

Peruvian Prison Reforms and the Covid-19 Outbreak

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ABSTRACT

Peruvian Prison Reforms and the Covid-19 Outbreak: The Peruvian State guarantees inmates the right to adequately equipped imprisonment facilities, and the prison regime's aims to re-educate, rehabilitate, and reintegrate inmates have been a recognized part of the Constitution of 1993. Peruvian Prison reforms, however, have experienced challenges in their efforts to enact and enforce these constitutional provisions. This research explores the Peruvian Prison System as a complex adaptive system to better understand the non-predictable outcomes of efforts by the Governmental Authorities to improve prisons, and considers how such a system has influenced prison reforms in light of the limited capacity of the Peruvian state. Employing the Complexity Theory to analyze prison reforms enacted between 2011 and 2016, as well as the ones during the Covid-19 outbreak in 2020, we observe that the regulatory capacity has prevailed in prison reforms despite the political context, but met with challenges in areas of analytical, coordination and deliver capacity in the Prison System as a complex adaptive system, due to the limited capacity of the Peruvian state.

Keywords: Prison, Reforms, Covid-19, Complexity theory, Complex adaptive systems, Peru

INTRODUCTION

The Peruvian Prison System has been placed under a state of emergency three times over the last 15 years (February 2005,¹ February 2012,² and

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1 Declared by Urgency Decree No. 04-2005.

2 Declared by Urgency Decree No. 007-2012.

recently, in January 2017³) under conditions deemed unconstitutional due to the lack of minimum provision of mental healthcare services⁴ as well as for being overcrowded.⁵ The Coronavirus outbreak has exacerbated this problematic context, and it has gone on to uncover several deficiencies in the whole Peruvian Public Administration and also within the Prison System itself.

Despite the World Health Organization's declaration of Covid-19 as an international public emergency on January 30, 2020, the Peruvian government responded belatedly in the area of prison matters. When the first Covid-19 patient in Peru was diagnosed and announced on March 6, 2020 (Redacción Gestión 2020), emergency measures were implemented in different sectors. And though these measures and the effects of the pandemic in prisons are still unfolding, some preliminary aspects of the government's response are worth analyzing.

This research aims to examine the challenges Peruvian prisons have experienced in implementing reforms and takes the measures enforced during the Covid-19 outbreak as a referential point, to be contrasted with previous reforms promoted during President Humala's government. Peru's limited state capacity has set the stage for the current prison situation. The Complexity Theory is a suitable approach to explore its prison setting as a complex adaptive system, as well as to compare the reforms implemented during the pandemic between March and December 2020 (Vizcarra, Merino and Sagasti Administration) with the ones executed between 2011-2016 (Humala Administration). This comparison analyzes the endogenous and exogenous aspects that have influenced prison reforms; furthermore, it allows us to explore retrospectively how the state capacity and prison system responded to the reforms implemented.

In this study, Section 2 explores the Peruvian state capacity and Complexity Theory in analyzing the Prison System as a complex adaptive system; Section 3 examines the complexity in the Peruvian Prison System and the state capacity in prison reforms, and Section 4 details the

3 Legislative Decree No. 1325, as amended by Supreme Decree No. 013-2018-JUS, declared the state of emergency of the Peruvian Prison System from January 7, 2017 until January 6, 2021.

4 See the Constitutional Court decision regarding (i) M.H.F.C. represented by Melchora Castañeda Tuesta de Flores v. INPE Director published in the Constitutional Court website on September 16, 2019; and (ii) Pedro Gonzalo Marroquín Soto represented by Miguel Aurelio Baca Villar v. INPE Director (2010), published on the Official Gazette El Peruano on November 3, 2010.

5 See the Constitutional Court decision regarding C.C.B. v. Tacna Prison (2020) published on the Official Gazette El Peruano on June 4, 2020.

conclusions. Employing a Mixed Methods approach, we analyze the regulations enacted during the pandemic, publicly available data provided by the Ministry of Justice and INPE (the Peruvian Prison Authority) and reports elaborated by the Peruvian Ombudsman, as well as interviews with former officials of INPE, scholars and attorneys at law, and contributions from members of academia and civil society.

STATE CAPACITY AND THE PERUVIAN PRISON SYSTEM AS A COMPLEX ADAPTIVE SYSTEM

The State's authority and power, its ability to enact public policies and enforce regulations, are related to its infrastructural power which reflects the state capacity (González-Bustamante 2021, 2). This capacity has improved in Peru with the development of a formal economy following an economic boom, alongside a decrease in the country's poverty rate, though this also includes the informal economy linked to illicit activities and crimes (Dargent et al. 2017, 10-11, 26; Luna 2020, 114). Challenges specific to the Latin American region, linked to insufficient provision of minimum required public services, a lack of enforcement to demonstrate the legitimacy of the State's use of physical force, as well as the "territorial, functional and socioeconomic divisions, and corruption" (Luna 2020, 127), are also evident in Peru. An increase in crime rate draws attention to the prison capacity and raises the question of improving it to meet population demands in criminal justice. Under Complexity Theory, we explore the types of administrative capacities that provide solutions within the state, such as provision of public services (delivery capacity), rule of law and law enforcement (regulatory capacity), comprehensive collaboration between institutions and state authorities (coordination capacity), and analytical capacity to evaluate forecasts and state actions in progress related to prison affairs (Lodge and Wegrich 2014, 11-14).

Complexity Theory was developed in the areas of natural science, and may be applied in the study of social sciences, particularly in Socio-legal research as proposed by academia^{6,7} for the study of nonlinear dynamical

6 Our research considers the approach of T. E. Webb that makes a distinction between Complexity Theory, Chaos Theory and Autopoiesis Theory (Webb 2014). However, other scholars cited by Webb (2014) such as J. B. Ruhl, J. Salzman, P. Cilliers, J. Murray, Julian Webb, N. Leuhmann, and G. Teubner, among others, focused their research in areas of Complexity Theory, public policies and law.

systems in which changes “are not (necessarily) proportional to inputs” (Pycroft and Bartollas 2014, 2). This theory aims to explore the complexity between the interactions of set of rules, the system, and its environment: “System parts interact under these rules and from this system behavior and organisation emerges. Notably, the form of system organisation and behavior cannot be predicted by examining the constituent parts, and a particular development cannot be predicted from observation of this starting point” (Webb 2014, 481). Therefore, it offers an explanation to the difficulties of managing legal regulation, and more generally, the development of legal systems (Webb 2014, 493), as well as an approach to examine the changes in the system from time to time, and the law’s adaptation (Ruhl 1997, 967-989; Ruhl and Katz 2015, 238-243), to measure complexity in systems (Harris 2019, 58-61; Ruhl and Katz 2015, 211-231)⁸ and to analyze the Environmental Law (Ruhl 1997, 942-966), International Environmental Law (Kim and Mackey 2014) and Foreign Investment Law (Pauwelyn, 2014) as complex adaptive systems.

Of interest, the Prison System has not yet been analyzed by academia under Complexity Theory, though some scholars have explored the application of Chaos Theory in criminology and social justice (Milovanovic 1997), as well as criminal justice and social work (Pycroft and Bartollas 2014). Considering the gap in Complexity Theory in the area of criminal justice, the prison system in particular, this represents an opportunity to evaluate the field as a complex adaptive system, how its reforms have been implemented, together with its outcomes and pending challenges.

