’ again on the map of the European Centre for Disease Prevention and Control, as the daily average of new infections in the region doubled over the two weeks prior, followed by ‘dark red’ (the most severe) in early November (source: Brussels Times, articles from 19 Aug, 18 Oct and 4 Nov).
The State of Prison(er)s in Europe

According to the most recent data, European prisons host about half a million people. In 2019, there have been 497,000 inmates – 112 prisoners per 100,000 people – in the European Union alone. Looking at the Council of Europe member states, the number increases threefold. On 31 January 2020, there were 1,528,343 inmates in the penal institutions of the Council of Europe member states for which data have been made available, which corresponds to the European prison population rate of 103.2 inmates per 100,000 inhabitants. Many European countries struggle with prison overcrowding and deleterious prison conditions. The most overcrowded prison systems in the EU are those of France, Italy, Hungary, and Romania, where occupancy rates range between 115% and 120%. Denmark, Austria, Greece, the Czech Republic, Portugal, Slovenia, Malta, and Belgium show occupancy rates between 100.5% and 109.3%, while the remaining 16 EU countries have fewer prisoners than available places. One-fifth of the prison population in Europe is held in prison without a final judgment (pre-trial detainees), about one percent of inmates are juveniles (almost all of which – 4,873 in 2019 – are male).

While the European Union has no specific legislation relating to detention conditions – prison conditions are mainly the responsibility of the EU Member States – the EU has reasons to tackle this issue, as poor detention conditions have become an impediment to the effective use of EU legislation: for example, to the effective use of the European Arrest Warrant (EAW).

The European Court of Human Rights has generated substantial case-law relating to detention conditions, thereby formulating standards that every detention should adhere to in order not to violate the European Convention

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7 ibid., p. 10.
8 See the cases of Aranyosi and Căldăraru (CJEU, Joined Cases C-404/15 and C-659/15 PPU, 5 April 2016), where the pre-trial detention conditions have provided fundamental rights-based grounds (specifically, prohibition of torture and inhuman or degrading treatment or punishment – Article 4 of the EU Charter of Fundamental Rights) for challenging or even refusing the execution of EAWs. See also ML, C-220/18 PPU, 25 July 2018; Dumitru-Tudor Dorobantu, C-128/18, 15 Oct 2019.
on Human Rights (ECHR). This includes all EU Member States as parties to the ECHR. The Council of Europe has also adopted the European Prison Rules, a non-binding document containing a series of rules or recognised standards on good principles and practices regarding the treatment of detainees and the management of detention facilities. Furthermore, the Council of Europe’s Committee for the Prevention of Torture (CPT), which is a preventive monitoring mechanism against torture and inhuman treatment, is empowered to visit any place within the jurisdiction of the States parties where persons are deprived of their liberty by a public authority. It monitors the active behaviour of law enforcement authorities, checks the factual conditions of prisons and other detention institutions, verifying whether they comply with the standards that the CPT itself has developed over time, and collects allegations of violence and abuses.

As regards discrimination, a particular problem is presented by a lack of data on prisoners that would be sufficiently segregated to uncover certain more systemic problems, such as institutional discrimination within the criminal justice complex. On a principled level, the Rule 13 of the European Prison Rules outlaws discrimination on several unjustified grounds (listed only indicatively), although this does not mean, as the Commentary to the Rules later explains,

that formal equality should triumph where the result would be substantive inequality. Protection for vulnerable groups is not discrimination, nor is treatment that is tailored to the special needs of individual prisoners unacceptable.

However, systematic discrimination or bias towards certain segments of the population cannot even be tested when data, e.g., on ethnicity, is missing.

