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Meeting: 1475th meeting (September 2023) (DH)

Communication from NGOs (FORUM PENAL - ASSOCIAÇÃO DE ADVOGADOS PENALISTAS (FORUM PENAL – ASSOCIATION OF CRIMINAL LAWYERS), THE EUROPEAN PRISON LITIGATION NETWORK (EPLN)) (03/07/2023) in the case of Petrescu v. Portugal (Application No. 23190/17).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1475^e réunion (septembre 2023) (DH)

Communication d'ONG (FORUM PENAL - ASSOCIAÇÃO DE ADVOGADOS PENALISTAS (FORUM PENAL – ASSOCIATION OF CRIMINAL LAWYERS), THE EUROPEAN PRISON LITIGATION NETWORK (EPLN)) (03/07/2023) dans l'affaire Petrescu c. Portugal (requête n° 23190/17) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



FORUM PENAL
Associação de Advogados Penalistas

DGI

03 JUIL. 2023

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

COMMUNICATION

in accordance with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and the terms of friendly settlements

In the case **PETRESCU v. Portugal (No. 23190/17)**

Submitted on: 30 June 2023

FORUM PENAL - ASSOCIAÇÃO DE ADVOGADOS PENALISTAS (FORUM PENAL – ASSOCIATION OF CRIMINAL LAWYERS) is a non-profit association that aims to provide a forum for promoting an open discussion concerning criminal law, criminal advocacy and the protection of fundamental rights in criminal proceedings. **FORUM PENAL** is fully independent from any political party or sovereign organ. Due to its interest in matters related to legislative policy, the association provides cooperation in order to develop and discuss legal drafts or proposals in its area of expertise. One of the main areas of concern of **FORUM PENAL** is to improve the right to legal assistance and the overall situation of persons deprived of their liberty in prisons in Portugal.

>> <http://forumpenal.pt/>

THE EUROPEAN PRISON LITIGATION NETWORK (EPLN) is an international non-governmental organization granted participative status with the Council of Europe. EPLN was founded in 2013 by a group of NGO jurists, lawyers and researchers active in the penitentiary field in different countries, with the aims of heightening the judicial protection of prisoners' fundamental rights in the Member States of the Council of Europe.

>> <http://www.prisonlitigation.org/>

INTRODUCTION

Main issues addressed in ECtHR judgment

1. The judgment **Petrescu v. Portugal**, concerned the inhuman and degrading treatment to which the applicant was exposed due to overcrowding and poor material detention in in two Portuguese prisons (Lisbon judicial police prison and Pinheiro da Cruz prison) at different periods between 2012 and 2014. The Court not only found that the detention conditions in which the applicant was held amounted to a violation of Article 3 ECHR: it also stated, on the basis of a number of national and international reports, that prison overcrowding was of structural nature in Portugal (§ 65), and that the applicant had no preventive and/or compensatory remedy available to challenge his detention conditions before domestic courts (§ 88).
 2. The Court accordingly recommended the Portuguese government, in the conclusions of the reasoning on the merits, to **adopt general measures to improve detention conditions**, and to **establish a system of domestic remedies** enabling prisoners held in inadequate detention conditions to put an end to the alleged violation of their right or to improve their detention conditions (§117).
 3. The judgment constitutes **a turning point in the ECtHR case law regarding detention conditions in Portugal**. In the years preceding the adoption of *Petrescu*, the Court had received **a number of similar applications**, which were struck out of the list following a friendly settlement between the applicants and the Portuguese authorities.¹ This can explain the fact that, **while a friendly settlement had been reached in *Petrescu* as well, the Court** considered that the scale of the problem complained of raised questions that go beyond the individual situation of the case, **decided to continue the examination of the case, and to ask the state to adopt general measures**.
 4. To date, the issue of detention conditions in Portugal remains a priority: **80% of the applications lodged against Portugal before the ECtHR are related to prison conditions**. These cases also represent the highest number of pending ECtHR applications concerning Portugal.
- I. **General measures taken following the quasi-pilot judgement in terms of penal and prison policy:**

¹ See *Bokor v. Portugal*, No. 52909/15, 4 April 2017 (decision), *Butuc v. Portugal*, No. 2582/16, 4 April 2017 (decision), *Patenaude v. Portugal*, No. 26986/16, 4 April 2017 (decision), *Dragan v. Portugal*, No. 56503/15, 23 May 2017 (decision), *Dumitru v. Portugal*, No. 28794/16, 13 June 2017 (decision), *Annear v. Portugal*, No. 33561/17, 15 May 2018 (decision), *Popa v. Portugal*, No. 41906/17, 15 May 2018 (decision) and *Wahed Assad v. Portugal*, No. 70531/17, 5 March 2019 (decision).