The Peruvian Prison System can be represented as a complex adaptive system from the general properties proposed by Ruhl (1997) based on Holland’s work (Holland 1995), namely “aggregation”, “nonlinearity”, “flows”, “diversity” and “self-criticality”. Firstly, “aggregation” states that systems act based on “complex, large-scale behaviors that emerge from the aggregate interactions of these less complex agents” (Ruhl 1997, 942) and the current structure of the Prison System is one of self-organization

7 Complexity Theory is employed to examine Administrative Law by scholars such as Ruhl and Salzman in a regulatory framework (Hornstein 2005, 914) as well as Hornstein (Hornstein 2005). Additionally, other scholars explore the Complexity Theory in different areas of law: Ruhl examines Complexity Theory in the environmental regulations, its failures, and mechanisms to improve its effectiveness (Webb 2014, 482), Roe analyzes the such theory in connection to the corporate law, and Di Lorenzo explores the Complexity Theory through the chaos theory to improve the legislation (Hornstein 2005, 914).

8 UK Office of Tax Simplification has developed a Complexity Index to identify which areas are most complex and why. See <https://www.gov.uk/government/publications/office-of-tax-simplification-complexity-index>

with interactions between the Ministry of Justice, INPE, prison workers and inmates. Secondly, “nonlinearity” considers that “relationships of system components [...] to be measured do not exhibit a mathematical proportionality” (Ruhl 1997, 946) can be observed in the continuing state of emergency of the prison system with its reforms that have not been sufficient to optimize areas of prison capacity, rehabilitation and reintegration. Thirdly, “flows”, as appears in the “force of change in complex adaptive systems [...] involves the flow of some medium” (Ruhl 1997, 947), can be seen where information available from INPE, as well as the society’s perceptions, are considered by the Executive Branch and Congress for the elaboration of policies and laws in prison affairs. Fourthly, “diversity” is generated by disturbances in complex adaptive systems (Ruhl 1997, 989) and is represented by the changes in prison policies and regulations, as well as the political decisions made by the Ministry of Justice and INPE, both as leading authorities. Finally, “self-criticality” is oriented to transform change into a stable standard instead of a radical reform, although the system “will occasionally experience major disruptions inherent in nonlinearity and aggregation” (Ruhl 1997, 943, 952). This case is evident from the prison’s declaration of emergency in the past years that have since become a normalized situation within the Prison System.

We consider it necessary to determine if the prison reforms during 2011-2016 and 2020 were implemented with the Prison System framed as a complex adaptive system or not, in order to better understand their outcomes and the trajectory of the ones ongoing. We consider Webb’s contribution based on Cilliers’s work in order to explore the Prison systems under complexity with regards to its “self-organization”, relationships between the system and the “boundary”, “attractors”, and the “environment and the system’s adaptation” (Webb 2014, 491), which is analyzed in Section 3. We believe that the analysis of the Peruvian Prison System under the Complexity Theory may contribute to the field of academia and benefit policymakers by examining the formulation of prison reforms that have generated subpar results for the inmates’ re-education, rehabilitation and reintegration. This examination has further relevance to the evaluation of state capacity and may highlight possible patterns underpinning the system as a whole.

COMPLEXITY IN PRISONS AND THE COVID-19 OUTBREAK

Analytical Capacity: The Prison System as a Self-organization

Under Complexity Theory, a self-organizing system is one in which its own organization emerges spontaneously from a non-order context as a result of diverse internal decisions arisen from the interrelation of its parts. As a consequence of this dynamic, the whole organization transcends its components and generates self-organized behaviors with a non-predictable impact within the context of nonlinearity (Webb 2013, 485-487). Thus, INPE and the Ministry of Justice are considered as components of the Prison System's self-organization due to their legal capacity in enforcing laws and regulations in the Executive Branch, specifically in matters of prison management, inmate treatment, and rehabilitation.

Several parts of this dynamic deserve further consideration. Firstly, the INPE,^{9,10} as a public executive organism (*organismo ejecutor público*) under the Ministry of Justice, is responsible for the National Prison System; it has normative, economic, financial, and administrative autonomy. The current structure, however, represents a burden for any Minister of Justice in office: prison matters are usually under scrutiny of public opinion¹¹ and ministers are aware that their continuity, reputation, and credibility are subject to any potential crisis involving, or in, prisons. In practice, the Ministry of Justice opts to allocate all the responsibility and risk to INPE in case any critical prison event occurs,¹² a behavior evident during the Covid-19 outbreak.

Secondly, it is common practice for the INPE's National Prison Board (the institution's managerial body comprising of a President, Vice-President, and a third board member) to rotate on a frequent basis. Between September

9 INPE acronym in Spanish refers to the National Penitentiary Institute (Instituto Nacional Penitenciario), the Peruvian Prison Authority.

10 Pursuant to the Peruvian Criminal Execution Code, article 133, the Ministry of Justice Organization and Functions Law, Law No. 29809, article 15, and the Legislative Decree that strengthens the National Prison System and the National Penitentiary Institute (Instituto Nacional Penitenciario-INPE), Legislative Decree No. 1328, article 6.

11 V. S. García Toma, interview, July 29, 2020; C. Nakazaki Servigón, interview, August 8, 2020; F. J. Llaque Moya, interview, July 25, 2020; J. L. Pérez Guadalupe, interview, February 1, 2020.

12 V. S. García Toma, interview, July 29, 2020.

2010 and February 2020, the institution had eight presidents, all of whose appointments and removals were politically driven. During the Covid-19 outbreak between March and December 2020, an aggravating political event occurred: after President Vizcarra was impeached in November 2020 for accusations of corruption, the President of Congress who assumed the Republic's interim's presidency occupied the position for less than a week before resigning, after which a second interim president was appointed.¹³ Also during this period, four Ministers of Justice were appointed,¹⁴ giving the INPE four different presidents at separate times. Notwithstanding this, Humala's Administration (2011-2016) appointed seven Ministers of Justice and three INPE presidents. Thus the changes in INPE management brought "outrage" and made it impossible to plan and execute any proper plan of prison management or policy due to the high volatility of the leading staff in charge,¹⁵ compounded by the fact that some of those appointed did not have sufficient experience in leading prison affairs (Pérez Guadalupe 2020).

The limitations in INPE management can be observed as well in the area of budget execution for prison infrastructure development. According to the Ministry of Economy and Finance, INPE's budget execution for prison infrastructure development was 100% in 2014 (PEN 120,756,723) and 99.6% in 2015 (PEN 105,914,077) during Humala's Administration. In 2016, following the transition to Kuczynski's Administration the budget execution was significantly reduced to 38.2% (PEN 34,802,432). For the next three years the budget execution continued to rise: 44.3% in 2017, 52.6% in 2018, 71.5% in 2019, before dropping in 2020 to 52.6%. It is important to note that for 2020, the initial budget for prison infrastructure was PEN 157,045,645 while its execution represented a reduction of more than 50% of the allocated amount, despite the pandemic. In this year alone it is obvious that political instability and deficient leadership in INPE management generated poor and non-sustainable development within the prison infrastructure.

13 President Martín Vizcarra was impeached by the Congress on November 9, 2020 and the President of the Congress, Manuel Merino took power on November 10, 2020. However, due to social protests in the country, President Merino resigned after six days and Francisco Sagasti was elected as the new president by the Congress and assumed the presidency on November 17, 2020.

14 During this period, Fernando Castañeda and Ana Neyra (Vizcarra Administration), Delia Muñoz (Merino Administration) and Eduardo Vega (Sagasti Administration) were appointed as Ministers of Justice.

15 F. J. Llaque Moya, interview, July 25, 2020.

The Peruvian Ombudsman agreed that Governmental Authorities did not have the necessary technical and political skills to react in time against Covid-19 (Fernández Millán 2020). Additionally, such institution, as the National Preventive Mechanism against Torture and ill-Treatments (NPM), reported an increase in the occurrence of ill-treatment during the pandemic and proposed recommendations to the Public Authorities (Defensoría del Pueblo 2020a; Defensoría del Pueblo 2020b).

