

Report for the Criminal Justice Alliance

Reducing the use of imprisonment

What can we learn from Europe?

By Rob Allen

This paper is published by the Criminal Justice Alliance. However, the views contained in the paper are those of the author, and not necessarily those of the Criminal Justice Alliance or its member organisations.

About the author

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About the Criminal Justice Alliance

The Criminal Justice Alliance is a coalition of 67 organisations – including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions – involved in policy and practice across the criminal justice system. The work of the Criminal Justice Alliance is led by its Director, Vicki Helyar-Cardwell.

For more information on the Criminal Justice Alliance and our work visit:
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Foreword

Like so many famous political phrases, David Cameron never actually said that anyone should ‘hug a hoodie.’ No matter. For it became a saying that helped define him as a new kind of Conservative, someone ready to slay the old shibboleths in his drive to decontaminate the Tory brand.

In fact, what he said was far more interesting. In a keynote speech soon after becoming leader, he stressed the need to understand the long-term causes of crime and recognise there was no hope of answering why people commit crime unless we ask the right questions. And he pointed out that these questions were complex, revolving around issues such as family breakdown, mental health, poor education, inadequate state care systems and substance abuse.

The fact that this was remotely controversial, that it was leapt on by his opponents as some kind of political gaffe, shows only the depressing level of what passes for debate on crime and justice in this country. Prison populations rise, spending soars but politicians must endlessly resort to tired and reckless rhetoric to appease hysterical headline writers.

So Michael Howard declared ‘prison works’ despite all evidence to the contrary. Under New Labour an astonishing and shameful 28 criminal justice bills were passed in 13 years; one new law was put on the statute book for every day they were in government. The coalition set out determined to let reason and reality intrude on the crime debate - but sadly is now wobbling in the face of fury on the backbenches, in the party and the media as it strives to shore up waning popularity. It is widely expected that Ken Clarke will be replaced as justice secretary and that his successor will resort to the more familiar gesture politics of the past.

All this is profoundly depressing. After nearly two decades of simplistic slogans and cheap political stunts, it should be clear that locking up more and more people does not solve society’s problems or, in itself, cut crime. Britain now puts proportionately more people than anywhere else in Europe behind bars - but still there are insatiable demands to get even tougher on crime. This is the politics of the madhouse.

We would do well to wake up to what is happening abroad. In the United States, some of the toughest states such as Texas are leading a revolution in rehabilitation after recognising that an expensive prison system locking up the same people again and again is just another sign of state failure.

Closer to home, there have been remarkable experiments in Finland, in Germany and - perhaps most pertinently for Britain - in the Netherlands, as outlined in this important and timely paper. They prove that countries do not have to keep consigning the flotsam and jetsam of society to jail in every greater numbers. There are alternatives that work as well, if not better - as well as being far cheaper, an important consideration amid the current economic maelstrom. Political courage combined with coherent policies on community punishments and rehabilitation can deliver the holy grail of declining crime, declining prison populations and declining budgets.

Despite the derision, Mr Cameron was on the right lines in his so-called ‘hug-a-hoodie’ speech in 2006. We will never solve society’s most fundamental problems if we do not ask the right questions and learn the right answers - wherever we can find them.

Ian Birrell

Former speechwriter to David Cameron and contributing editor to the Daily Mail

Introduction

The familiar story of a rising prison population across Europe, and a general ‘punitive turn’ in Western democracies, now requires a new chapter. Since 2004, European countries have seen a divergence in prison numbers, with the Netherlands, Germany and some others successfully managing to reduce their prison populations, effectively tracking their falling crime levels, whereas England and Wales, along with France, have not achieved this. In England and Wales the prison population has continued to rise despite a clear and sustained reduction in crime.

Since 2004 the total numbers incarcerated in the Netherlands has fallen from more than 20,000 to less than 15,000. In 2009 the Dutch Ministry of Justice announced plans to close eight prisons and cut 1,200 jobs in the prison system.¹ They expect the number of prisoners to continue to decline and to average 8,875 by 2015.² The Netherlands now uses the spare capacity to lease space at Tilburg jail to house 500 prisoners from Belgium, whose prisons are severely overcrowded.³ Alongside the Netherlands, Germany, too, has seen a significant decrease in numbers in custody since the middle of last decade.

The aim of this paper is to look at features of the criminal justice systems in operation in these countries and to analyse changes in prison numbers in order to see whether any lessons might usefully be considered in England and Wales. There is a particular focus on Germany and the Netherlands as these are countries which share certain similarities with the UK. All three are highly urbanised countries with a GDP per capita well above the EU average, although the UK has recently had higher rates of unemployment and a higher proportion of citizens at risk of poverty and leaving education early than either the Netherlands or Germany.⁴ Spending on courts, prosecution and legal aid is similar in the UK and Netherlands,⁵ and trust in justice institutions is broadly comparable.⁶ Both Labour and the Conservatives have looked to the Netherlands for some of their ‘welfare to work’ agendas.

A recent study by the National Audit Office drew attention to “the potential benefit of conducting more research into prison population trends in other countries in order to learn lessons from those with declining prison populations”⁷. This briefing seeks to identify some of those lessons.