5. As acknowledged by the Portuguese authorities themselves in their latest Action Plan submitted October 2021², **no significant legislative reform aiming at implementing the general measures recommended by the Court was passed** since the date of the entry into force of the *Petrescu* judgment (3 December 2019).
6. The only general measure that was undertaken by the authorities between 2019 and 2021 was the launch of **important renovation works in 20 prison facilities out of 49 in the country**, as part of a ten-year plan aiming at improving prison infrastructure³. As it will be argued below, if these renovation works tend to improve material detention conditions in particularly dilapidated facilities, they are **insufficient to address the issue of prison overcrowding**, which requires significant changes in the country's criminal law and judicial practices.
7. The only legislative measure aimed at tackling prison overcrowding was **Law No. 9/2020 of 10 April 2020⁴, adopted in the context of the COVID-19 pandemic**. The law's primary aim was to prevent the spread of the virus in prison facilities, and established to this end exceptional measures (pardons and special prison leaves) allowing for the immediate release of inmates, either permanent or temporary. Because of its exceptional nature, this law **could not bring long-standing effect on the structural problem of overcrowding**. As a matter of fact, while it led to a rapid decrease of the prison population shortly after its adoption, this trend was reversed a few months later (see below).
8. The Government has recently announced two other legislative reforms, that are still at the project stage. Firstly, on 19 June 2023, the government presented Draft Law 97/XV⁵ establishing an **amnesty and a collective pardon for young offenders** (aged between 16 and 30 years old at the time of the commission of the offense). One year of imprisonment is pardoned for all sentences of imprisonment up to eight years. Several exclusions apply, mainly related to the type of offence. Just like the 2020 emergency law, because of its temporary nature, if adopted, this measure will have immediate effect, but no long-term consequences on prison overcrowding.
9. Secondly, according to recent statements made by the Ministry of Justice of Portugal, the Government aims to pass during the current legislature an **important reform of the Code of Execution of Sentences, with the aim to bring it in line with ECtHR case law**, reduce the use of imprisonment and increase the use of alternative sentences. The lack of consultation with the various players in the penal chain and the lack of involvement of civil society at this stage call into question the ability of the reform to effectively take into account the complexity of the factors at play in the phenomenon of prison overcrowding. As noted in the White Paper on Prison Overcrowding (PC-CP (2015) 6 rev 7), in this area, "coherence is possible only if based on dialogue, trust and co-operation and this often demands sharing of information and data, sharing ownership and bearing responsibility for important decisions". The development of strategies and public policies in this area should involve dialogue between judges, prosecutors,

² Available at: [https://hudoc.exec.coe.int/eng?i=DH-DD\(2021\)1032F](https://hudoc.exec.coe.int/eng?i=DH-DD(2021)1032F) (accessed 28.06.2023)

³ Available at: <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3D%3DBAAAAB%2BLCAAAAAAABAAzNjY3AQAbh0RUBAAAAA%3D%3D> (access 28.06.2023)

⁴ Available at: <https://diariodarepublica.pt/dr/detalhe/lei/9-2020-131338919> (accessed 28.06.2023)

⁵ Available at: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=173095> (accessed 28.06.2023)

legislators, decision-makers, civil society representatives and prison and probation services with a view to agreeing on long-term national strategies and on specific actions to deal with prison overcrowding.

10. In its Action Plan, the Portuguese authorities also mention Law No. 94/2017 of 23 August 2017⁶, adopted two years before *Petrescu* was handed down. This reform amended the Penal Code, eliminated two custodial sentences deemed inefficient (weekend detention and semi-detention) and introduced home detention as a modality of execution of a custodial sentence of up to two years (or a remainder of two years' imprisonment in case of recall to prison following revocation of a non-custodial sentence).

II. Current conditions of detention in Portugal

II.1. Material detention conditions

11. As indicated in the Government's Action Plan, important renovation works have been made. As of 2021, these works concerned 21 prisons and a total of 1037 prison accommodations. While noting these improvements, two observations need to be made. The first is that the intensive use of these facilities is bound to cause them to age prematurely. The second is that the refurbishments concern **only a small fraction of the actual need of the country's prisons**, half of which were deemed affected by the structural problem of poor detention conditions in *Petrescu* (§ 37).
12. As a matter of fact, detention conditions in Portuguese prisons continue to be often undignified, as highlighted in the NPM's reports. In 2021, the NPM stated openly that there has been "no significant changes in relation to the panorama observed" in the previous year.⁷
13. This is especially the case in **old facilities which closure has been planned** (e.g. Setúbal, Leiria and Lisbon prisons, as well as Ponta Delgada). The mere fact that these facilities are to be closed in the near future is already in itself a strong indicator of their inability to fulfil their purpose. While renovation works in these facilities should be treated as a matter of priority to guarantee that minimum requirements of health and safety are complied with, uncertainty as to their closure date hampers any renovation – to the detriment of prisoners held in poor detention conditions. For example, the NPM noted in 2021 that overcrowding in Leiria prison reached "the limits of what is acceptable" as the lack of personal spaces causes that some prisoners have to stay in their bed so that others can stand in the common part.⁸
14. The NPM also noted in 2020 already that **other facilities would qualify for closure but nevertheless continue to function**, thereby exposing prisoners to undignified detention conditions (psychiatric clinic at Santa Cruz do Bispo Prison, the central block of Alcoentre Prison

⁶ Available at: <https://diariodarepublica.pt/dr/detalhe/lei/94-2017-108038373> (accessed 28.06.2023)

⁷ NPM report, 2021, available at: https://www.provedor-jus.pt/documentos/MNP_2021_final.pdf (accessed 29.06.2023)

⁸ *Idem*

and Montijo prison).⁹ The NPM went as far as saying that parts of Alcoentre Prison are “simply inadequate to hold persons deprived of their liberty, raising safety and security concerns”.¹⁰