Most of the European penal statistics segregate data per sex, and so we can learn that women (biologically defined) represent about 5% of inmates – which

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9 In the context of EU law, i.e., when an issue of EU law is triggered, the adherence to ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) is also mandated by the EU Charter of Fundamental Rights, the preamble of which ‘reaffirms’ the rights as they stem from, inter alia, ECHR and from the case-law of the ECtHR, while its Art. 52(3) stipulates that the meaning and scope of those Charter rights which correspond to ECHR rights shall be the same as those laid down by the ECHR.

10 The first European Prison Rules were adopted in 1973, revised in 1987, further reformulated in 2006, completely replacing the previous versions, and revised again in 2020. See the Council of Europe, ‘Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules’.
is a constant for several years now. There is also some data on nationality to be found, often split merely along the lines of nationals vs. foreigners. However, data on race and ethnicity is generally lacking at national as well as at the European level – with some exception on Roma.\textsuperscript{11} This makes it very difficult to monitor the potentially problematic practices and outcomes of criminal justice institutions – to the same extent that, for example, they can be monitored in the USA and Latin America, where racialisation (and systematic racism) of criminal justice is a well-known and observed phenomenon. It is true that incarceration in Europe does not seem to be as racialised or intertwined with the issues of race and racism, as it is in the USA or Brazil, and this may partly be the case because (especially in certain parts of Europe, such as the Central and Eastern European countries) there is no apparent similar diversity in the general population in terms of race, and the prison population may reflect this. However, this may also be the case due to the fact that in many European countries there are simply no data on the racial or ethnic makeup of their prison population collected and hence ‘no problem’ can be found, i.e., no possible racial or ethnic discrimination can be uncovered or clearly pointed out.

3 Harms and Inequalities Related to Incarceration

3.1 Harms
Incarceration embodies and engenders several harms. It is their product and a source. On the one hand, imprisonment suggests harm has been done by the offender-turned-prisoner and established (together with their culpability) by the court of law, which also pronounced the sentence of imprisonment as a consequence. On the other hand, incarceration is also a source of a series of harms and deprivations; physical, psychological, emotional and financial. Some arise from the very deprivation of liberties, such as the freedom of

\textsuperscript{11} This has also been observed by the researchers of Justicia (the EU criminal justice reform network) who inspected 12 EU police and justice systems and noticed ‘a significant level of unfairness in how people are treated, depending on their ethnic background’, but that data are lacking. ‘There are no European Union–wide regulations that have standardized data collection and monitoring of outcomes in the criminal justice systems, with particular attention to ethnic and racial minorities, and non-nationals. In addition, in most of the countries covered by the study, there was a lack of ethnic and racial data. Even when this data was gathered, we noticed a lack of consistent methods of their collection and application of concepts of race, ethnicity, and national origin.’ Z. Namoradze and I. Pacho, ‘When it comes to race, European justice is not blind’, \textit{Open Society Justice Initiative}, 4 Dec 2018, available at: https://www.justiceinitiative.org/voices/when-it-comes-race-european-justice-not-blind.
movement and freedom to make autonomous choices regarding one's time and activities, the loss of relationships, jobs and social standing, and the acquisition of social stigma attached to the status. Others arise out of specific circumstances in which prisoners find themselves. Is the prison overcrowded? Sufficiently financed? Does it provide healthy environment, e.g., in terms of temperature, food, exercise, health care? Is prison violence prevented and appropriately addressed? Do prison facilities allow for conjugal visits? Are they organised in a way that grant sufficient dignity and respect? Is education available and other means of self-betterment? How professional are the therapists and other prison staff when dealing with prisoners? Are they supervised for quality and appropriate behaviour? Is the ‘rewards system’ that allows inmates to earn certain benefits fair? All these and other factors not only determine the quality of life in prison but can, when found deficient, also inflict a significant degree of harm on the prisoner – for whom there is literally no possibility to walk away from this ‘game’, to remove oneself from the setting.