Rates of Imprisonment

The size of the prison population in England and Wales has almost doubled since 1992. The extent of the increase over the last twenty years astounded the Justice Secretary Kenneth Clarke who had been responsible for prisons as Home Secretary in 1992-3. Despite efforts to halt the rise in numbers since the Coalition government was formed, the prison population has continued to grow. It remains to be seen whether the measures in the *Legal Aid, Sentencing and Punishment of Offenders Act* will make an impact on the numbers held on remand or under sentence.

England and Wales is not the only jurisdiction to have seen a substantial increase in imprisonment over the last twenty years. With the exception of Finland, all of the

countries that formed the European Union in the mid 1990s had higher numbers in prison in 2011 than in 1992. The rates of imprisonment per 100,000 of the population in 1992, 2004 and 2011 are shown for these countries (plus Norway and Switzerland) in Table 1.⁸ Unlike England and Wales, not all of these countries have seen a *continuously* rising use of imprisonment during this period. Indeed, in five of the countries, the prison population has fallen since 2004: Germany, the Netherlands, Portugal, Sweden and Switzerland. Prison numbers have fallen too in Finland, and in Austria and Denmark the population has remained broadly stable.

Table 1: Prison Population Rates 1992 and 2010/11

Country	Prison Population rate in 1992	Prison Population rate in 2004	Prison Population rate in 2010/11
England and Wales	90	141	156
Scotland	103	134	155
Spain	105	137	154
Luxemburg	89	121	124
Portugal	97	125	119
Italy	83	96	110
France	84	91	111
Austria	90	103	104
Greece	63	79	101
Belgium	71	88	97
Ireland	61	79	95
Germany	71	98	87
Netherlands	49	123	87
Switzerland	79	81	79
Sweden	63	81	78
Norway	58	66	73
Denmark	70	70	74
Finland	70	68	59

The Netherlands is a particularly interesting comparator with England and Wales, as between 1992 and 2004 these two jurisdictions saw the highest rate of prison population growth – their pace outstripping all other western European states. Since 2004 there has been a clear divergence, with the prison population in England and Wales continuing to rise, while in the Netherlands and a number of other countries it has fallen.

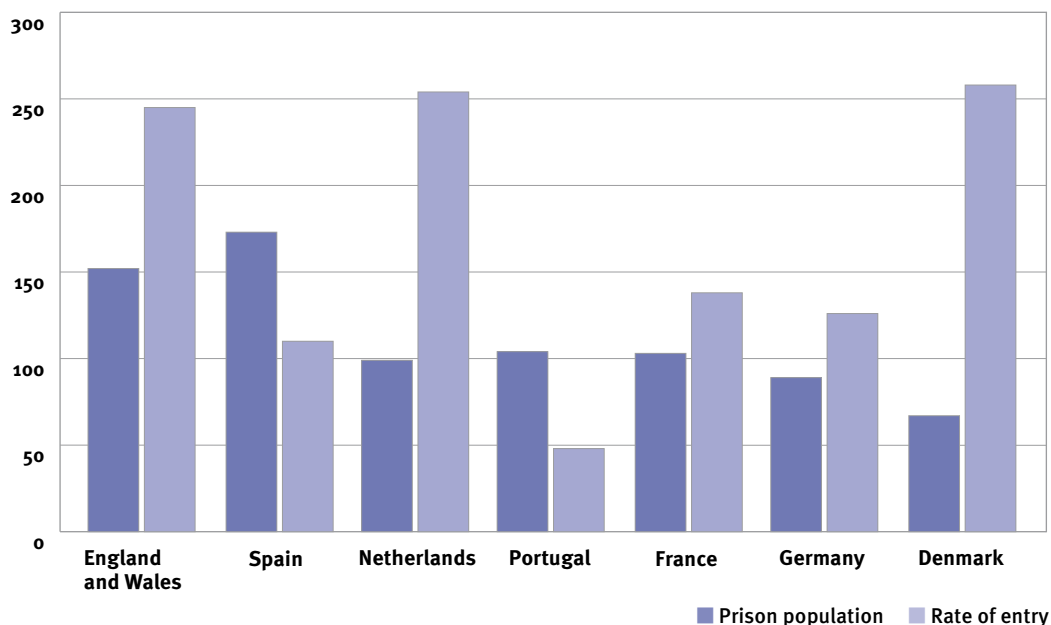
Within Europe as a whole, there are striking differences in the rates of imprisonment. The latest data on the 56 jurisdictions in the Council of Europe show that former Soviet and Eastern bloc countries have significantly higher rates of imprisonment than western European countries. Indeed, Georgia and Russia which detain more than 1 in every 200 of their citizens are among the highest users of prison in the world.

Even among western European countries there are significant differences in rates of imprisonment: England and Wales and Scotland top the list with more than 150

prisoners per 100,000, followed by Spain (152), Portugal (121), Italy (112) and France (111). There is a large number of Western countries that, despite recent rises, still lock up fewer than one in a thousand. These include the Netherlands (87 prisoners per 100,000 of the population), Germany (86) and the Nordic countries. Among countries with populations of more than 5 million, the lowest rate of imprisonment is in Finland with 59 prisoners per 100,000 citizens. This rate in England and Wales would translate into a prison population of 33,000.