15. **Overcrowding can be severe** in facilities where there are **no individual cells** (e.g. Castelo Branco and Covilhã prisons) or where the normal accommodation arrangement is a **dormitory** (e.g. in Izeda prison). In 2021, the NPM reported dormitories designed for six prisoners could in practice hold 16 people.¹¹ Not only this creates obvious **privacy issues**, especially where showers for collective accommodation have no separation, it generates also tensions and contributes to a **climate of violence**.¹²
16. This situation is further exacerbated by the **chronic lack of staff**, seen as a priority concern by the NPM because of its direct impact **on prisoners’ detention conditions**, e.g. on prisoners’ access to healthcare.¹³ The NPM noted that “there were multiple occasions in which medical [...] appointments had to be cancelled or postponed, sometimes last minute, due to the absence of available staff to supervise transportation”.¹⁴
17. Degrading conditions are further **enhanced when prison staff goes on strike** (as a means of protest against this workforce shortage). In relation to a 2018 strike, the NPM has received numerous complaints of prisoners mentioning “longer periods of time locked in their cells, closed canteens, cancelled activities, reduced number of visits and telephone contacts”.¹⁵
18. Described as critical by the Director General of Reinsertion and Prison Services at a Parliamentary hearing in March 2023¹⁶, staff shortages are likely to worsen as a result of the high average age (above 50 years old) of prison guards, and the ongoing trend in the prison population – with higher prison density and incarceration rates.

II.2 Prison density

19. The Portuguese Government, in its 2021 Action Plan, mentions the fact that the then prison density rate was of 90.4%. This figure calls for two comments.
20. First, **the average prison density does not say much on the situation of each facilities** in which this rate can be much higher – and above 100% - and therefore in which detention conditions can give rise to a violation of Article 3 ECHR.

⁹ Contribution of the Portuguese Ombudsman to the List of Issues in relation to the fifth periodic report of Portugal on the International Covenant on Civil and Political Rights, 2020, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNHS%2fPRT%2f41405&Lang=en (accessed 29.06.2023)

¹⁰ *Idem*.

¹¹ NPM report, 2021, *ibid*.

¹² *Idem*.

¹³ Contribution of the Portuguese Ombudsman to the List of Issues in relation to the fifth periodic report of Portugal on the International Covenant on Civil and Political Rights, 2020, *ibid*

¹⁴ *Idem*

¹⁵ *Idem*

¹⁶ Observador, *Diretor-geral da Reinserção e Serviços Prisionais alerta para "falta crónica de pessoal"*, 16 March 2023, available at : <https://observador.pt/2023/03/16/diretor-geral-da-reinsercao-e-servicos-prisionais-alerta-para-falta-cronica-de-pessoal/> (accessed 29.06.2023)

21. As a matter of fact, **as of December 2022, 22 prison facilities out of 49 were operating above 100% of their capacity, with eight of them above 120%** (see box below).¹⁷ Among these, some facilities are particularly impacted by prison overcrowding. For instance, in the last 12 years, the prisons of Braga, Bragança, Porto and Viana do Castelo have operated almost uninterruptedly with occupancy above 120%.¹⁸
22. Overall, these figures show that **little progress in terms of prison overcrowding has been made since the adoption of *Petrescu***, in which the Court found that there was a “general problem of prison overcrowding in **almost half of the country's prisons**” (§ 37). To the contrary, a worsening trend can be observed since **a year earlier** (as per December 2021 figures) **the number of prison facilities operating above their capacity was 17, six of which above 120%**.¹⁹

Facilities operating above 100% of their capacity as of 12 December 2022 (see source in footnote no. 17)

1. Caxias (capacity 300, occupation 333 = 111%);
2. Coimbra (capacity 540, occupation 560 = 103,70%),
3. Lisbon (capacity 887, occupation 1043 = 117,59%),
4. Porto (capacity 675, occupation 964 = 142,81%),
5. Aveiro (capacity 82, occupation 111 = 135,37%),
6. Beja (capacity 162, occupation 193 = 119,14%),
7. Braga (capacity 91, occupation 123 = 135,16%),
8. Bragança (capacity 58, occupation 76 = 131,03%),
9. Caldas da Rainha (capacity 80, occupation 105 = 131,25%),
10. Chaves (capacity 55, occupation 73 = 132,73%),
11. Elvas (capacity 53, occupation 67 = 126,42%),
12. Faro (capacity 103, occupation 169 = 164,08%),
13. Guimarães (capacity 73, occupation 80 = 109,59%),
14. Lamego (capacity 65 occupation 74 = 113,84%),
15. Leiria (capacity 111, occupation 133 = 119,82%),
16. Olhão (capacity 50, occupation 63 = 126)
17. Lisbon Judicial Police (capacity 116, occupation 124 = 106,90%),
18. Ponta Delgada (capacity 141, occupation 165 = 117,02%),
19. Setúbal (capacity 162, occupation 181 = 111,73%),
20. Silves (capacity 58, occupation 68 = 117,24%),
21. Viana do Castelo (capacity 42, occupation 62 = 147,62%),
22. Vila Real (capacity 67, occupation 81 = 120,90%).