Considering the prison reform experiences between 2011-2016 and the unique context of 2020, a politically stable Executive Branch, as reflected in the appointment of INPE Prison Board, may be necessary to open the way to develop consistent reforms inside the sector. With a change in government every five years, it is understandable that new authorities would implement their own policies subject to their political orientations, and would not necessarily continue the work of previous administrations. Nevertheless, it is not unreasonable to argue for consistent and sustainable prison policies during the period of a five-year government.

Regulatory capacity:

Relationship between the Prison System and the boundary

Webb (2013, 488) considers boundaries as a defining feature of any system, whether these boundaries are within partial systems or represent observed boundaries of a partial system, and that systems do not necessarily adapt its structure or boundaries towards externalities unless they are considered “legal”, although the concept of “legal” may change from time to time. The law’s boundaries are subject to ongoing interactions within society, and refer specifically to “the product of emergent interaction, of the encounter between self-understandings of assemblages, processes and concepts that claim the legitimacy afforded by identifying themselves as legal, and those assemblages compelled to engage with them” (Webb 2019, 72). However, boundaries influence the adaptation of the system’s organizational rules and structure due to the learning capacity and memory of the system’s participants, as proposed by Cilliers (Webb 2013, 488). In cases where problems arising from nonlinear contexts are excluded, the legal system may still be influenced by a different kind of learning capacity, through aspects such as “limited memory”, “locality and contingency of knowledge”, as well as the innate imperfections of its models (Webb 2013, 489), giving rise to unforeseeable results.

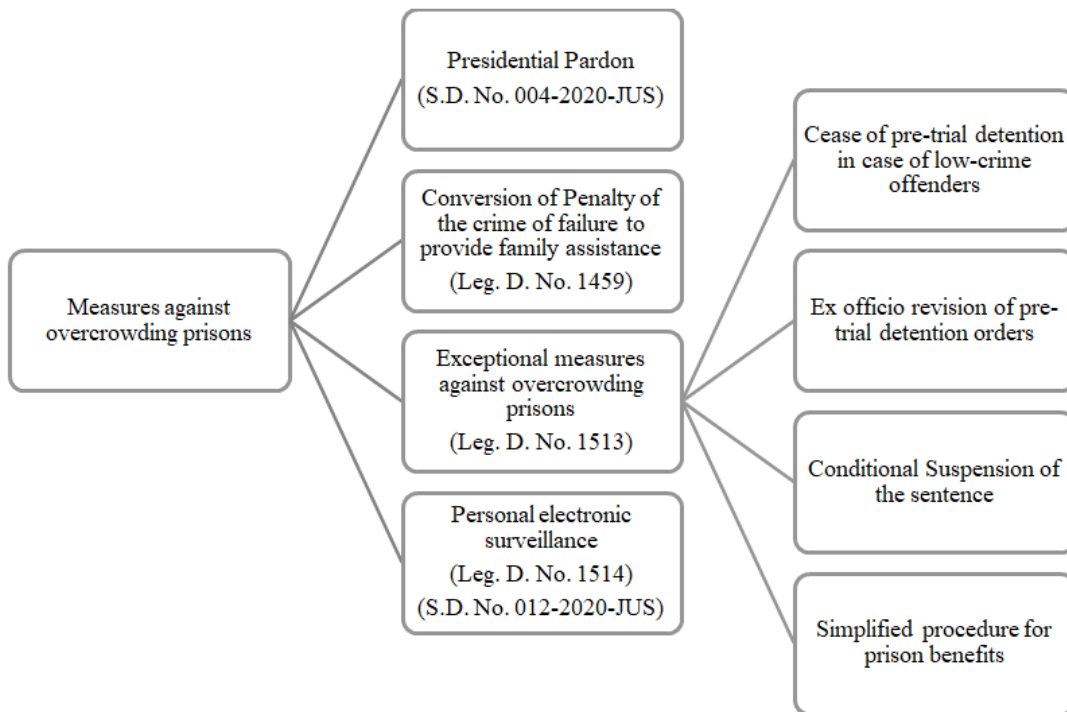
Peru’s position as a Civil Law jurisdiction is based on the Principle

of Legality acknowledged by the Peruvian Constitution (Const. 1993, art. 2, section 24, literal d.): “No one shall be prosecuted or convicted for any act or omission which, at the time it was committed, was not previously expressly and unequivocally described in the law as a punishable offense; nor shall it be punished by a penalty not provided for by law”. Inmates have the right to occupy adequate facilities, and the prison regime aims to re-educate, rehabilitate, and reintegrate the inmate into society at the time of their release (Const. 1993, art. 139, sections 21-22); furthermore, the Constitution of 1993 recognizes that no one shall be a victim of moral, mental or physical violence, nor subject to torture or inhuman or degrading treatments (Const. 1993, art. 2, section 24, literal h).

The Criminal Enforcement Code (1991), meanwhile, stipulates that criminal justice and preventive measures shall exclude torture, inhuman or degrading treatment, and any other acts against human dignity (CEC, 1991, Preliminary Text, art. III). Another provision furthers the clause, stating that inmates shall receive comprehensive treatment in an adequately equipped environment from the time of admission to the internment facility, until release (CEC, 1991, art. 3). The principles of the Peruvian Prison System, therefore, are focused on the inmate’s treatment and reintegration and the maintenance of an optimal prison facility to satisfy those ends.

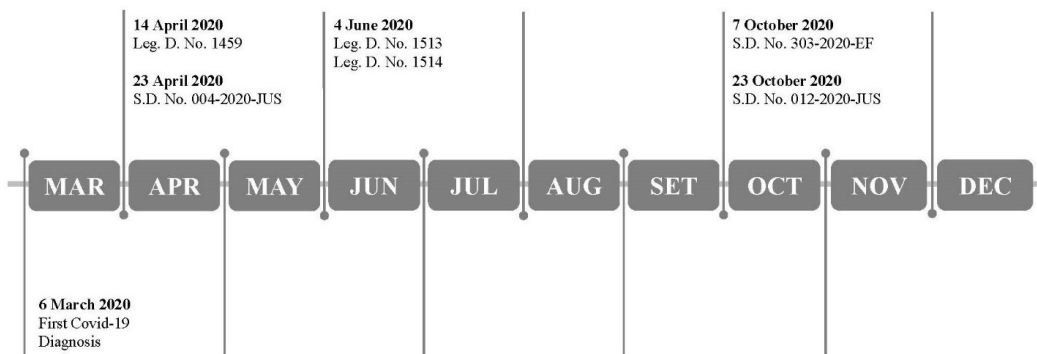
Between 2011-2016, the government enacted regulations prioritizing prison infrastructure development and prison service improvement (Legislative Decree No. 1229 and Supreme Decree No. 007-2016-JUS), the 2016-2020 National Prison Policy and the National Prison Plan (Supreme Decree No. 005-2016-JUS). Meanwhile, in 2012 the Ministry of Justice and INPE launched 10 measures to improve the Prison System (Ministerio de Justicia and INPE, 2012) and the former body prepared a sectorial plan to implement sustained improvement of the prison capacity and inmates’ rehabilitation, for as early as 2030.

Notwithstanding this, there has not been sufficient regulations and reforms to secure the rights of the entire prison population within the challenging context where social distancing is required. During the pandemic, specifically between March and December 2020, the Peruvian government enacted the Supreme Decree No. 008-2020-SA to declare a national public health emergency for 90 calendar days. Special laws were implemented during the Covid-19 outbreak, as detailed in Fig. 1 and Fig. 2, to reduce the overcrowded prison population.



Source: Author’s elaboration based on CEAS (2020), Pérez Guadalupe and Nuñovero (2020).

Fig. 1. Peruvian State Response to Covid-19 Outbreak in Prisons



Source: Official Gazette El Peruano.

