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Tuberculosis in Brazilian prisons: responsibility of the State and double punishment for the inmates

Tuberculose nos presídios brasileiros:
entre a responsabilização estatal e a
dupla penalização dos detentos

Tuberculosis en las cárceles brasileñas:
entre la responsabilidad del Estado y el
doble castigo de los detenidos

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The risk of developing tuberculosis (TB) while in prison is quite significant for the 580,000 inmates in Brazil¹, including those still awaiting trial (40% of the total), who are often kept in the same conditions as those already convicted. The incidence of active TB in the prison population is about twenty times higher than in the overall population (Brazilian Ministry of Health. Sistema de Informação de Agravos de Notificação. <http://dtr2004.saude.gov.br/sinanweb/tabnet/dh?sinannet/tuberculose/bases/tubercbrnet.def>, accessed on 27/Feb/2015), and mass screening carried out in prisons of Southern and South-eastern regions of Brazil, where the characteristics of incarceration are similar to most prisons in the country, has shown that 5 to 10% of the inmates present an active TB^{2,3}.

TB is, thus, a second sentence for many inmates of the Brazilian prison system. The high risk for TB is shared with guards, health professionals, visitors, and all those who, for some reason, attend the prisons. In addition, TB may also be disseminated in the communities where the inmates will live after being released.

To explain TB hyperendemicity in prisons, one often considers the characteristics of the inmates themselves: their origin, in many instances from poor communities where TB is highly endemic; higher frequency of HIV infection and drug use by the prison population compared to

the overall population; and previous incarceration. The inmates could, thus, be considered as “the main responsible” for the chaotic TB situation in the prisons.

This perspective, however, is wrong; many studies have shown that TB transmission is predominantly intra-institutional. A molecular epidemiology investigation carried out in a prison of Rio de Janeiro showed that most of the TB cases identified were related not to reactivation of previous infections, but rather to new infections by strains that circulated massively in the prison where the investigation was held⁴. This conclusion, similar to the one of a molecular epidemiology study carried out in Barcelona, Spain⁵, is supported by a study held in prisons of the Brazilian state of Mato Grosso do Sul that showed an increase in TB latent infection rate (positive tuberculin test) of 5% a year for the duration of incarceration⁶.

All the necessary conditions are present in most Brazilian prisons to perpetuate the massive dissemination of a respiratory-transmitted infection such as TB: the confinement of a high number of cases, often bacilliferous, in cells that are, most frequently, collective (50 inmates or more), poorly ventilated, with no sunlight, and overcrowded (mean occupancy rate: 160%)¹, in association with the well-known deficiency of prison health services.

To respond to this situation, for which the State is clearly responsible, the National Tuberculosis Control Program (PNCT) of Brazilian Ministry of Health ⁷ recommends, in accordance with international guidelines, detection on the basis of spontaneous demand by inmates, systematic active search among inmates on admissions to prisons, periodic mass screening, directly observed treatment, information and awareness-building in inmates and guards, in addition to improvement of the environmental conditions ⁸.

These national norms are only partially applied, whereas the number of inmates are rapidly increasing (28% between 2008 and 2013) ¹. In this aspect, changes in criminal policies are instrumental to limit the inmate population.

The main obstacles to overcome this situation are of political and social nature. The inertia of the state power is fueled by a social and cultural context strongly marked by stigmatization, discrimination and prejudice against the inmate population. In this context, the role of the judicial system is essential, particularly in a worrisome scenario where we observe a minimization of the State responsibility for the physical, psychological, and moral integrity of the inmates. One aimed to identify exemplary and recent cases of how the courts are addressing such responsibility, considering that the massive TB transmission in prisons is intra-institutional.

In October 2012, the Public Prosecutor's Office (*Ministério Público Estadual* – MPE) of the State of Rio de Janeiro sued the state of Rio de Janeiro after finding “*a fall in the detection and cure rates, and in the provision of medical consultation and tests to inmates with tuberculosis starting from 2010, with an increase in mortality rates within the prison system*” ⁹. The court's preliminary injunction ruled that the state of Rio de Janeiro should provide at least 12 certified physicians to work at the Penal Sanatorium, and that the labs were to be fully operational for TB tests. The state of Rio de Janeiro appealed, claiming that those measures had already been adopted. Despite the response by the MPE challenging the reasons of appeal, the Higher Court of Rio de Janeiro (TJRJ) revoked the preliminary injunction in May 2013. The suit still continues, in order to establish state duties and responsibilities. It will be certainly possible to measure the damages from the measures that were not timely adopted. The question remains on whether or not the Court, once the damages and hazards to inmates' health are proved, will acknowledge their right to compensation due to omission and/or lack of effectiveness of the measures adopted by the state administration.

Among the few individual suits of this kind, a request for compensation was made by the mother of a young inmate, convicted in 2006 and diagnosed with TB and gastritis in 2009. She claimed that her son did not have medical care while in prison. He was admitted to a hospital in 2010, and died four days later. The TJRJ acknowledged the right of compensation for moral damages to the mother, due to inhuman treatment, but denied the concession of pension due to death, the reason being that the inmate did not have a lawful activity to contribute to the household expenses ¹⁰. The current jurisprudence acknowledges the right of parents to a pension, even in the case of a child, and the lack of acknowledgement of such a right in this case shows an unjustifiable discrimination in the application of civil law, by not considering the possibility of paid labor within the prison system, and later, once the time was served and the young inmate was released from prison.

This problem is also being discussed by the Brazilian Federal Supreme Court. The result of this discussion will unify discrepancies of local courts with respect to requests of moral damage compensation due to an overcrowded prison population. The arguments against the compensation state that the idea of compensation being of educational nature is not acceptable; it is not fair to grant individual compensation, as this will decrease the resources to improve the system, making the situation of the inmates even worse; the precarious conditions of the prisons are due to scarce public resources, which may become even worse with the granting of compensations. Finally, they state that “*instead of pursuing a solution to change the deterioration of the prisons, what is being sought is an inadmissible individual compensation that may form a ‘dungeon toll’ or an ‘indignity pension’*” ¹¹ (p. 300), concluding that the establishment of an individual compensation does not contribute to improvement of the prison system.

The opposing arguments are frail when analyzed from the perspective of human rights, as they do not consider the mandatory interdependency between civil and social rights. The *Brazilian Federal Constitution*, of 1988, and international laws on human rights do not exclude the objective responsibility of the State for damages and risks caused by ineffective actions: lack of budgetary resources does not serve as an excuse, and the right of individual compensation is assured. Furthermore, new condemnations for violation of human rights in relation to the right of healthcare are possible; Brazil has already been condemned by the Inter-American Court of Human Rights ¹².

Due to the seriousness and nature of rights violation within the prison system, there is no question finding the State guilty, from the point of view of the individual is not enough. But to lessen the legal responsibility of the State in relation to the individual dimension of the physical, psychological and moral integrity of inmates, leading to softening the application of civil law for this group may, in effect, perpetuate de-humanization and expand the roll of rights violated.

At the end of this reflection, we have expanded our initial concern, as such a scenario, within the scope of the judicial system, may place democracy at stake by reducing the possibilities of citizens to have their rights assured. Moreover, it make rooms for other questions: What will be the next group to be barred from their right to receive compensation from the State? What will be the effects from lessening the duties and responsibilities of the State in relation to health policies and actions for all of us?

Contributors

B. Larouzé, M. Ventura, A. R. Sánchez and V. Diuana collaborated equally with the core idea, and manuscript writing and reviewing.

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