A different picture emerges when comparing the rate of entries into prison during a year rather than the numbers in prison on a particular date. Chart 1 shows for selected countries data collected by the Council of Europe from 2008, the latest year for which it is available.⁹ It illustrates that while there were more prisoners in England and Wales per head of population than in the Netherlands and Denmark, the rate at which people were received into prison was lower. This is explained by the relatively greater proportion of prisoners on remand and serving short prison sentences in Europe as a whole than in England and Wales. In 2008, on average across the Council of Europe countries, 27% of prisoners were on remand. The figure in England and Wales was 16%. The current proportion is lower still - 14.2% at the end of 2011. However, it should be noted the picture for women prisoners in the UK is different, as a much higher proportion of female prisoners are held on remand or are serving short sentences. But in contrast to overall UK figures, more than four out of ten of the prisoners in the Netherlands are awaiting trial or sentence, more than one in three in Denmark and more than 18% in Finland. The prison population in England and Wales comprises one of the lowest proportions of remand prisoners. Almost all of the countries with lower overall rates of imprisonment have higher proportions of prisoners awaiting trial. This suggests that courts in European countries are using imprisonment as a sentence much less frequently or for much shorter periods than their counterparts in England and Wales.

Chart 1: Prison Population Rate and Rate of Entries to Prison: Selected Countries 2008



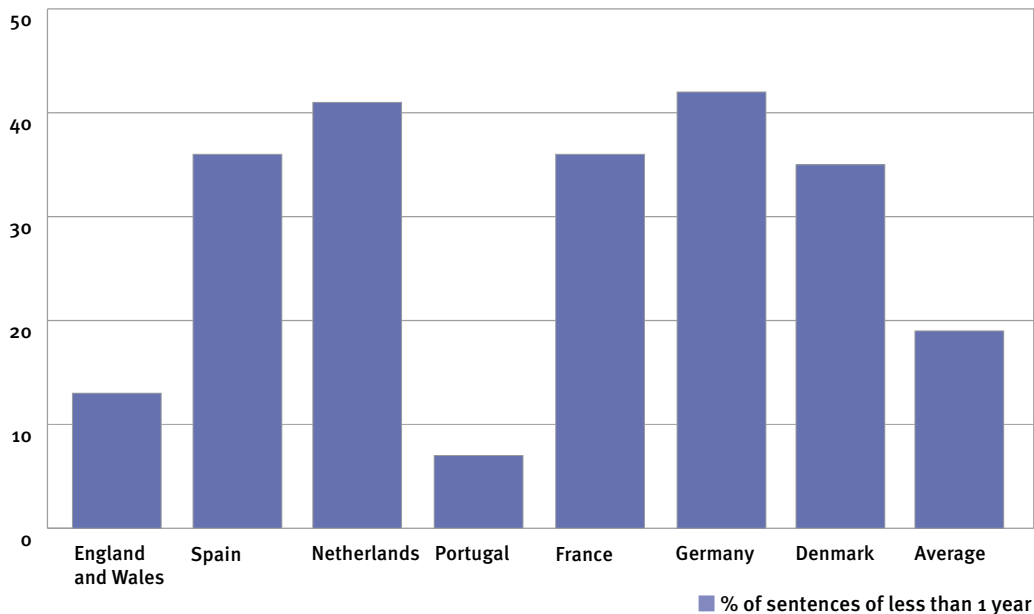
The Council of Europe data shows that as far as length of sentences is concerned, there are proportionately fewer prisoners serving short sentences in England and Wales than in Europe as a whole.¹⁰ Chart 2 shows the proportion of prison populations comprising sentences of less than 12 months.

At the other end of the spectrum, the Council of Europe data shows that the proportion of life sentence prisoners in the prison population is very much higher in England and Wales than in Europe. In 2009 on average 3% of prisoners were serving sentences of life imprisonment or other indeterminate sentences in Europe. In England and Wales the percentage was 18.3%. The figure now is just under 19%.

There is no evidence that this very large difference in use of indeterminate sentences is explained by greater rates of very serious or violent crime in the UK. While comparisons are difficult to make, annual homicide rates for all three countries were below two per hundred thousand of the population in the period 2007-9. The greater proportion of life and indeterminate sentences in England and Wales is likely to be accounted for by the mandatory life sentence for murder and the availability of both discretionary life sentences and the indeterminate sentence of imprisonment for public protection since 2005.