Fig. 2. Regulations enacted during Covid-19 Outbreak

The first of these, the prison benefit of an automatic penalty conversion for inmates guilty of failure to provide family assistance¹⁶ was enacted

16 Pursuant to Criminal Code, articles 149 and 150, the “crime of failure to provide family assistance” refers to the omission to provide food, education, clothing, among others from a householder to their children, as well as a to its spouse or legal non-marriage partner (*pareja bajo unión de hecho*), and to the man who abandons a pregnant woman under a critical situation whom he has impregnated.

by Legislative Decree No. 1459 for those who did not represent a source of significant social harm, and could be expected to contribute to the citizenship's social welfare. Once inmates satisfy the provision of family assistance and the cost of damages of their crime, whichever the case may be, the penalty is converted and the inmate released.

Next is presidential pardon, which falls under Presidency duties in accordance with the Constitution of 1993 (art. 118, par. 21); the Ministry of Justice's Presidential Pardon Commission is in charge of evaluating, qualifying and proposing to the presidency cases for approval. However, accusations of corruption surrounding some cases of presidential pardon have reduced the number of inmates released through this modality (CEAS 2020, 15). Instead, it has become necessary for Governmental authorities to adopt special measures to implement the same process but on an accelerated basis by enacting Supreme Decree No. 004-2020-JUS. Inmates in the advanced stages of a chronic disease that may be aggravated by Covid-19, those with any other non-terminal diseases that render them vulnerable to the spread of Covid-19 while imprisoned, female inmates with children, pregnant inmates, inmates whose penalty conclude within six months at the time of the review, inmates with a penalty of no more than four years, and inmates older than 60 years old all have benefitted from these new presidential pardon regulations. Due to the population's concerns, some crimes were excluded from consideration.¹⁷

The exceptional measures introduced against prison overcrowding consisted of four main courses of action: cease of pre-trial detentions, revision of pre-trial detentions granted, conditional suspension of sentence, and implementation of a simplified process for prison benefits focused on specific crimes that do not overly affect society's expectations of sanctions.¹⁸

17 Exception includes crimes such as murder, aggravated injuries, omission to family assistance, kidnapping, human trafficking, sexual exploitation, slavery, rape, sexual offenses, sexual harassment, sexual extortion, promotion of prostitution, infant pornography, aggravated robbery, extortion, elaboration, supply or possession of dangerous materials, spread of contagious or dangerous disease, illegal medical practice, among others (Supreme Decree that establishes special conditions for the evaluation and recommendation proposal for Presidential Pardon, under the public health emergency by Covid-19, art. 3.3).

18 Exception includes crimes such as murder, aggravated injuries to women and family members, injuries to women and family members, promotion of or participation in gangs, kidnapping, human trafficking, sexual exploitation, slavery, forced works, rape, sexual offenses, among others (Legislative Decree that establishes exceptional measures to reduce overcrowding prisons and juvenile offender centers due to Covid-9 contagion, art. 2).

Finally, the Covid-19 outbreak forced an accelerated implementation of special regulations for personal electronic surveillance. Prior to the pandemic, the pilot program consisted of only 24 electronic shackles placed into circulation (CEAS 2020, 18) due to bureaucratic regulations and a limited budget that could not support a wider distribution. The situation has since moved ahead, with complementary actions, such as the enactment of new rules to facilitate its implementation by Supreme Decree No. 012-2020-JUS,¹⁹ together with the public call in on October 7, 2020 addressed specifically to electronic shackle providers (INPE 2020a; INPE 2020b).

Delivery capacity: The Prison System and Attractors

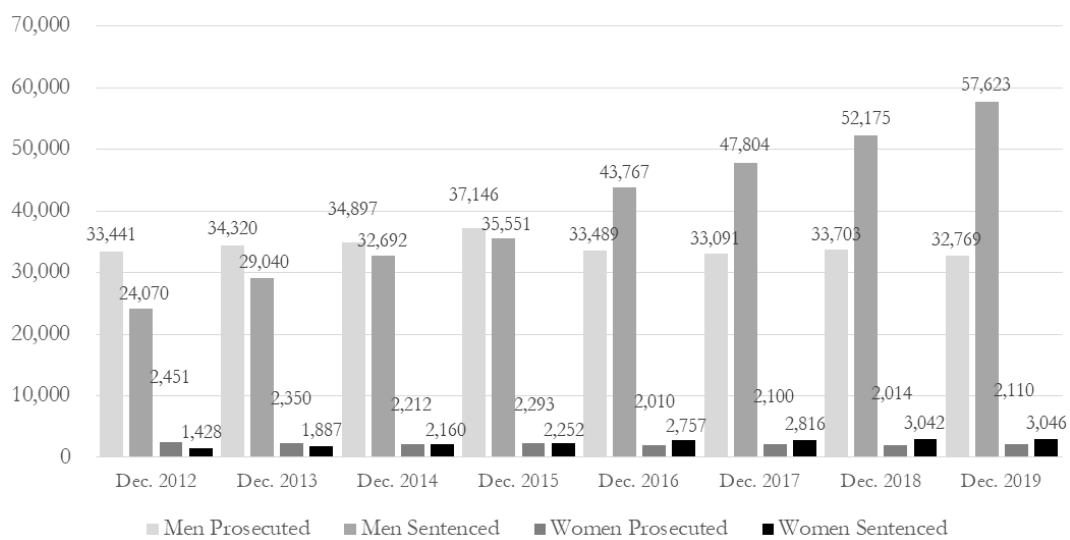
Studying the attractors of a system and their contributions to that system's structure is a way to interpret and understand the reasons why certain events have occurred at a specific time. For example, by describing the prevailing 'social influences' and 'structures' in a societal setting (Webb 2013, 489). For the purposes of our investigation, the Prison System's attractors may be examined under the Complexity Theory to understand how the interactions within the parts of the system and its boundary have influenced the current prison situation in Peru, prior to, and after the Covid-19 outbreak.

The prison regime aims to re-educate, rehabilitate, and reintegrate inmates into society at the time of their release (Const. 1993, art. 139, sections 21-22). It recognizes that no inmate shall be a victim of moral, mental, or physical violence nor subject to torture or inhuman or degrading treatments (Const. 1993, art. 2, section 24, literal h). However, the Prison System's attractors differ from the ideal scenario stipulated by the laws; the Peruvian Ombudsman is the independent public institution to monitor this particular.

Peruvian Criminal Justice allows prosecuted parties (and even those without a criminal charge) to be imprisoned during ongoing investigations, or up to the date when criminal trials are scheduled to commence, due to the nature of the crime involved, or if the prosecuted party's behavior represents a potential risk to the criminal investigations (pre-trial detention). This mechanism is criticized not only by scholars²⁰⁻²¹⁻²² but also by

19 Supreme Decree that approves the Rules to employ the personal electronic surveillance, Supreme Decree No. 012-2020-JUS was published in the Official Gazette El Peruano on October 23, 2020.

international organizations^{23:24} as it anticipates punishment before a person has been found guilty. As detailed in Fig. 3, between 2012 and 2019 the number of prosecuted men and women in prisons have reduced, with an increase in the numbers of those sentenced, from which it may be inferred that criminal justice has undergone few improvements, but not enough to significantly affect prison infrastructure. Therefore, some scholars and professionals consider it important that this aspect should be addressed through a comprehensive reform in Criminal Justice by Judiciary and Congress.²⁵



Source: Author's elaboration based on INPE (INPE 2012; INPE 2013; INPE 2014; INPE 2015; INPE 2016; INPE 2017; INPE 2018; INPE 2019).