Recently publicly decried prisons harms in Europe included squalid conditions, minimal service and humiliating treatment, to name a few that made it into the mainstream media. Prisoners, however, often experience what is in victimology called ‘hidden victimisation’: any harm occurring to them in prison mostly remains invisible, which has a lot to do with the fact that many believe that prisoners deserve whatever happens to them by dint of having committed a crime themselves. Having a criminal record, moreover, is a reason for further harm once the incarcerated are released. Criminal histories often follow them for the rest of their lives, making it difficult for these individuals to get back on their feet. Employers may in general lawfully discriminate against job applicants on the basis of a ‘relevant criminal record’.

That prisons are psychologically taxing is evident also from the fact that detainees commit suicide 4.4 times more than the average. In 2017, for example, 1,380 people died during their detention in the EU, out of which almost one-third took their own lives. See European Prison Observatory, op. cit, p. 16.

For example, in the UK, the Liverpool prison distinguished itself by having rats, cockroaches, blocked toilets, pools of urine, the country’s highest suicide rate and severely deficient psychiatric care. S. Jenkins, ‘Liverpool prison is a symbol of our broken system. Send the inmates home’, The Guardian, 12 Mar 2018, available at: <https://www.theguardian.com/commentisfree/2018/mar/12/liverpool-prison-symbol-broken-system-send-inmates-home>.


The COVID-19 crisis has, however, brought about some new harms and heightened existing harms and inequalities. The new virus has added strains on prison health and measures taken against it often increased social isolation, for example, by limiting prisoners’ visitation rights. The World Health Organisation (WHO) particularly alerted to special vulnerabilities of imprisoned children and adolescents as well as prisoners with mental health issues in this time. When the virus hit prisons, however, it was prisoners’ physical health that raised immediate concerns. In the US, the stories of serious prison health crisis started pouring in early on:

As of 8 October [2020], there have been 23,085 positive cases of COVID-19 in the Texas prison system alone – 15% of its total population. A total of 201 people have died – although the Texas department of criminal justice (TDCJ) is yet to confirm that COVID-19 was the cause of all of these deaths.¹⁶

Prison, as a ‘total institution’,¹⁷ controlling prisoners’ lives, moves and even identities, is already a perfect breeding ground for any sort of infection as keeping a sufficient distance or ‘social distancing’ is hardly an option, so the devastation that COVID-19 could wreak upon it should have been easily imagined, and to a large extent prevented. The fact that it was not, speaks volumes about the humanity, empathy and care of society towards the prison population. Or, in rhetorical words of an inmate who had to watch her fellow prisoners ‘drop like flies’: ‘Shouldn’t a healthy society want us well, whole and restored?’¹⁸

During its prison visits in recent years, the CPT has progressively found that significant cuts had been made ‘in the basic essentials needed for prisoners to maintain a dignified life’, such as lowering prison food or heating budgets, which adversely impacts on prisoners’ lives. In its most recent annual report, commenting on the situation also in light of the pandemic, the Committee wrote:

If reductions of this nature occur at the same time as developments such as increasing prisoner admissions (most notably of those with long sen-

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¹⁷ A ‘total institution’ as ‘a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life’. See E. Goffman, Asylums (New York: Doubleday/Anchor, 1961) at p. xiii.

¹⁸ Toon, op. cit.
ences), as well as a reduction of visits and activities and a lack of work opportunities, the cumulative effect is to impinge significantly on the basic right of prisoners to live a safe, humane, healthy and dignified life while deprived of their liberty.¹⁹

### 3.2 Inequalities

Social inequalities are an important cause of, or motivation for, crime. Absolute deprivation or poverty and unemployment as well as a sense of ‘relative deprivation’²⁰ often propel people into crime. Inequalities are, however, also a product of incarceration, which is reflected in the economic and family lives of the formerly incarcerated. Western and Pettit assert that ‘the social inequality produced by mass incarceration is sizable and enduring for three main reasons: it is invisible, it is cumulative, and it is intergenerational’.²¹ The invisibility stems from the fact that incarcerated population does not show in the official records of poverty, unemployment or measures of economic well-being. The cumulative dimension transpires through the deepening of the disadvantage of the most marginal in society, and the intergenerational in the fact that it affects not just those who go to prison but their families as well.²²