¹⁷ See https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2022/Q-03-Rcls.pdf?ver=DfvcYTHi3B_jrVnMZ_4JYA%3d%3d (accessed 28.06.2023). This number does not include persons considered unaccountable due to a mental health disorder, who are serving a security measure in civil hospitals.

¹⁸ Karla Tayumi Ishy, *ibid*.

¹⁹ *Idem*.

23. Second, a 90.4% density rate (90.3% according to figures publicly available)²⁰ is hardly a satisfying figure for the authorities to claim. As mentioned in the Council of Europe's *White Paper on Prison Overcrowding* (CM(2016)121-add3, 23 August 2016)²¹, **a 90% density rate is rather "an indicator of imminent prison overcrowding" (§ 20).**
24. What is more **the situation has worsened** since the Government presented its Action Plan. **As of 31 December 2022, the national prison density rate was 96.6%**²² – and has been rising until now, the rate as of June 2023 being of 98%.²³
25. Already at the time the Government submitted its Action Plan, the effects of the 2020 COVID-19 emergency law started to wear off: **after a drop in of prison density observed between 2019 (97.7%)²⁴ and 2020 (87.1%)²⁵, the figure was already on the rise in 2021 (90.3%)²⁶.**
26. This figures, however, are to be treated with caution as the data available "may not match the practical reality, considering that the official capacity of certain prisons may not be up to date and, therefore, may not correspond to the true capacity of the space".²⁷

III. Trends in the prison population

27. The two measures put forward by the Government in its latest Action Plan submitted (the 2017 Penal Code reform and the 2020 COVID-19 emergency law, see above) have not had a significant impact on the country's prison density or incarceration rate.

²⁰ As of December 2021, the number of inmates amounted to 11,393 for a total capacity of 12,618 – which makes a prison density rate of 90.29%. See https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2021/Q03.pdf?ver=5q7IIPFHE54h_Dxhu68Pg%3d%3d (accessed 28.06.2023)

²¹ Available at: <https://rm.coe.int/white-paper-on-prison-overcrowding-cm-2016-121-add3-e/16807c886b> (accessed 28.06.2023)

²² <https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2022/Q-03-Rcls.pdf?ver=FCv187ZuSHopm1XkNwfk4A%3d%3d> (accessed 28.06.2023)

²³ See 15 June 2023 figures (12,419 inmates) here <https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Quinzenais/2023/1q06-2023-sexpen.pdf?ver=UIGMjNUGrOpcKonTXw-gSQ%3d%3d> (accessed 28.06.2023). The prison capacity has not changed since December 2022 to the best of our knowledge with a total capacity of 12,618 inmates – see https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2022/Q-03-Rcls.pdf?ver=DfvcYTHi3B_jrVnMZ_4JYA%3d%3d (accessed 28.06.2023)

²⁴ https://dgrsp.justica.gov.pt/Portals/16/Est%3%A1tisticas/%C3%81rea%20Prisional/Anuais/2019/quadro_03.pdf?ver=2020-04-29-150126-670 (accessed 28.06.2023)

²⁵ https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2020/q03-2020.pdf?ver=c4CL485t87QZMQAJ_zegSQ%3d%3d (accessed 28.06.2023)

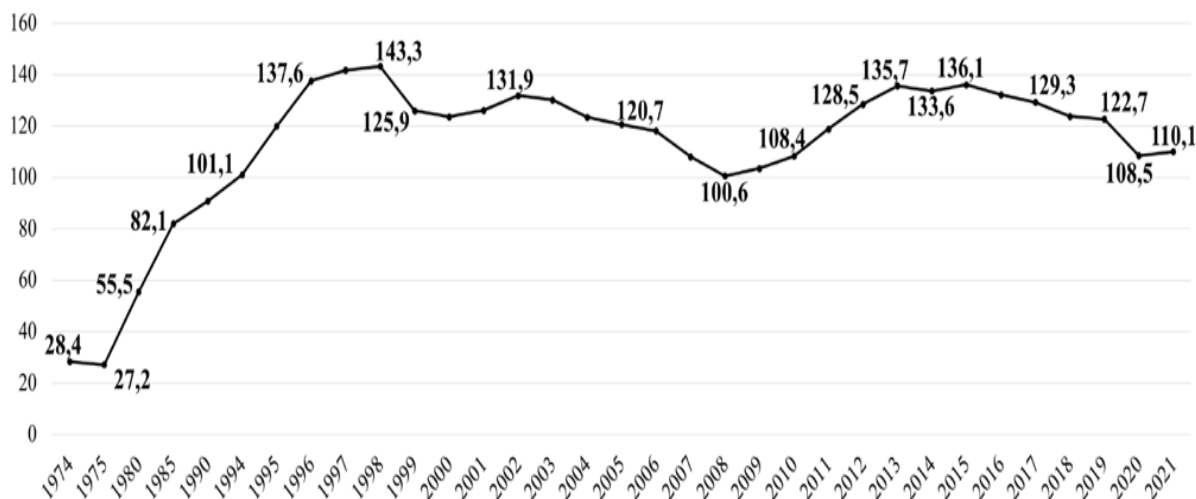
²⁶ https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2021/Q03.pdf?ver=5q7IIPFHE54h_Dxhu68Pg%3d%3d (accessed 28.06.2023)