Fig. 3. Prosecuted and Sentenced Inmates in Peruvian Prisons, December 2012-December 2019

20 See <https://laley.pe/art/9746/prision-preventiva-en-tiempos-de-pandemia-y-la-doctrina-razon-de-tipo-humanitario>

21 See <https://lpderecho.pe/discusion-ideologica-prision-preventiva-presuncion-inocencia/>

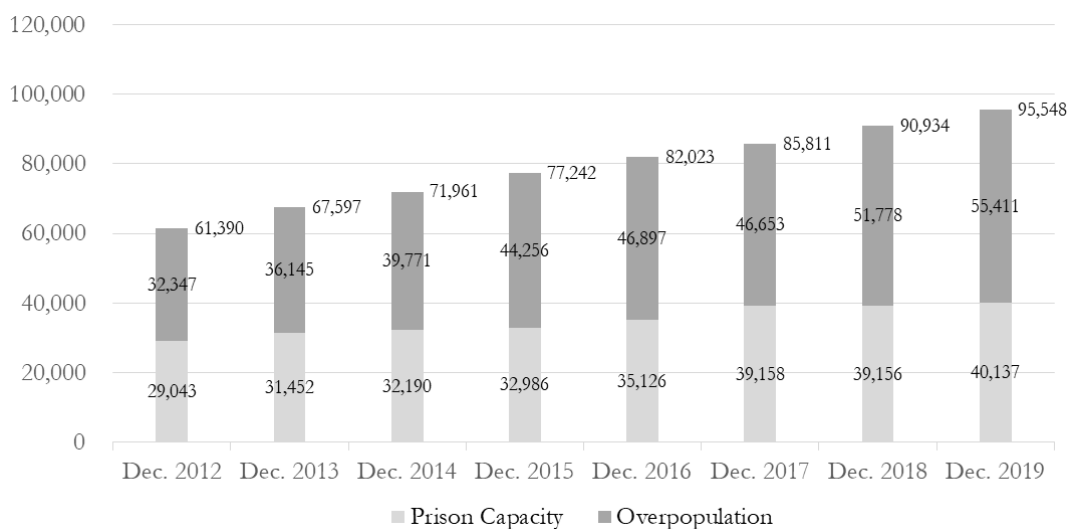
22 See <https://revistaideele.com/ideele/content/la-prisi%C3%B3n-preventiva-en-per%C3%BA-%C2%BFmedida-cautelar-o-anticipo-de-la-pena>

23 The Inter American Human Rights Court has issued a report encouraging the reduction of pre-trial detentions in the Americas. See <http://www.oas.org/es/cidh/informes/pdfs/PrisionPreventiva.pdf>

24 UN Office of the High Commissioner for Human Rights issued the in the "Human Rights Dispatch 2" in which recommends alternatives to pre-trial detentions due to Covid-19 outbreak. See https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch_2_PlacesofDetention.pdf

25 V. S. García Toma (interview, July 29, 2020); C. Nakazaki Servigón (interview, August 8, 2020); F. J. Llaque Moya (interview, July 25, 2020); J. L. Pérez Guadalupe (interview, February 1, 2020).

Prison capacity is also a limiting factor to improve inmate treatment. It reduces resocialization efforts, which are subject to a specific budget in accordance with the maximum capacity of the physical infrastructure allocated to this area. As detailed in Fig. 4, government authorities have failed to foresee and so plan for the increase in prison matters across a seven-year period: in December 2012, overpopulation represented 52.69% (32,347), and in December 2019, 57.99% (55,411). Moreover, as of December 2019, the prison capacity allowance was 40,137 inmates, with an overcrowding rate of 138% that limited provision of accommodation, healthcare attention, education, prison works -all of which impacted on efforts to prepare inmates for their reintegration into society at the end of their sentence. The unconstitutional state of affairs seen in the overcrowding of prisons and its impact on prison mental healthcare, prior to the events of the pandemic, highlights the permanent crisis of the Prison System and the failure of authorities to take the necessary steps to improve the situation.



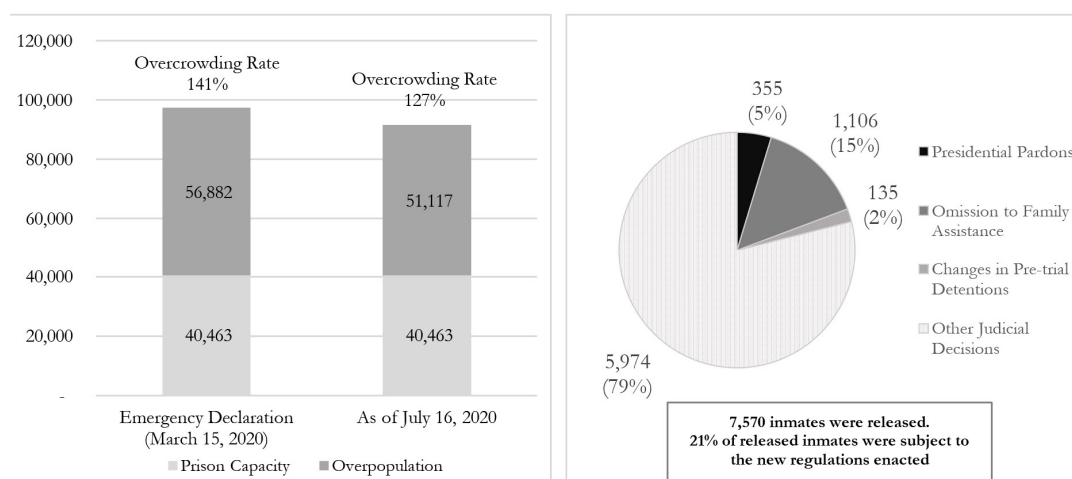
Source: Author’s elaboration on INPE (INPE 2012; INPE 2013; INPE 2014; INPE 2015; INPE 2016; INPE 2017; INPE 2018; INPE 2019).

Fig. 4. Prison Accommodation Capacity December 2012-December 2019

During Humala’s Administration, the prison system made important achievements in the areas of security and prison capacity (in 2016, no riots occurred and only 8 brawls were reported; prison capacity was increased from 32,347 to 35,126) (INPE 2020; INPE 2020c), enacted a 10-measure plan to improve the Prison System, and elaborated on the 2030 Prospective Plan of the Ministry of Justice, which includes

INPE as its dependent body. However, when Kuczynski’s administration came into office, several projects that were still in progress, such as the implementation of electronic shackle, were not continued.

Between February and November 2020, 18 riots and 14 brawls occurred, which affected the stability and management of the prison; in the same period, 219 inmates died from Covid-19 and another 232 died with Covid-19 symptoms without official confirmation of the disease. Government official data regarding inmate status in prisons during the pandemic and their release under the different legal mechanisms enacted by the Executive Branch has not been disclosed in a standard, transparent and accountable manner. Notwithstanding this, civil society has carried out an essential role during the pandemic. CEAS published a report proposing recommendations for Prison System reforms and compiling separate information disclosed by governmental authorities (CEAS 2020), as detailed in Fig. 5.



Source: CEAS (2020, 19).

Fig. 5. Overcrowding Reduction between March 15, 2020 and July 16, 2020

As of March 15, 2020, the day of the emergency declaration, prison overcrowding rate was 141%. The ideal scenario was a reduction of 56,882 excess inmates to control the effects of the pandemic in all the prisons across the country. As detailed in Fig. 5, as of July 16, 2020 only 7,570 inmates had been released, and the overcrowding rate reduced to 127%; 79% of whom benefitted from decisions made within the Judiciary that were not related to the new regulations implemented by the Executive Branch. In this context, is it possible to say that regulations implemented during the pandemic produced predictable results and

achieved the governmental expectations? Without doubt, the inherent complexity in prisons became even more evident with during this period, and it is essential to note that although the number of inmates released could not solve the overcrowding problem in prisons, it represents an important improvement in prison management.