Comparing the levels of crime between different countries is notoriously difficult, complicated in the case of EU countries “by considerable differences in the methods and definitions used in the Member States”.¹¹ Notwithstanding these difficulties, experts under the umbrella of the Council of Europe have assembled data from 2007 which shows the number of offences per 100,000 populations in forty countries. England and Wales (9,156 per 100,000), Germany (7,603) and the Netherlands (7,329) were all well above the average (4,675). The rate of crime had fallen in the preceding four years in all three countries- but much more so in England and Wales (by 20%) than the Netherlands (13%) or Germany (5%).¹²

Chart 2: Percentage of Sentenced Prisoners Serving Sentences of less than 1 Year on 1 September 2009. Selected Countries and Council of Europe Average



Explaining the differences in rates of imprisonment

A number of factors are likely to explain the generally lower rates of imprisonment in Western European countries. Crime rates may play some part although comparative studies find no straightforward relationship between the size of the prison population in a country and the level of recorded crime.¹³ An EU study concluded that:

“sentencing policies in Europe as a whole are considerably less punitive than in the USA... and yet crime is falling just as steeply in Europe as it is in the USA. No relationship between the severity of sentencing of countries and trends in national levels of crime is therefore in evidence.”¹⁴

The recent study by the National Audit Office found no correlations, noting “the lack of evidence for a clear relationship between the use of prison and changes in crime levels”.¹⁵ The countries in their study included some where crime had gone down, as the prison population had increased (including all three UK jurisdictions); countries where crime had increased, as the prison population increased (including the Republic of Ireland); one country where crime was up but the prison population down (Finland) and another where crime had gone down and so had the prison population—the Netherlands.

Some structural features of criminal justice systems appear to be associated with lower rates of imprisonment. These include:

Different arrangements for children and young adults: The age of criminal responsibility is 15 in Scandinavia, 14 in Germany and 12 in the Netherlands. It is 10 in England and Wales with children able to be remanded or sentenced to custody at the age of 12. Alongside this, young people aged 18-21 in Germany and the Netherlands can be treated either as juveniles or adults depending on the seriousness of the crime, the circumstances in which it was committed and the personality of the defendant. In Scandinavian countries, sentence lengths are systematically reduced for young adults. According to Council of Europe figures, 18-21 year olds represented 3.1% of the Swedish prison population, 6.1% of the German and 7.8% of the Dutch. The proportion in England and Wales was 10.7%.

Options to divert even relatively serious cases from prosecution: In Germany criminal proceedings can be terminated by the prosecutor if the offender’s guilt is of a minor nature and there is no public interest in prosecution. This termination can involve the imposition of certain conditions, such as financial redress for the injury caused by the act, the payment of a fine, the undertaking of community service, or, since the year 2000, offender-victim mediation.¹⁶ While this diversion is limited to offences categorised as “vergehen” and not used for the more serious “verbrechen” (offences which carry a minimum prison sentence of a year), the “vergehen” category includes burglary, almost all forms of theft, forgery, extortion, aggravated assault and many drug crimes.¹⁷ In the Netherlands, the prosecutor can agree with a suspect a so-called “transaction”, a form of diversion in which the offender voluntarily pays a sum of money to the Treasury, or fulfils one or more (financial) conditions laid down by the

prosecution service in order to avoid further criminal prosecution and a public trial. Transactions are available for offences for which the maximum penalty is less than six years, which covers “the overwhelming majority of crimes”.¹⁸ The prosecutor can also impose a penal order which can comprise a fine, community service or compensation.¹⁹

Milder sentencing tariffs: Lower sentencing tariffs are also milder in several European countries than they are in England and Wales. This may be a result of maximum sentences for particular crimes which are lower than in England and Wales, a lower “going rate” for particular offences and/or a different approach to sentencing. In the Netherlands, the maximum sentence for domestic burglary is six years and for simple theft four years.²⁰ In Germany the maxima are ten years and five years respectively. In England the maximum penalties are 14 years for domestic burglary and seven years for theft. Again, it should be noted that these differences in sentencing tariffs do not appear to be associated with crime rates, which have fallen across all three countries. Mandatory minimum sentences are much less in evidence in most European jurisdictions and many judges are accorded much greater discretion than in England and Wales.

Better treatment options for people with drug dependency and psychiatric problems: According to the European Monitoring Centre for Drugs and Drug Addiction, the Netherlands has full availability of provision for detoxification, in-patient psychological treatment and substitution therapy, such as methadone treatment – nearly all persons in need would obtain these services. In addition there is extensive provision for outpatient psychological treatment, whereby a majority of people in need would obtain it. In Germany there is full availability of detoxification and outpatient services and extensive provision of the other services. In England and Wales the only one of the four categories of provision with full availability is substitution treatment-methadone. While the provision of the other three types of intervention is extensive, there is likely to be more in the way of unmet need in England and Wales than in the European countries.²¹ A recent review for example found that “despite the considerable investment in prison drug treatment in recent years, it is estimated that there remains a significant unmet treatment need.”²² On the mental health side, the Netherlands has a well developed system for dealing with mentally disordered offenders in hospital settings, apart from the mainstream prison system. The so called TBS (terbeschikkingstelling) deals with adults who have committed a serious offence and have been declared entirely or partially unaccountable for that offence.

Restrictions on Remands: Notwithstanding the higher proportions of untried detainees in many European prison populations, in some countries, there are strong restrictions on the use of remands in custody. In Germany, pre-trial detention can only be imposed where the detention is not disproportionate to the significance of the case and to the likely punishment; in the Netherlands, remand in custody is not permitted if it is not likely that the offender will be sentenced to unconditional imprisonment. Furthermore, pre-trial detention has to end if it is likely that the actual term of imprisonment (taking into consideration the provisions on early release) will be shorter than the period spent in pre-trial detention.