In addition, there are various legal or lawful inequalities that are related to their conviction and custodial sentence: limitations on movement, loss of civil and political rights such as voting (in some countries), impeded access to various services and benefits (such as health care, education, visits, employment). Some inequalities or discrimination may be arising out of their legal status, e.g., be based on whether they are pre-trial detainees or convicted inmates, as well as from the everyday operations inside the prison, for example, from the discretion involved in evaluating the prisoner’s behaviour, which allows for biases and inequalities to arise out of the prison ‘rewards system’.

Disadvantages arising out of mentioned inequalities do not affect all prisoners in the same way or to the same extent, which enables the identification of

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²⁰ Relative deprivation generally refers to ‘the perceived discrepancy between personal status and the status of some relevant other(s)’ (M. Schulze and R. Krätschmer-Hahn, ‘Relative deprivation theory’, in A.C. Mihalos, ed., Encyclopedia of Quality of Life and Well-Being Research (New York: Springer, 2014), at p. 5443.) In the context of crime, specifically, the ‘strain theories’ (e.g., Merton (1938), Davis (1955), Runciman (1966), Agnew (1985)) use the concept to explain why people may feel ‘strain’ or ‘anomie’ or a certain discontent giving rise to a perception of injustice, under the conditions of which they can make a variety of adaptations to reach their desired, culturally recognised goals – one of such adaptations being resorting to crime.


²² ibid.
the more vulnerable segments within the prison population. Vulnerable prisoners can, in general, be defined as ‘those who, because of age, gender, ethnicity, health, legal or political status, face an increased risk to their safety, security, or well-being as a result of imprisonment’, encompassing juveniles, women and mothers, foreigners, minorities or indigenous peoples, the mentally ill or developmentally disabled, those on death penalty, the elderly, physically disabled or ill persons, and those held in pre-trial detention.\textsuperscript{23} The mentioned personal attributes can increase the likelihood of those attribute-holders being affected by inequalities in prison – and in society, more generally – and accruing disadvantages related thereto. Adopting the ‘intersectionality perspective’\textsuperscript{24} to explore such prisoners’ overlapping disadvantages can shed light on the even more vulnerable and invisible subpopulations of prisoners and their challenges.

Having recognised the increased harm and vulnerabilities, including possible discrimination, a number of relevant international bodies hastened to produce statements and guidelines in response to the onset of the COVID-19 virus. The WHO, acknowledging the disproportionate health impact and special vulnerabilities of imprisoned, thus stressed, for example, that people deprived of their liberty are ‘more vulnerable to the coronavirus disease (COVID-19) outbreak’, as they ‘live in settings in close proximity and thus may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons’.\textsuperscript{25} In a joint statement on COVID-19 in prisons or closed settings on 13
May 2020, the UNODC (UN office on drugs and crime), WHO, UNAIDS (Joint UN Programme on HIV/AIDS) and OHCHR (UN Human Rights office of the High Commissioner) stated that

all states are required to ensure not only the security, but also the health, safety and human dignity, of people deprived of their liberty and of people working in places of detention at all times [...] irrespective of any state of emergency’ that might be declared and that ‘there must be no discrimination on the basis of the legal or any other status of people deprived of their liberty.26

The CPT, furthermore, warned that an inadequate level of health care can quickly lead to situations falling within the scope of the term ‘inhuman and degrading treatment’ and, consequently, to the violation of the Art. 3 of the ECHR. On 20 March 2020, it adopted a statement of ten principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, highlighting, for example, that ‘concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty’ (principle 5), that special attention must be paid to the ‘the specific needs of detained persons with particular regard to vulnerable groups and/or at-risk groups, such as older persons and persons with pre-existing medical conditions’ (principle 6), and that in cases of prisoners who are infected or suspected of being infected with the virus and thus isolated or placed in quarantine, ‘the person concerned should be provided with meaningful human contact every day’ (principle 8).27