The government's expectations and the results of laws enacted during the pandemic, as detailed in Table 1, shows the challenges in implementing regulations inside the Prison System, a motion that involves not only INPE but also the Ministry of Justice and the Judiciary. In this self-organized system the environment, and therefore its attractors, remain not predictable. Consequently, the delay in governmental strategy to counter the effects of the pandemic inside the prisons meant that the focus fell inevitably to addressing the overcrowding situation by the enactment of special regulations, as detailed in Section 3.2.

Table 1. Overcrowding Reduction as of August 9, 2020

	Legal Base	Expectation	Inmates released	Balance
1	Presidential Pardon Supreme Decree No. 004-2020-JUS	3,000	367	2,633
2	Conversion of Penalty of the crime of failure to provide family assistance Legislative Decree No. 1459	2,832	1,164	1,668
3	Exceptional measures against Covid-19 Legislative Decree No. 1513	Not Determined	615	-
4	Personal Electronic Surveillance Legislative Decree No. 1514	2,000	-	-
Total inmates released		2,146		

Source: Author's elaboration based on data from CEAS (2020) and INPE (2020b).

Between March 15, 2020, and July 16, 2020, as detailed in Fig. 4, 7,570 inmates were released from prisons, and the population reduced from 141% (97,345 inmates) to 127% (91,580 inmates) due to two arms of action: (a) new regulations to reduce the overcrowded facilities that saw the release of 1,596 inmates (1.7% of the prison population; representing 21% of the inmates released), and (b) judicial decisions unrelated to the implementation of new regulations to counter overcrowding (representing 79% of the inmates released). Other actions such as the limitation of visits and healthcare measures have been insufficient or

executed without appropriate transparency. It is premature to discuss the impact and results of these actions.

In the area of presidential pardons, only 12.23% of the expected target population received this benefit; for inmates who opted to reduce their sentence through the omission of family assistance, 40.10%. Despite governmental intentions, there were a limited number of prison workers to assess the inmates' clinical conditions, confirm the status of inmates applying for presidential pardons (the prison population registry is managed exclusively by INPE) and prepare individual case files, as well as the additional information requested by INPE or the Judiciary where records were outdated or incomplete (CEAS 2020, 14).

It was not possible to determine the exact number of inmates released under Legislative Decree No. 1513, due to the specific requirements to apply for this benefit. As for Legislative Decree No. 1514, the enforcement of personal electronic surveillance is still a pending task from the Ministry of Justice: prior to the enactment of this Legislative Decree, only 24 inmates had received the personal electronic surveillance device under the pilot plan (Redacción Gestión 2020a); four months after implementation, the Executive Branch issued the Supreme Decree No. 012-2020-JUS²⁶ approving new rules for employing Personal Electronic Surveillance. Executive Branch has estimated a provision of 2,000 electronic shackles; however, this plan is still ongoing due to delays within the Ministry of Justice, and results may only be appreciable during 2021.²⁷

According to INPE, as of October 2020 the prison population numbered 87,754 inmates, of which 46,927 were in excess of prison capacity. If we compare this information with Prison Accommodation Capacity December 2012-December 2019 (Fig. 4), this represents an important improvement in the Prison System. This situation underscores the reality that for a reform to be effective, it should address concurrently and in parallel several aspects to mitigate potential risks from changes in Peruvian politics and the unpredictable dynamics of prison affairs.

26 Supreme Decree approving the Regulations for the application of the Personal Electronic Surveillance measures, Supreme Decree No. 012-2020-JUS was published in the Official Gazette *El Peruano* on October 23, 2020, repealing and replacing the Supreme Decree No. 004-2017-JUS, approving the Regulation of Legislative Decree No. 1322, which regulates personal electronic surveillance and establishes measures for the implementation of the pilot plan.

27 Fernando Castañeda as the Minister of Justice announced the purchase of 8,000 electronic shackles and around 7,000 inmates should receive such benefit. However, he was replaced by Ana Neyra in July 2020, and the Terms of Reference for purchasing only 2,000 shackles were issued in October 7, 2020 (INPE 2020b).

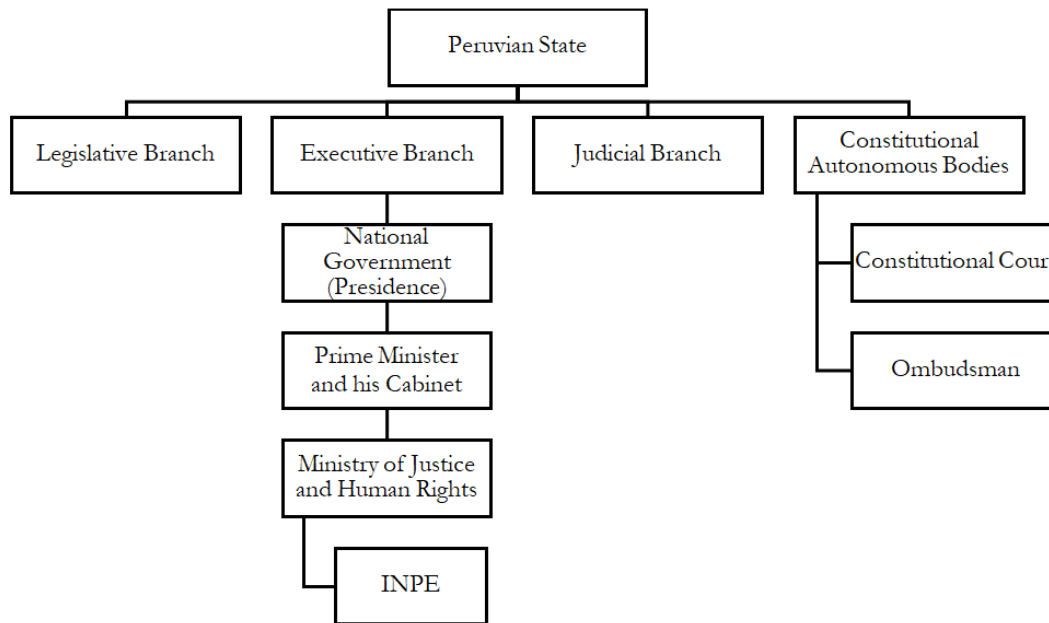
Coordination capacity:

The Environment, the Prison System and its Adaptation

Complex systems are affected by the interaction between its parts and the environment; Webb considers that disorders experienced by the system may either be those of maladaptation or stagnation. The former refers to when a system does not adapt appropriately due to environmental factors subject to the population's knowledge: laws maladapted "might appear irrelevant, overly rigid, too flexible, inaccurate, or disjointed, to those whom the rule applies" (Webb 2014, 491); the latter refers to scenarios where "rules are forgotten, neither being misapplied or acknowledged but going unobserved" (Webb 2014, 492). When this happens, the collective will of the participants define the direction of a complex system and may lock it onto a particular 'path of development' despite its nonlinearity, unless a 'massive environmental upset' forces any significant change (Webb 2014, 491).

Peruvian Prison System reform is a regular topic in public administration discussions owing to its lack of infrastructure. Although regulations implemented in the system have been effective, as detailed in Section 3.2., insufficient prison services in the area of mental healthcare and the situation of overcrowding has resulted in it being declared unconstitutional by the Constitutional Court.

The relationships among INPE, Ministry of Justice, Courts of Justice, Congress, and Peruvian Ombudsman, under the structure of the State, as detailed in Fig. 6, have influenced the Prison System as well. Firstly, we consider it important to explore the influence of the Courts of Justice in the Prison System represented by the Judiciary and the Constitutional Court. The Judiciary is one of the three main branches of the Peruvian State, together with the Executive Branch and Congress. This body administers justice within its jurisdictional function granted by the Constitution of 1993 (art. 138) and it integrates the Supreme Court of Justice, Superior Courts of Justice, Specialized and Mixed Courts, Courts of Peace (either including an attorney at law as judge, or not); it is empowered to judge criminal cases, among others. The Constitutional Court, on the other hand, is an autonomous constitutional body with the duty to hear (i) the writ of unconstitutionality, (ii) orders refusing petitions of *habeas corpus*, *amparo*, *habeas data*, and *mandamus* as a last resort, and (iii) disputes over jurisdiction or over other cases assigned by the Constitution, in accordance with the law (Const. 1993, art. 202).