Perhaps surprisingly, there does not seem to be a greater availability of non-custodial sentencing options in Europe than in England in Wales, although there are some distinctive features in how they are organised and implemented. In Germany, fines are imposed in daily units. This is intended to ensure that they have the same impact on offenders who have committed equally serious crimes but have different levels of disposable income. The Netherlands rejected the strict day fine approach, however, since the 1983 Financial Penalties Act all offences, including those subject to life imprisonment, may be sentenced with a fine. The 1983 Act furthermore expresses the principle that the fine should be preferred over the prison sentence. The Criminal Procedure Code requires the court to give special reasons whenever a custodial sentence is ordered instead of a fine. Data from the Netherlands suggests that the proportionate use of fines has been relatively stable over the last ten years, representing about half of all unsuspended sentences. By contrast in England and Wales, while fines are the most common disposal for adults, their use has been declining over the last decade, especially for indictable offences. The Ministry of Justice concluded that “a greater use of community sentences for similar offences over the same period suggests the two are related to each other and that there has been upwards drift in severity of disposals given for indictable offences.”²³

In the Netherlands, the Community Service Order was introduced in the 1980s and proved popular as a substitute for short terms of imprisonment. In 2001 it was replaced by the so-called task penalty (*taakstraf*), a distinct penalty in its own right. It requires a combination of work and training of up to 480 hours to be completed within a year. When imposing a task penalty, the court must state the period of detention to be served in the event of non-compliance. This can be between one day and eight months. In addition, prison sentences of up to two years may be fully suspended in the Netherlands, and sentences of up to three years partially suspended.

Suspension of prison sentences is widely used in Germany. If the convict is sentenced to a prison sentence of up to two years, the court will suspend execution of the sentence on probation if it is to be expected that the offender will not commit any further crimes and there are no other reasons not to suspend the sentence. Courts must give special reasons for not suspending a sentence of a year or less.²⁴

The German Criminal Code states that the court shall not impose a term of imprisonment of less than six months unless special circumstances exist.²⁵ Punishment can be mitigate, or even dispensed with altogether, in minor cases because of the defendant’s mediation or restitution efforts. The procedures for dealing with breach of a non-custodial sentence also involve a considerable degree of flexibility. In Germany suspended sentences can only take effect if an offender grossly or persistently violates directions or persistently evades the guidance of the probation officer, thereby causing reason for fear that he will re-offend. In practice, failure to comply with instructions to compensate victims is for example dealt with more seriously than non-compliance with supervision requirements. Recall to prison should only be a last resort if changing or increasing directives are not seen as sufficient.²⁶ The thresholds for breaching non-custodial sentences appear to be higher than in England in Wales,

where the numbers of offenders going to prison for non-compliance with community sentences and being recalled to prison following conditional release have grown substantially in recent years. In contrast, in Germany the proportion of offenders subject to suspended prison sentences and conditionally released who are recalled to prison has declined.²⁷ Most of the cases follow serious further offending.

Finally, relatively mild elements of criminal justice law, policy and practice have been found in academic studies to exist in countries which share particular characteristics. Moderate penal policies have their roots in a consensual and corporatist political culture, in high levels of social trust and political legitimacy, and in a strong welfare state; and those more punitive policies that make more use of imprisonment are to be found in countries where these characteristics are less in evidence.²⁸ While these characteristics may appear relatively hard to change, trends in the last five years show that even when these cultural values are under strain – which they have been in much of the western world – rising use of imprisonment is not an inevitable consequence.

Trends in Imprisonment

While the rates of imprisonment vary considerably across Western Europe, the last twenty years has seen increases in those rates in almost all countries. But more recent history shows falls in prison numbers in a handful of Western countries which are worthy of closer examination. One of the most dramatic changes in prison numbers over the last few years has been experienced by the Netherlands. Germany, too, has seen a significant reduction in use of custody.

The Netherlands

In the post-war period, the Netherlands had one of the lowest rates of imprisonment in Europe. In the 1970s, its rate of 23 prisoners per 100,000 of the population was easily the lowest in the developed world. Academic studies suggested that this reflected a peculiarly Dutch culture of tolerance which in turn grew out of the particular forms of social organisation- the so-called pillarised society in which religious denominations played a more significant role than social class. The importance of churches in providing informal social control particularly of young people and in supporting people at the margins of society combined with a political culture dominated by moderate elites served to create and sustain a range of liberal policies on a range of social issues, as well as drugs and criminal justice. In the criminal justice system, it has been argued that the Netherlands developed various “shields” which guarded against prison expansion. These included the use of waivers of prosecution, a queuing system when prisons were full, generous regimes of leave and pardons for those imprisoned. These “shields” were located within a political and media culture which respected professional expertise.²⁹