²⁷ Karla Tayumi Ishy, op. Cit., p.440

III.1 Incarceration rate

28. If these concerning prison density rates are also marginally influenced by a slight drop in prison capacity between 2020 (when the total capacity of the prison system was of 12,923 inmates)²⁸ and 2021-2022 (12,618)²⁹, they reflect above all a **rise in incarceration rates** since 2021 as shown in the chart below. The rate for 2022 (114 inmates for 100,000 inhabitants), recently made available, confirms this trend.³⁰

Incarceration rates in Portugal from 1974 to 2021³¹



29. This increase in the incarceration rate is caused by a raise in the prison population. While the prison population in Portugal had decreased between 2015 (with a peak of 14,222 inmates) and 2020 (11,418), the figures have been rising at a worrying pace since 2021 (see table below). In 2021, there were already 11,588 prisoners in the country, and in 2022 the prison population reached its pre-COVID level with 12,383 prisoners.³² The situation in the country is indicative of a **general upward trend in incarceration rates in Council of Europe countries, following an exceptional fall due to the COVID-19 pandemic.**³³

²⁸ See https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2020/q03-2020.pdf?ver=c4CL485t87QZMQAJ_zegSQ%3d%3d (accessed 28.06.2023)

²⁹ https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2021/Q03.pdf?ver=5q7IlyPFHE54h_Dxhu68Pg%3d%3d and

<https://dgrsp.justica.gov.pt/Portals/16/Estatisticas/%C3%81rea%20Prisional/Anuais/2022/Q-03-Rcls.pdf?ver=FCv187ZuSHopm1XkNwfk4A%3d%3d> (accessed 28.06.2023)

³⁰ See Aebi, M. et al. (2023), *Prisons and Prisoners in Europe 2022: Key Findings of the SPACE I survey*, p.6 Available at: https://wp.unil.ch/space/files/2023/06/230626_Key-Findings-SPACE-I_Prisons-and-Prisoners-in-Europe-2022.pdf (accessed 28.06.2023)

³¹ See Karla Tayumi Ishy, op. Cit, pp. 438-439. Note: for the years 1975-1990, the figures include persons considered unaccountable due to a mental health disorder, who are serving a security measure in civil hospitals.

³² See Agência de Notícias de Portugal, *Reclusos em Portugal ultrapassam 12.000 e atingem números de antes da pandemia*, 6 January 2023, available at <https://www.dnoticias.pt/2023/1/6/343213-reclusos-em-portugal-ultrapassam-12000-e-atingem-numeros-de-antes-da-pandemia/#> (accessed 28.06.2023)

³³ See CoE, *European incarceration rate increased following the end of Covid-19 lockdown measures: Council of Europe's annual penal statistics released*, 27 June 2023, available at: <https://www.coe.int/en/web/portal/->

Evolution of the number of prisoners from 2009 to 2022 in Portugal

Year	Pre-trial detention		Prison sentence		Security measure of confinement		Total
	No.	%	No.	%	No.	%	No.
2009	2141	19,3	8708	78,5	250	2,3	11099
2010	2307	19,9	9069	78,1	237	2,0	11613
2011	2470	19,5	9979	78,7	232	1,8	12681
2012	2661	19,5	10722	78,8	231	1,7	13614
2013	2592	18,1	11441	80,1	251	1,8	14284
2014	2330	16,6	11398	81,4	275	2,0	14003
2015	2303	16,2	11645	81,9	274	1,9	14222
2016	2117	15,4	11396	82,7	266	1,9	13779
2017	2105	15,7	11060	82,3	275	2,0	13440
2018	2196	17,1	10386	80,7	285	2,2	12867
2019	2271	17,8	10192	79,7	330	2,6	12793
2020	2273	19,9	8793	77,1	346	3,0	11412
2021	2149	18,5	9061	78,2	378	3,3	11588
2022	2470	19,9	9517	76,9	396	3,2	12383

30. This shows that **emergency measures**, such as the law adopted in 2020 to fight the spread of the COVID-19 in prison, **do not have any long-lasting effects and cannot be regarded a satisfactory**. As a matter of fact, the effects of the law were only felt for a few months (whereas the pandemic hit every country in Europe hard for at least two years). Immediately after the law was passed, the number of inmates decreased sharply: 2,035 were released temporarily or permanently between April and May 2020, leading to a decrease in the prison population from 12,553 (as of 1 April) to 10,997 inmates (as of 15 May). However, in the following months, the population rose again, with 11,315 registered at the end of the same year.³⁴

31. The future amnesty law announced by the Government in June 2023 (see above) will predictably also have limited effects on the long run as **structural prison overcrowding requires consistent, long-sighted measures that address the penal system as a whole**.³⁵

[/european-incarceration-rate-increased-following-the-end-of-covid-19-lockdown-measures-council-of-europe-s-annual-penal-statistics-released](#) (accessed 28.06.2023)

³⁴ See Rodrigues, A.M./ Pinto, I.H. (2021), 'Portugal', in: Dünkel, F., Harrendorf, S., Van Zyl Smit, D. (eds.), *The Impact of Covid-19 on Prison Conditions and Penal Policy*, Routledge, 2021, pp. 411–423.