4 European Responses to COVID-19 Challenges in Prisons

In anticipation of COVID-19 reaching penitentiaries,28 governments or ministries or prison administrations adopted several measures. One of the first, most common prison measures in response to the pandemic involved the

26 Available at: https://www.who.int/news/item/13-05-2020-unodc-who-unaidsohand-ohchr-
27 CPT, 'Statement of principles relating to the treatment of persons deprived of their liberty',
28 For the latest information on the COVID-19-related health situation in EU prisons and
measures taken, see the EuroPris document from 21 September 2021 gathering the
feedback received per country: https://www.europris.org/wp-content/uploads/2021/09/
suspension or limitation of visits (e.g., in Ireland, the Netherlands, North Macedonia), limitation of prison leaves and prison activities. The reduced or withdrawn access to various educational activities became a concern in view of possible disrupted rehabilitation efforts. Recognising that social isolation may increase, some prisons increased the number of phone calls allowed (e.g., Portugal, France) or turned to videoconferencing technology, offering video calls (e.g., through Skype as in Hungary) to replace the loss of physical visitation options, including from the prisoners’ attorneys. The availability of financial and technological means, which is not a given for all prisoners’ families, determined the success of these ad hoc alternatives.

Following up on the recommendations by international bodies, many states also turned to releasing some prisoners (sometimes with electronic tags as, for example, in Belgium) or commuting their custodial sentences into fines and opting for alternatives to detention. The close proximity in which prisoners live, even more so in overcrowded systems, provide an ideal setting for the quick transmission of the virus, hence a release seemed the most logical and humane solution. In the period from 1 January to 15 September 2020, there was thus an overall decrease (for more than 4%) of prison population in 20 European (Council of Europe) prison administrations: Montenegro, France, Bulgaria, Albania, Portugal, Italy, Lithuania, Netherlands, Scotland, Luxembourg, Finland, Latvia, Poland, Spain (Catalonia), Cyprus, Czech Republic, Spain (State Administration), England and Wales, Slovenia and Serbia. Prison population rates remained stable (neither increased nor decreased for more than 4%) in 11 (Azerbaijan, Belgium, Estonia, Hungary, Liechtenstein, Moldova, Monaco, Norway, Romania, Slovak Republic, Northern Ireland) and increased (for more than 4%) in 4 prison administrations (Andorra, Denmark, Greece, and Sweden). Only 35 prison administrations, however, provided data for this SPACE study. Moreover, while 25 prison administrations released inmates as a preventive measure against COVID-19, the virus was not the cause of all drops: prison population decreased also in several countries that did not release prisoners for this specific reason.

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However, much fewer countries seem to have turned to this option than to limiting visitation rights. A study analysing prison responses to the pandemic in Europe noted a policy convergence in two areas, namely, in limitations on visitation rights for prisoners and early releases of prisoners. They have found that all states in their sample (47 European countries) implemented bans on visits, which demonstrates policy convergence, while fewer countries (16) opted for early releases. Furthermore, they noticed that early releases took longer to enact, compared to visitation bans, and that countries with overcrowded prisons were quicker to release or pardon prisoners. In case of countries with no prison overcrowding problems, however, ‘countries with higher proportions of local nationals in their prisons were much faster to limit visits relative to prisons in which the foreign population was high’—a finding that may be contrary to expectations, considering the observed ‘enemy penology’ or harsher, separate treatment of foreign nationals in criminal justice systems.