By the middle of the 1980s the rate of imprisonment had started to grow, but, it was in the following decade that the numbers in custody really took off, according to some sources apparently trebling from a rate of 33 per 100,000 in 1985 to 134 in 2005.³⁰ One leading criminologist has described this period as a journey from Disillusion to Dystopia.³¹

In fact, it seems that changes in the way statistics were collected by the Dutch Government and presented by the Council of Europe served to exaggerate somewhat the apparent growth in imprisonment. Until 1999 offenders held in secure psychiatric hospitals were excluded from the prison population statistics. Their inclusion thereafter thus represented an artificial inflation of the figures. During this period too, the lack of prison capacity served cosmetically to keep down prison numbers. Until 2003, a policy of placing only one prisoner to a cell was strictly applied. When space was unavailable, remand and sentenced prisoners were placed on waiting lists. In 1995 remand prisoners were sent home on more than 5000 occasions.³² Thus the building of new prison places enabled more offenders who the courts had decided should be placed in prison to be actually detained.

It also appears that during the later period, prison statistics started to include categories which would not normally be included in prison population figures, for example: immigration detainees and juveniles held in institutions as a result of civil as opposed to criminal proceedings, which may have inflated the figures by up to 15%.

Despite these caveats, there is no doubt that a major increase in imprisonment did take place in the Netherlands. It is usually described as reflecting a punitive turn, imported from the US and the UK whose prison populations also of course grew very fast during the 1990s. Between 1985 and 1995 the custodial sentencing rate in the Netherlands went up from 16% to 21% for violent crimes, from 22 % to 34 % for drug offences and from 13% to 18% for property crimes. The average sentence lengths went up from 96 days in 1985 to 197 days in 1995.³³

But the bulk of the increase in imprisonment was not only the consequence of an application of increasingly severe measures by courts. This was a period which saw sharp and sustained increases in crime. The number of crimes recorded by the police almost quadrupled between 1970 and 1985 from 265,000 to just over a million, after which the rise slowed. 1.3 million crimes were recorded in 2000 with a peak of 1.4 million in 2002 since when the numbers have fallen. Of particular concern during the eighties and nineties was the rise in violent crime. Between 1970 and 2000 the number of violent crimes increased six fold from 15,800 to 90,900. There were 120 violent crimes per 100,000 in 1970, 510 in 1995 and 700 in 2000.

The explosive growth in imprisonment was seen by several commentators as representing a fundamental change in criminal justice policy. For one, it was clear that “something fundamental has changed”.³⁴ For another “in the context of a sharp and sustained rise in crime, with a number of highly visible crimes redolent of social collapse, harsher punishment was reinvented as the only feasible means of social defence against heart of darkness narrative.”³⁵ It was suggested that the changing political economy of late modern capitalism had driven the transformation in the use of imprisonment and that penal trends were thus unlikely to be halted.

It has, however, recently been argued that the upward trends in prisoner rates in the

period up to 2005 are largely explained by changes in the volume and seriousness of cases coming before the courts, rather than by any radical shift in criminal policy, although increases in crime undoubtedly had an impact on the political, public and media climate in which decisions were made.³⁶

The Reduction in Custody

The period since 2004 has shown that the trend has to an extent been halted, with the total numbers incarcerated in the Netherlands falling from more than 20,000 to less than 15,000. In 2009 the Dutch Ministry of Justice announced plans to close eight prisons and cut 1,200 jobs in the prison system.³⁷ The plans were modified by the proposal to use the spare capacity to lease space at Tilburg jail to house 500 prisoners from Belgium, whose prisons are severely overcrowded.³⁸ The Dutch Ministry of Justice expect the number of prisoners to continue to decline and will average 8,875 by 2015.³⁹ A more recent projection has concluded that the demand for prison capacity for adults will be 9.6% lower in 2016 than in 2010.⁴⁰

The reasons for the reductions in prison numbers since 2005-6 were at first thought to lie both in a reduction in serious violent crime and in new legislation and prosecution guidelines promoting the use of community service- the Task Penalty- instead of short prison sentences.⁴¹

More recent analysis has shown that the use of the Task Penalty in place of short sentences has played a role, but a relatively minor one. The number of these community based orders imposed as sentences on adults rose from fewer than 20,000 in 2001 to more than 36,000 in 2009, while during the same period the number of unsuspended prison sentences fell from 36,000 to 25,000. The Task Penalty was designed to be used in place of prison sentences of up to three months, and appears to have proved an effective replacement for short sentences, reducing the flow of offenders into prison.

Nevertheless, the fall in the total number of years of imprisonment imposed by the courts since 2005 is explained much more by reductions in the number of serious crimes put before the courts. These are likely to reflect falls in the number of serious crime committed. Falls in particular categories of crime may have resulted from particular policy initiatives. For example, increased efforts to detect the importation of drugs at Amsterdam's Schiphol airport appear to have had a deterrent effect.

A number of factors emerge from an analysis of trends in the Netherlands. First sentencing tariffs per category of crime have remained remarkably stable over the last three decades- sentences imposed for individual cases have remained the same. "Radical changes in levels of crime, public opinion on crime and in available resources for crime control seem not to have had any discernible impact on the sentencing tariffs of the Dutch courts"⁴². Prisoner rates have tracked changes in crime unlike in England and Wales where prisoner rates have continued to increase despite falls in crime. It appears that Dutch courts may be less responsive to external pressures than elsewhere.