³⁵ See among others CPT/Inf (2020) 33 available at <https://hudoc.cpt.coe.int/eng?i=p-prt-20191203-10> (accessed 28.06.2023)

III.2 Lack of a coherent policy that takes into account the factors that lead to prison overcrowding

32. According to the Government's Action Plan and its addendum, the strategy developed for the execution of the judgment is based essentially, in the penal field, on the implementation of the reforms relating to alternative measures to imprisonment.
33. This approach does not seem likely to bring about a lasting and significant change in prison statistics, and is at odds with the recommendations contained in the Committee of Ministers' White Paper on the fight against prison overcrowding, which calls for all levers to be mobilised to reduce the use of imprisonment (i.e. to act on entry and exit flows and the length of detention) in an integrated approach.
34. A coherent penal reform policy would need to take into account the long-term characteristics of the Portuguese penal system (and in particular the demographic weight represented by long prison sentences) and the determinants of the inversion of prison indicators that occurred after the COVID-19 crisis in order to make the necessary corrections. They should not take for granted the assumption that the alternative measures put in place will automatically lead to a reduction in the prison population.
35. Portugal's prison figures are characterised by long stays in prison (the average it is almost 31 months, which is in fact the maximum length of detention found in Europe) and low entry and exit flows. As noted by the authors of the Space reports drawn up under the aegis of the Council of Europe, Portugal is among the jurisdictions with a high probation population rate (≥ 200 per 100 000 inhabitants) and a relatively high prison population rate (>100 to <200 per 100 000 inhabitants)³⁶. The probation population rate is in a significant increase (324.2 for 100 000 inhabitants (stock) on 31 January 2023³⁷, comp. to 298 on 31 January 2019. \
36. If the upward trend in the incarcerated population were confirmed, the scenario would be one of an expansion of the penal system, given the parallel increase in the probation population.
37. According to a recent research, the main reasons behind Portugal's relatively high incarceration rate and high prison density, in spite of a low rate of violent offences, lies in three sets of factors: "the high occupancy rates in some overcrowded prisons seem to be: the relatively high length of the prison sentences (and the time actually served in prison); the short-term and medium-term sentences that, for some reason, are not replaced by a non-custodial alternative; and the long-term sentences where the court does not grant conditional release (or only grants it at a later stage than the law would allow for)".³⁸ Indeed, "the relatively high incarceration rate and average length of imprisonment reveal both that the length of the sentences being served by convicted inmates are longer than the European median and that conditional release is not granted to many inmates – until 2019 more than 40% of the releases were due to the completion of the sentence".³⁹

³⁶ https://wp.unil.ch/space/files/2022/06/Key-Findings_Prisons-and-Prisoners-in-Europe-2021_220615.pdf

³⁷ <https://wp.unil.ch/space/space-ii/probation-stock-on-1-january-2/probation-stock-on-31-january-2023/> .

³⁸ Miranda Rodrigues, A. et al (2021), Promoting non-discriminatory alternatives to imprisonment across Europe. Non-custodial sanctions and measures in the member states of the European Union: Portugal, p.21 Available at: <http://www.prialteur.pt/index.php/home/comparative-study/national-reports> (accessed 30.06.2023)

³⁹ Idem. NB.: figures from 2020 are difficult to interpret as a result of the COVID-19 pandemic

IV. Right to an effective remedy

IV.1 The preventive remedy

(i) *Internal administrative recourses*

38. In their action plan, the Portuguese Government stated that it envisaged to amend the law in order to create both administrative and judicial remedies which would allow persons deprived of their liberty to complain about inhuman and degrading prison conditions and obtain a decision by the administration or the courts putting an end to the violation.

39. In respect of internal administrative recourses, there are no effective mechanisms in place. There is mention to the approval of a “Regulation on Complaints and Applications of Inmates” (Circular 9/2021⁴⁰). This Regulation established a more uniform complaints procedure to be applied in all prison establishments. It applies in respect of all areas. We could not access its text on the website of the DGRSP or otherwise in order to assess whether it can be considered a sufficient remedy. Publication on the website of the DGRSP of all rules in force in prison establishments is a pre-condition to the possibility to exercise one’s rights effectively, namely by making those rules accessible to lawyers, NGOs and the families and friends of those deprived of their liberty. Apart from providing this information to the general public, we are equally unaware of any detailed assessment of the effectiveness of the system put in place by that Regulation in the field of the prevention of violations of Article 3 ECHR in respect of detention conditions. In sum, the possibility of complaining to the director of the prison or to the general director of the penitentiary services is a merely theoretical remedy, incapable of being converted into a practical and effective one. It is true that inmates can complain to the directors in charge; however, it is not true that this is a regular and effective way to obtain a response able to stop the violation of the right of the detainee not to be submitted to inhuman and degrading treatment.

(ii) *Judicial remedies*

40. Looking at judicial remedies which would be the only one capable of meeting the requirements laid down by the Court's case law (see *Ananyev and others v. Russia*), there are no remedies in place. A proof to that end are two cases of the Portuguese Courts, which rejected the prisoners claims for granting bail, on one hand (Lisbon Court of Appeal, 24.11.2020, case 27/20.6GBALM-A.L1-5⁴¹), and for declaring that their detention was unlawful and order their release, on the other hand (Supreme Court, 11.11.2020, case 5553/19.7T8LSB-L.S1, *habeas corpus*⁴²). In both cases the courts did not rule on the effect of the prison conditions alleged by the appellant / petitioners, since they found that they could not constitute grounds for changing the coercive measure of pre-trial detention and for granting *habeas corpus* release.