In view of the latter, one would anticipate that the more punitive approach towards imprisoned foreigners would lead to quicker rather than delayed bans. Yet, as authors observe, a slow implementation of prison visit bans in the case of high proportion of foreign prisoners could also be an expression of penal nationalism, ‘in the event that this showed that protecting prisoners from infections coming in from outside was not a priority, combined with a reluctance to release prisoners’. While early release, in countries that opted for it, immediately solved some overcrowding problems, the criteria who qualifies for such a release varied between countries and rise potential inequality concerns.

While early release, in countries that opted for it, immediately solved some overcrowding problems, the criteria who qualifies for such a release varied between countries and rise potential inequality concerns. Whereas the crime...
committed and the length of prison sentence often played a role, criteria such as good behaviour, age and health could be (and was) used as well. However, there is a lot of scope for possible discrimination here, particularly in countries where such a decision (to release or not) is left to individual prison authorities. For example, in Belgium, prisoners ‘who are considered to have behaved well have been released, apart from those sentenced to more than 10 years, or for terrorism offences, or moral reasons’. Moreover, the way the system of early release is set up can increase health and arbitrariness risks. The NGO Fair Trials notes, for example, that in Spain

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. 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.38

Furthermore, prison researchers observe that release might not always be the best, the most optimal solution. What about, for example, those who have nowhere to go? Or those who have other problems, such as drug or alcohol addictions, or difficult family situations (as many offenders do) and need


36 Other factors, such as nationality, ethnicity or race, may have played an important factor, too, particularly when criteria for the release are not explicitly known or clear-cut but depend largely on the discretion of the decisionmaker. A recent experimental study, examining the influence of racial biases in the early-release decisions, has shown not only that such biases penetrate into this type of decision-making even when early release represents an important measure to address the COVID-19 pandemic (participants being less favourably inclined towards the early-release of Black compared to White prisoners, when they had committed a stereotypically Black crime) but also that the ideology of ‘meritocracy’ predicted a greater disadvantage for the Black prisoner, compared to the White, in the support for their early release. M.P. Miranda, R. Costa-Lopes, G. Freitas, C.L. Carvalho, 'Early release from prison in time of COVID-19: Determinants of unfavourable decisions towards Black prisoners', 16 PLoS ONE (2021) e0252319, https://doi.org/10.1371/journal.

37 Fair Trials, 'Short Update: Belgium has reduced its prisoner population by 11% to prevent the spread of coronavirus, but there are fears over a “boomerang”', Fairtrials.org, 6 May 2020 (italics added), available at: https://www.fairtrials.org/news/short-update-belgium-has-reduced-its-prisoner-population-11-prevent-spread-coronavirus-there.

further support? Or those released to precarious circumstances? Or those needing immediate medical help? Risks and harms that released prisoners may face once outside may not be negligible and ought to be taken into account when deliberating the options to ensure safe community re-entry.39

5 The Special Case of Pre-Trial Detention

A particular sore point presents the institution of pre-trial detention, which is inflicted upon those criminal suspects who are deemed to present a particular risk, e.g., of absconding, tampering with evidence, re-offending, or satisfy other public interest grounds to be placed under detention.40 Deprivation of liberty, even before one is found guilty of a crime and therefore under the presumption of innocence, is, however, one of the harshest measures that the state can impose on the individual. Studies have discovered that pre-trial detainees often have even less access to educational, work, and recreational activities than prisoners, meaning that they can be held in a harsher regime than convicted detainees.41 In addition to interference with their fundamental rights, pre-trial detainees thus incur a number of social, economic and psychological harms and disadvantages.42 The overuse of pre-trial detention, together with overcrowding, has also been described as undermining the foundations of the European social progress and democratic achievements.43

Considering the heightened health risks of COVID-19 in prison, pre-trial detention – already normatively considered a measure of last resort – should really, not merely de iure but de facto, be the very last possible measure the