Germany

The prison population in Germany rose during the 1990s, from 57,500 in 1992 to a peak of 81,000 in 2004. Since 2004, the number has fallen to less than 70,000 and appears stable. Crime recorded by the police peaked in 1995 and although it rose slightly during the early 2000s, has been falling since 2005.

German researchers find it hard to explain the significant decrease in imprisonment since 2005. There is a process of so-called “bifurcation” in operation whereby imprisonment is widely used for certain types of offenders: foreigners in remand custody, sex offenders, those convicted of serious drug crimes and juveniles that have committed serious violent offences, and simultaneously, a less severe approach is being used for other types of offenders.”⁴³

The increase in punitiveness, driven in part by increasing crime, is illustrated by the fact that from 1992 to 2006, 42 paragraphs in the German Criminal Code were modified to allow for tougher sanctions. The number of sentences inflicting terms of imprisonment of 5 years or more tripled between 1980 and 2004 for rape and sexual assault.

But as harsher sentences increased so too did the proportion of prison sentences that were suspended for less serious and non-violent offences. There has also been a rise in the use of early releases, postponed execution of prison sentences to allow drug treatment for addicts and an increase in releases as an act of mercy. 20.7% of all released inmates in Baden-Württemberg left prison because of reasons of mercy, but it is not clear if this includes some of those subject to more routine conditional release.⁴⁴

The falls in custody have probably been caused by a mixture of demographic factors – fewer young people and fewer immigrants with an insecure status- and a decrease in crime rates. Different factors are likely to account for developments in particular Lander. Economic prosperity in some Lander such as Hamburg is thought to have led to reductions in crime. Rates of imprisonment vary significantly between the 16 Lander, ranging from 135 per 100,000 of the population in Berlin to 48 in the largely rural Schleswig-Holstein. ⁴⁵

There is some evidence of the so-called “punitive turn” in Germany. The vice-president of the German Federal Constitutional Court spoke of a growing penal mentality: “I have never perceived as much self evident readiness to punish or even delight in punishing as I do today”.⁴⁶ But there is evidence too that politicians have not always been willing or able to translate the punitive turn into more repressive policies. This may be in part due to the greater influence of academic researchers and the churches on the development of policy.⁴⁷ This could be seen as a ‘protective’ factor in preventing ever-increasing prison numbers and managing to halt the punitive swing experienced by other countries.

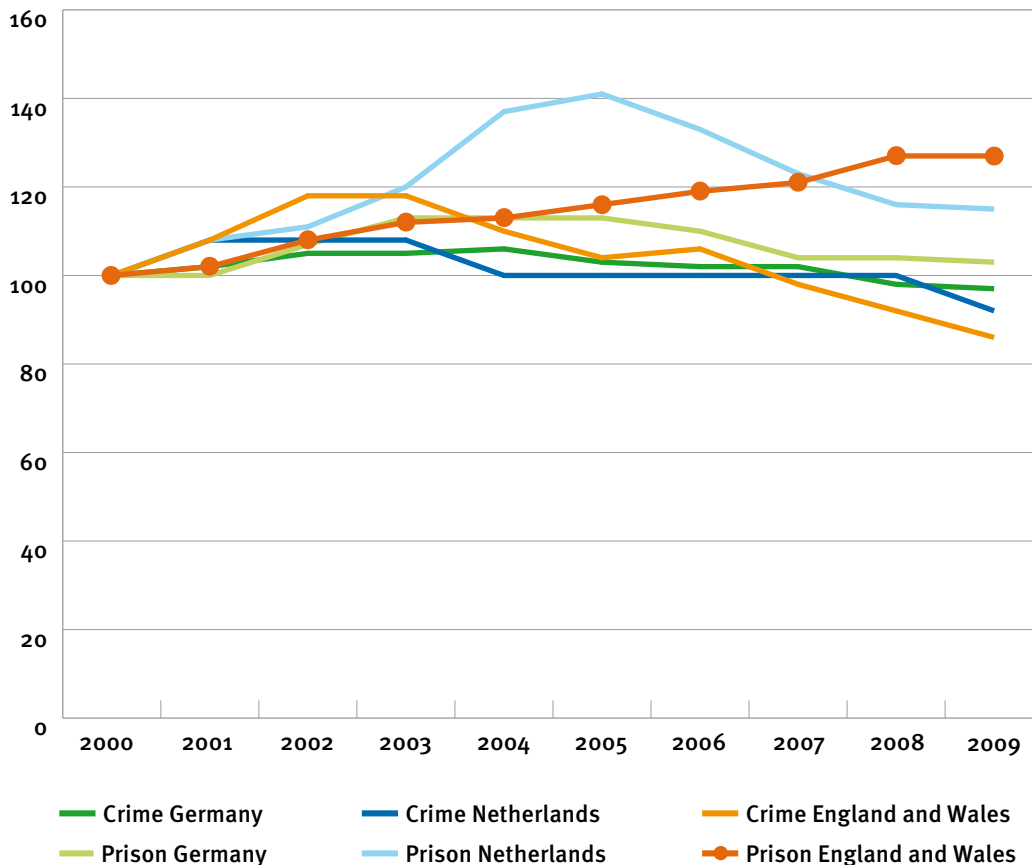
Germany has seen a particularly large decrease in the proportion of prisoners on remand. This is due to a more restrictive approach to the use of remands in custody