Source: Author's elaboration based on the Peruvian State website.^{28,29}

Fig. 6. Peruvian State Organizational Structure

The judges' independence and discretion to decide whether or not to impose pre-trial detentions³⁰, as well as to determine the punishment term once a person has been found guilty are reflected in the body of the prison population. The number of people detained during an ongoing investigation (prior to the criminal charge) or prosecution phase, in addition to inmates already sentenced, significantly affects the infrastructural capacity and the reintegration process of inmates across the country. In response to this, the Supreme Court of Justice issued the Plenary Agreement No. 01-2019/CIJ-116 on September 10, 2019 to establish a standard criterion for pre-trial detentions by judges. However, pre-trial detentions continue to be ordered by judges, and its consequences were evident during the Covid-19 outbreak. Consequently, joint efforts

28 Retrieved August 4, 2020, from <https://www.peru.gob.pe/docs/estado.pdf>

29 Portal del Estado Peruano (*Peruvian State website*) includes a figure with the whole state structure. For referential purposes, the Legislative and Judicial Branch were included in order to clarify the main structure of the State. We intentionally omitted other Constitutional Autonomous Bodies that are not comprised under this research.

30 According to the Criminal Procedure Code (2004, art. 268), the pre-trial detention is enforced as the *ultima ratio* if, based on the initial findings, it is possible to determine the concurrence of the following assumptions: serious elements of conviction for reasonably estimating the commission of a crime that links the accused as the author or participant in the crime, the penalty to be imposed is more than four years' imprisonment; and it is reasonably inferred that the investigated or prosecuted will try to evade justice or hinder the criminal investigation.

between the Executive Branch and Judiciary for reducing pre-trial detentions in prisons were considered (examined in Section 3.3), and the situation remains of significant concern for its effect on the Prison System as a whole.

Secondly, we consider Congress's leading role, which is to legislate within its sole chamber in a semi-Presidential State in a multi-party system, a responsibility it has assumed since the Constitution of 1993. During 2011-2016, the official coalition obtained 47 of 130 seats in the parliament and constructed a majority built on political alliances with other parties. This generated a comprehensive relationship between both branches of the State. However, as a consequence of the 2016 Congress and Presidential elections, leadership of the Legislative Branch fell into the hands of the opposition party, who secured 73 of 130 seats. This reversal created tension between Congress and Executive Branch and led to the resignation of President Kuczynski, with vice-president Vizcarra assuming the presidency, after which Congress was dissolved and a new parliament with new members assumed function on March 2020. This political shift proved aggravating during the pandemic, since at that time the Executive Branch had no official representation.³¹ A politically strained relationship between the Executive Branch and Congress became commonplace during the presidency of Martin Vizcarra; the Covid-19 pandemic aggravated it further due to the newly elected Congress of March 2020. Difficulties to reach a consensus that would allow for prison matters laws to be enacted were evident in the middle of the pandemic. The first initiative between Congress and the Executive Branch was the delegation of certain faculties for a period of 45 calendar days under Law No. 31011, published on March 27, 2020, in issues such as public health, fiscal and tax policy, promotion of investments, citizenship security and the internal order, labor right's protection, education, prevention and protection of people in vulnerable situations, provision of goods and services to the population, industries protection, culture, and tourism. Legislative Decree No. 1459,

31 Vice-President Martin Vizcarra assumed the presidency upon Pedro Pablo Kuczynski's resignation on March 23, 2018 and dissolved the Congress on September 30, 2019, arguing a vote of confidence factually denied by the congressmen. However, the Constitutional Court by sentence dated January 14, 2020 (Case No. 0006-2019-CC/TC) ratified such decision and new congressmen started functions for the period between March 19, 2020 and July 26, 2021. During this period, political conflicts between the Executive Branch and the Congress were frequent, the official Party (Peruanos por el Cambio) broke off relations with President Vizcarra and the Executive branch had no congressmen in the new parliament for the period 2020-2021.

in turn, was enacted by the Executive Branch on April 14, 2020, in response to the governmental lack of clarity towards the Prison System while prison riots were increasing in the country. Subsequent discussions, however, between Congress and the Executive Branch to reduce overcrowding in prisons proved fruitful³² and on May 22, 2020 a bill was sent for additional faculties' delegation in favor of the Executive Branch to implement measures to reduce overcrowding in prisons and juvenile offender's rehabilitation centers. As a consequence of the Congress's approval of this bill,³³ the Executive Branch enacted Legislative Decrees No. 1513 and 1514.³⁴

Thirdly, we consider the Peruvian Ombudsman, which was incorporated for the first time within the national legal system during the enactment of the Constitution of 1993 as an autonomous constitutional body. It represents another important actor involved in prison affairs. This institution is in charge of defending fundamental rights, supervising Public Administration duties, as well as the efficient provision of public services in the country; particularly, the Constitution of 1993 (art. 162) establishes and confers the constitutional mandate to this institution to protect the citizen's right across the country as well as to act as the National Preventive Mechanism (NPM) under the OPCAT for preventing torture and other cruel, inhuman, or degrading treatment or punishment.³⁵ These roles have been actively fulfilled by the Ombudsman Officers from time to time, but the compliance of Ombudsman's non-binding recommendations

32 The Congress received the Executive Branch's Bill No. 5110/2020-PE to implement exceptional measures for overcrowding population reduction in prisons, the Judiciary's Bill No. 5149/2020-PE and 5150/2020-PE regarding special measures for the conditional suspension of the sentence and revision of pre-trial detentions and Congressmen's Bill No. 5115/2020-PE to establish a humanitarian penalty execution and Bill No. 5139/2020-PE to replace the pre-trial detention with restricted court appearance but due to their inconsistency between each other, the Congress Commission on Justice Affairs proposed a substitute Bill that was finally rejected by the Congress on May 17, 2020.

33 The Law that delegates faculties to the Executive Branch for legislating in criminal, criminal procedure and prison law, Law No. 31020 was published in the Official Gazette El Peruano on May 28, 2020.

34 Legislative Decree No. 1513 implements exceptional measures against overcrowding prisons and Legislative Decree No. 1514 optimizes the implementation of personal electronic surveillance as a coercive mechanism and criminal penalty for reducing overcrowding prisons. Both were published in the Official Gazette El Peruano on June 4, 2020.

35 Peru is a signatory of the UN Convention Against Torture (CAT), effective in the country upon August 6, 1988, as well as the Optional Protocol to the UN Convention against Torture (OPCAT), effective upon October 14, 2006.

has been subject to monetary issues: whereas more than 80 percent of the cases are resolved in accordance with the Peruvian Ombudsman's recommendations, the percentage dramatically drops to less than 10 percent in cases where monetary compensation is suggested (Uggla 2004, 441).

The Peruvian Ombudsman monitors prison affairs across three phases: *ex-ante* prevention (before ill-treatment occurs), during ill-treatment and *ex-post* prevention (avoid the reiterative occurrence of ill-treatment); during the pandemic, it took an active role criticizing several governmental omissions and suggested possible solutions to the prison crisis (Defensoría del Pueblo 2020; Defensoría del Pueblo 2020a; Defensoría del Pueblo 2020b; Defensoría del Pueblo 2020c). However, owing to its innate property of defending human rights, the society's perception may be that Ombudsmen supports criminals and wrongdoers (Uggla 2004, 438); on top that its legitimacy may vary in the areas of prison matters, despite the institution's remarkable landmarks in upholding national democracy.