41. The court of execution of sentences has no relevant powers in this field. There are no explicit, clear and detailed provisions concerning the power of this court to oversee material conditions of detention and the court does not have jurisdiction to order renovations of the prisons.

⁴⁰ Report of the NPM in respect of 2021, https://www.provedor-jus.pt/documentos/MNP_2021_final.pdf;

⁴¹

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/a6e11f47c81d325d80258639004850aa?OpenDocument>

⁴²<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/6d03694bfacd5a838025864000585884?OpenDocument>

42. Equally, the inmates have a right to lodge an appeal only in respect of those decisions of the administration that are listed in the law and do not include any issue on detention conditions (Article 200 of Law 115/2009). There is also no right to appeal from a decision to deny the inmates transfer to a different cell or establishment. There is not even a merely theoretical remedy at the disposal of the applicant in this regard, the least a practical and effective remedy.
43. The Portuguese Government has not created any remedy and no proposal to amend the relevant legislation has been filed in the Parliament.
44. In this respect we would like to outline that any amendments to the law need to tackle the pressing need to take into account the determinants of access to the courts: **access to legal information and access to a lawyer**.
45. Firstly, there is a structural problem in Portugal with reference to the publication of court decisions, since judgments of the first instance courts are not published, and not all judgments of the higher courts are published and there are no clear criteria for the selection of those that are indeed published (on www.dgsi.pt and more recently on <https://jurisprudencia.csm.org.pt>). We believe all Judgments of higher Courts should be published since lack of publication hinders access to information on the law and also the case law, hence hindering the right to judicial review and to an effective remedy in general. Ideally, the judgments of the courts of execution of sanctions should also be made public (after anonymization or pseudonymization).
46. Concerning this topic, it should be mentioned that the Portuguese authorities provided for the dissemination of the *Petrescu* ruling, by translating it to Portuguese and ensuring its publication and its communication to the High Council of the Judiciary, to the General Prosecutor of the Republic (for distribution to magistrates and prosecutors at courts for the enforcement of sentences), to the General Directorate of Prison Services (for distribution to officials and civil servants), and to the Centre for Judicial Studies (national training institution for judges and prosecutors) so that it be included in the training programme for magistrates.
47. Secondly, in order to make the rights of persons deprived of their liberty more effective, it is necessary to facilitate the right to access to a lawyer in prison establishments by setting up a scheme of legal information and orientation, provided by lawyers registered at the Portuguese Bar Association who would attend to the establishment in person regularly. Establishing such a system would help persons deprived of their liberty to know their rights and to be able to make effective complaints and exercise their rights.
48. Currently the right to access to a lawyer for those persons deprived of their liberty who cannot afford a lawyer, especially after they have been finally convicted, is not guaranteed in an effective and practical manner. A particularly illustrative case is the one at issue in a judgment of a lower court⁴³ (local criminal court of Paços de Ferreira) of May 2018, confirmed by the Porto Court of Appeals in December 2018⁴⁴.
49. In Portugal, the inmate population has significant limitations on the access to legal advice. Some of those limitations are inherent to the incarceration itself and result, directly, from the

⁴³ Cited here: <https://www.publico.pt/2019/10/27/sociedade/noticia/ordem-processou-recluso-ajudava-presos-advogado-tribunal-absolveuo-1891391>

⁴⁴ Cited here: <https://www.publico.pt/2019/10/27/sociedade/noticia/ordem-processou-recluso-ajudava-presos-advogado-tribunal-absolveuo-1891391>

respective limitation of the freedom of movement. Other limitations are associated with the fact that a significant part of the inmate population is particularly vulnerable, including people with special economic needs or low literacy skills, undocumented foreign citizens and inmates displaced from their area of residence or with special addictions. Finally, there are limitations on the access to legal aid that result from the Law itself. Namely, the System of Access to Law and Courts is limited to specific issues or causes⁴⁵, that do not include, for example, cases of penitentiary and disciplinary law in the non-judicial phases.

50. In practice, this often means that persons deprived of their liberty in Portuguese prisons are not fully aware of their rights and face significant hurdles in the exercise of such rights, which often causes feelings of helplessness and revolt, and equally often affects their legal situation by preventing them to make effective use of their rights established by law.

51. Between the 27th of September and the 7th of October 2016, the *European Committee for the Prevention of Torture* (hereinafter “CPT”) visited Portugal. The Report was adopted on the 13th November 2020⁴⁶. On the 27th February 2018, the Portuguese Government presented its Response to the mentioned CPT Report⁴⁷. In reply to the allegations of ill-treatments in the Portuguese prisons, the Portuguese Ministry of Justice stated, among others, the following:

«on the other hand, it has already been agreed between the Directorate-General for Reintegration and Prison Services and the Bar Association to set up legal counselling offices in the prisons where the lawyers may provide free information and legal advice to inmates on various issues concerning their lives, such as, and in particular, how to make a complaint about less appropriate treatments, as well as to challenge decisions that are not favourable to them. Right now, talks are taking place with a view to solving logistical problems. We do believe however that in a very short term such Offices will become a reality».