40 As mentioned above, the ECtHR jurisprudence has developed a number of standards on detention and pre-trial detention. For a detailed examination and a critical perspective, pointing out that these standards contain a number of shortcomings and contradictions and are far from being the solution to the excessive use of pre-trial detention, see A. Martufi and C. Peristeridou, ‘The purposes of pre-trial detention and the quest for alternatives’, 28 European Journal of Crime, Criminal Law and Criminal Justice (2020) 153–174.
41 European Prison Observatory, op. cit. (n 6), p. 11.
42 See, for example, C. Heard and H. Fair, Pre-Trial Detention and Its Overuse: Evidence from Ten Countries (London: Birkbeck University of London, 2019).
state should resort to. Nevertheless, not only have pre-trial detainees been explicitly excluded from some temporary release schemes (e.g., Albania, Ireland, Turkey), the use of pre-trial detention has continued to increase in many states (e.g., Ireland, Hungary and France) during the pandemic. This has been understood as a sign that the necessary safeguards to prevent overuse of detention are not functioning and, consequently, as another sign of erosion of the rule of all across the EU. As COVID-19 has thus even worsened Europe’s pre-trial detention crisis, with people having to wait longer for trials (owing to court closures) and not receiving the benefits of release that many already convicted and imprisoned have, this spurred renewed calls for the EU to address this critical situation.

The problem of pre-trial detention is not new, nor are EU institutions oblivious to it. In its 2009 Resolution on a Roadmap for strengthening procedural rights of suspected persons in criminal proceedings, the Council recognised that detention times before being tried in court and during the court proceedings varied a lot across the EU, as well as that excessively long periods of pre-trial detention were harmful for the individual detained, that they could prejudice the judicial cooperation between the Member States and were not representative of the values for which the European Union stands. The European Commission’s 2011 Green Paper further acknowledged that while detention issues were the responsibility of Member States, ‘there are reasons for the European Union to look into these issues, notwithstanding the principle of subsidiarity’, as detention issues are, firstly, ‘a relevant aspect of the rights that must be safeguarded in order to promote mutual trust and ensure the smooth functioning of mutual recognition instruments’, and secondly, as ‘the European Union has certain values to uphold’. In 2019, the European Commission tasked some members of its Expert Group on EU Criminal Policy with advising it on how to tackle this salient issue at EU level. Their

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44 Baker, op. cit., p. 320; Fair Trials, op. cit. (n 38).
paper\textsuperscript{49} analyses the need and possible content of EU pre-trial detention rules; specifically, it proposes a directive based on Art. 82(2) TFEU that establishes minimum rules relating to the use of pre-trial detention, details the issues that \textit{should} be regulated and a couple (where policy choices arise) that \textit{may} be regulated in it, and suggests that such EU action be complemented by a number of soft law actions and other measures relating to the implementation of existing EU legislation. Things are thus progressing also at EU level, although perhaps a bit too slowly – particularly for the detained and their advocates. Harmonising the area would certainly make it clear across the EU that pre-trial detention can only be used as a measure of last resort, for a limited period of time and provided certain minimum standards are met, which would lead to greater justice, equality and quality of pre-trial detention.

6 A Concluding Thought

Many penological studies demonstrate not only that incarceration entails harms and is costly but also that ‘prison doesn’t work’\textsuperscript{50} – if ‘working’ is to mean more than just incapacitation, elimination from society. As this truism has been around for some time now, a modern, human rights-oriented society needs to put forward good reasons for maintaining penitentiaries in their current form. The basic problems such as prison abuses, recidivism and the high social and financial costs persist. While alternative sentences have demonstrated the potential to minimise these problems, the European Prison Observatory notices that ‘the use of alternatives has not altered an increasing reliance on incarceration’\textsuperscript{51} What is certain, however, is that the pandemic has


shone a new light on the old problems facing prisons, and detention more generally, i.e., ‘highlighted the structural deficiencies and systemic inequalities in our prison systems’\(^\text{52}\) – problems which despite their relative invisibility or low ranking in the hierarchy of social problems that attract public scrutiny warrant a serious and urgent reform.

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