Last to be considered is the socio-cultural environment. This area represents a challenge for the Prison System for its legitimacy and the population's perceptions. Although there is no consensus between scholars on the definition of the concept of organizational legitimacy, common ideas support a valuation of an organization's behavior based on the treatment of its recipients, which are subject to the rules and standards of their respective cultural environment (Canel and Luoma-aho 2019, 139). Particularly, Suchman examines three typologies: pragmatic legitimacy (determined by what an organization delivers to society), cognitive legitimacy (organizations are accepted since there is no other option), and moral legitimacy (Canel and Luoma-aho 2019, 142). The fact that INPE is the only leading body in charge of prison affairs and that dealing with an overcrowded population and managing the treatment of its inmates often produces inconsistent results, among other problems, means that the cognitive approach best defines the legitimacy of INPE.

Additionally, perceptions of crime, as well as the Peruvian social consciousness towards prison matters are strongly influenced by the populist viewpoint perpetuated by governmental authorities,³⁶ for the simple fact that improved prison conditions do not necessarily guarantee

36 President Vizcarra announced on April 29, 2020 that the government shall not allow to open prisons for rapists, the criminals, the female killers and the current prison chaos was not generated by the inaction of the government but because of the problems coming from many years ago, <https://elbocon.pe/trends/coronavirus-covid-19-minuto-a-minuto-martin-vizcarra-hoy-explica-cuales-seran-las-personas-que-saldran-de-las-carceles-noticia>.

electoral votes. If hospitals have never been a relevant priority in Peruvian politics, life in prisons has been less so.³⁷ Governmental authorities are less interested in prison matters unless a crisis were to arise, and any decision to ‘improve’ inmate life is to the effect of securing popular support. Therefore, these two aspects were critical during the pandemic: judges were faced with the challenge of deciding if pre-trial detention in prison facilities was ‘necessary’ against a background of prison overcrowding, deficient mental public healthcare -both unconstitutional circumstances- on top of the Covid-19 outbreak and the lack of clarity in the governmental directive relating to prison matters. Having said that, should the Executive Branch prioritize meritocracy and technical skills over political interests, INPE officials with express expertise in prison matters may be in a position to provide a sustainable alternative to the matter.

CONCLUSIONS

Complexity Theory comprises the study of nonlinear dynamical systems in which changes “are not (necessarily) proportional to inputs” (Pycroft and Bartollas 2014, 2) due to the interaction of the parts in the system and the behavior it generates that cannot be predicted by examination of its constituent parts alone (Webb 2014, 481). Therefore, considering the Prison System as a complex adaptive system, we examine, retrospectively, the initial actions taken by the Peruvian Governmental Authorities in prison affairs during the Covid-19 outbreak between March and December 2020 against the ones implemented between 2011 and 2016 in response to the limited research in Complexity Theory application in this sector and the non-predictable preliminary results that have generated different outcomes in the Peruvian prison reforms.

The Peruvian state capacity, as analyzed in the Prison System under the Complexity Theory, evidences that analytical capacity (system’s self-organization), regulatory capacity (normative boundaries), delivery capacity (attractors) and coordination capacity (the interactions within the environment and its adaptability) are necessary to understand the challenges in implementing reforms and why certain challenges persist (Webb 2014, 491). The Prison System, as a complex adaptive system,

37 C. Nakazaki Servigón, interview, August 8, 2020.

structures its self-organization based on the interactions between the Ministry of Justice and INPE, the competent authorities within the Executive Branch in power to decide on prison affairs. This relationship brings its own set of complexities for reasons that include INPE's position as a dependent institution of the Ministry of Justice, the qualification of INPE as a burden to the ministry, frequent rotation of INPE management team, political instability within the Executive Branch, the relationship between Executive Branch and Congress, and the government's delayed response during the Covid-19 outbreak. We observe, however, that a stable leadership in the presidency may provide the necessary support to INPE authorities to promote and enact changes to improve prison capacity and the treatment inmates receive.

Boundaries define a system and the same system does not necessarily adapt its structure or boundaries towards externalities, unless they are considered "legal", although the concept of what constitutes "legal" may change from time to time (Webb 2013, 488). Nonetheless, boundaries influence the adaptation of a system's organizational rules and structure through the learning capacity and memory of the system's participants, as proposed by Cilliers (Webb 2013, 488). During the pandemic, special regulations were enacted with the aim of releasing inmates that do not represent a 'potential' source of harm to society and so reduce the occupancy in overcrowded prisons; the Prison System, as a self-organized system, appropriately handled the situation. Pursuant to the Principle of Legality, regulations regarding special measures to guide presidential pardons, penalty conversion of those charged with failure to provide family assistance, measures against overcrowding prisons and the employment of personal electronic surveillance were enacted, all without meeting their expected goals. Implementation and enforcement of these regulations remain a challenge in the area of prison affairs due to the limited state capacity.

Attractors are the situations addressed in a complex system, and describe the prevailing 'social influences' and 'structures' in a society that help interpret of why certain events happened at a specific time (Webb 2013, 489). It is further associated with delivery capacity. Although the prison regime aims to re-educate, rehabilitate, and reintegrate inmates into society at the time of their release (Const. 1993, art. 139, sections 21-22), the Prison System's attractors differ from the ideal scenario stipulated by the laws, a situation that became more evident during the pandemic. When Governmental Authorities enacted special regulations with the

intention of releasing 56,882 inmates through several legal mechanisms, it was in response to the unconstitutional conditions of insufficient prison mental healthcare services and the overcrowded environment of prisons. Implemented mechanisms ultimately only established a determinate target of 7,832 inmates; as of July 16, 2020, the number of those released was 7,570, 21% of whom (1,596 inmates) were released under these special regulations, while the rest (5,974 inmates) were subject to discretionary decisions within the Judiciary. It is necessary to explore the interaction between the Prison System and the environment to understand how these results came about inside the Peruvian complex prisons. This situation underscored the importance that once a reform is conceived it should address several aspects in parallel to mitigate potential risks that might occur due to the constant changes in Peruvian politics.

Complex systems may be affected by the interaction between the environment and the system's parts, and Webb (2014, 491-492) considers system disorders that may be due to maladaptation (systems do not adapt appropriately owing to its response to environmental factors, subject to the population's knowledge) and stagnation (rules are forgotten, neither being misapplied or unacknowledged, but going unobserved). In these cases, the participants define the direction and guide the system; the system may be eventually locked onto a particular 'path of development', despite its nonlinearity, unless a 'massive environmental upset' forces any significant change (Webb 2014, 491). This last point provides a context for us to consider the many failings underpinning the Peruvian Prison System: deficiencies seen in the Executive Branch, such as weak institutions in the Presidency, Ministry of Justice and INPE; the limited INPE capacity (reduced number of prison workers) and reduced capacity of the State as a whole to accelerate public purchases for electronic shackles; preference of pre-trial detentions by the Courts of Justice instead of other alternative mechanisms to reduce prison population; the permanent state of political instability from a weak or absent official Party in Congress; limited prison monitoring (non-binding recommendations by Peruvian Ombudsman); inherent limitations of the socio-cultural environment and non-favorable perceptions towards crime and prison affairs.

The impact of Covid-19 on prisons encouraged Governmental Authorities to refocus their attention on the Prison System and accelerated the implementation of solutions to overcome overcrowded facilities and

deficiencies in areas of health care. Despite political instability within the Executive Branch and particularly, in INPE authorities, the enactment of new regulations under the State's regulatory capacity introduced several feasible avenues for improvement. The analytical, coordination and delivery capacity, however, still represent a challenge when considered against a prevailing background of limited state capacity.

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