52. The mentioned statement of the Portuguese Ministry of Justice is very significant. On one hand, the Portuguese Government formally accepted that legal advice to inmates, through lawyers registered at the Bar Association, constitutes a significant measure for preventing ill-treatment in prisons. Thus, along with other preventive measures identified in the said Response, free access to legal assistance was qualified by the Portuguese Government as a relevant instrument for the humanization of the treatment given to inmates by the prison system and, consequently, for personal and social empowerment of the inmates. On the other hand, the Portuguese Government made the commitment to create, in the short term, within Portuguese prisons, and in articulation with the Bar Association, Offices of legal assistance to prisoners, whose functions and competences would include, among others, the legal support in what concerns filing complaints and challenging unfavorable decisions, in the context of the execution of sentences.

53. The agreement between the Directorate-General for Reintegration and Prison Services and the Bar Association (hereinafter “**Protocol**”), mentioned in the Portuguese Reply to the CPT Report, was negotiated between 2017 and 2019. Forum Penal was directly involved in the process and sought to contribute to the drafting of an agreement that would be realistic and effective, drawing on experiences from other countries, namely Spain, where there is a longstanding scheme of prison legal orientation and assistance (“Servicio de Orientación y Asistencia Jurídica Penitenciaria”, aka “SJOAP”).

⁴⁵ Law n.º 34/2004, July, 29, in particular, article 6.º.

⁴⁶ Document CPT/Inf (2018) 6.

⁴⁷ Document CPT/Inf (2018) 7.

54. The draft of the Protocol provided for the regular presence of Lawyers in prisons to assist inmates. Such assistance could include, on one hand, support in referring the inmate to the System of Access to Law and Courts (i.e. the legal aid system), when the matter in question required the assistance of a Lawyer in a judicial forum and the inmate did not have an appointed representative, providing, in that case, information about the respective procedure and if needed helping the inmate to fill in and lodge the necessary application forms. On the other hand, it could include legal information and advice on issues that did not involve the intervention of a Lawyer in a judicial forum, such as requests and complaints addressed to the Prison Governors or General Directorate, legal information on parole, short-term releases and transfers of prisoners, legal information on disciplinary procedures, disciplinary measures and respective means of reaction, requests and renewal of personal documents, draft letters, legal advice on everyday life issues such as parental responsibilities, social housing, payment of debts and debt collection, attribution of nationality, labor rights and duties (related to the inmate's employment prior to incarceration or work done during incarceration).
55. The Protocol ended up not being concluded and signed. Therefore, at the present time, the mentioned *“legal counselling offices in the [Portuguese] prisons where the lawyers may provide free information and legal advice to inmates”*, do not exist.
56. In conclusion:
1. As already recognized by the Portuguese State, the reintegration of the inmates into society and the prevention of ill-treatment in prisons depends on the significant reinforcement of their legal protection, through the legal assistance of a Lawyer.
 2. This observation applies both to measures taken in respect of the prisoner's internal legal status and external legal status (measures relating to the adjustment of the sentence towards release).
 3. Incarceration, especially in the most fragile segments of the prison population, creates additional difficulties in dealing with issues related to family relationships, housing, work, asset management, personal documentation, etc.
 4. Portugal assumed, in 2018, the international obligation to create a remedy to improve the legal assistance of the inmates (*“legal counselling offices in the [Portuguese] prisons where the lawyers may provide free information and legal advice to inmates”*).
 5. However, at the present time, that remedy has not yet come into force.
 6. The Government should put such a remedy in place, in consultation with the Bar Association and relevant NGOs.

IV.2 Compensatory remedies

57. The common non-contractual liability lawsuit concerning State action is not an effective remedy. Firstly, there is no specific regulation of such an action in respect of prison conditions. Secondly, the shortcomings in access to legal information and to legal assistance referred to above have as a consequence that most inmates are not acquainted with such a remedy and cannot exercise it effectively. Thirdly, the Portuguese administrative courts take many years to decide a case (it could even reach more than a decade). Finally, as outlined in *Vargas and Others v. Hungary*, the ECtHR considered that not even a single case is enough *“to show the existence of a settled domestic practice that would prove the effectiveness of the remedy”* (§ 53)⁴⁸.

⁴⁸ There is a recent ruling of the Administrative Court of Sintra, granting compensation to an inmate for his detention in degrading prison facilities. The ruling declared the responsibility of the State for violation of Article

58. In order to be able to afford redress in respect of the breaches alleged, a remedy has to be available not only in theory but also in practice, which is understood as not only existing within the domestic legislation, but also having the evidenced capacity of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred. The above-mentioned remedy is clearly not in line with these tenets. There is no standing case law (even less publicly available case law) recognising the right to compensation in respect of prison conditions and thus establishing a sufficient compensatory remedy.
59. The law has to be amended in order to establish effective compensatory remedies. So far, despite the affirmations of the Portuguese Government, nothing has changed.

3 of the ECHR and Articles 1 and 25 of the Constitution (dignity of the human person and prohibition of cruel, inhuman or degrading treatment) and ordered the State to compensate the applicant. See Report of the NPM in respect of 2021, https://www.provedor-jus.pt/documentos/MNP_2021_final.pdf. However, the ruling is not published and therefore remains mostly unknown to the public.