by the courts following decisions by the Federal Constitutional Court and the European Court of Human Rights- although the domestic influence has been stronger.⁴⁸ Courts have, for example, ruled that a defendant should have access to Prosecutors' files in order to be able to contest the case for pre-trial detention. German law emphasises that any pre-trial detention should be proportional in its use. If there is little likelihood of the imposition of an unconditional prison sentence, pre-trial detention must not be ordered, a similar provision to that which is contained in the *Legal Aid, Sentencing and Punishment of Offenders Act*. There are additional restrictions based on proportionality and the so-called prohibition of excess. For example if a person has a record involving certain offences (including assault or burglary, robbery, fraud, or certain drug offences), he may be detained, if there is a substantiated risk that he will repeat a similar offence. Detention may only be used if a sentence of more than one year can be expected.⁴⁹

Potential Implications for UK Policy

While comparisons between developments in different countries must be made with a great deal of care, experience in a number of European countries shows that a steadily increasing prison population is not an inevitable feature of life in the early part of the 21st Century. Chart Three shows that in the Netherlands and Germany as crime has fallen, so too has the prison population. In England and Wales by contrast, as crime has fallen, the prison population has continued to rise.

Chart Three: Changes in Recorded Crime Levels and Prison Populations Indexed from 2000



An analysis both of the lower rates of imprisonment prevalent in most Western Europe countries and the falls in that rate over the last few years in the Netherlands and Germany suggest a number of broad policy themes which merit consideration in England and Wales.

The first five relate to the generally lower level of imprisonment. The first of these is the **appropriate age at which criminal proceedings should be used against children, and the case for modifying the consequences of criminal responsibility for young adults**. Unlike the majority of European countries, the age of criminal responsibility in England and Wales is set at the very low age of 10 and specific measures for young adults is very limited. The Ministry of Justice has no plans to raise the age of criminal responsibility but there has been modest acceptance of the case for age and/or lack of maturity to be taken into account by the criminal justice process where it affects the responsibility of the offender.⁵⁰

The second concerns the significant **role that is played by Prosecuting authorities in settling cases** before they reach court. While a range of out of court disposals are available in England and Wales, many European systems give prosecutors a much wider range of quasi judicial discretion to deal with more serious cases. This can involve the payment of fines or compensation, or participation in mediation and reconciliation between offender and victim. In the Netherlands Prosecutors can impose and oversee Community Service. Despite this, the relatively modest use of out of court disposals in England and Wales has been criticised by judges and ministers and plans are being prepared by the Ministry of Justice to reform them. Whether this will lead to an increase or decrease in their use remains unclear.⁵¹

The third distinctive element available in the European jurisdictions is **Restorative Justice (RJ) options** which can be used by prosecutors and by courts in a wider variety of cases than in England and Wales. In Germany prosecutors can dismiss charges if the accused makes a serious attempt to reach a mediated agreement with the aggrieved person thereby trying to make reparation for his offence, in full or to a predominant extent⁵². Courts can mitigate or even in minor cases dispense with punishment if the perpetrator has in an effort to achieve mediation with the aggrieved party, completely or substantially made restitution for his act or earnestly strived to make restitution⁵³. About half of victim offender mediation cases in Germany relate to a violent offence⁵⁴. In England and Wales, the Ministry of Justice is committed to making more use of RJ but does not want to do so in a way that is “over prescriptive or places unnecessary restrictions or burdens upon the system”.⁵⁵ There are currently no plans for the kind of legislative provisions that apply in Europe.

The fourth issue relates to the **length of sentences imposed by the courts** for particular crimes and offences. For certain common crimes (e.g. theft, burglary and certain low level drug offences), the maximum penalties are higher in England and Wales than in Europe. Mandatory minimum sentences, indeterminate sentences and life sentences are also very much less commonly used in Europe. The abolition of the sentence of Imprisonment for Public Protection (IPP) in the *Legal Aid, Punishment*

and Sentencing of Offenders Act should help to reduce the use of indeterminate sentences. This piece of legislation has introduced a new mandatory life sentence for those convicted of a second serious sexual or violent offences. The Ministry of Justice also expects wider use of discretionary life sentences after the abolition of the IPP.

The fifth theme relates to the **provision of measures for dealing with people with mental health and addiction problems** outside the criminal justice and mainstream prison systems. While the availability of drug treatment provision has improved in the UK over the last ten years, there are still shortfalls which mean that people whose problems could be addressed more effectively in health and social care settings are instead processed through prosecution, conviction and sentencing.

There are a further five issues that emerge from the analysis of the falls in the use of custody since the middle of the last decade.

The first of these relates to **restraining the use of custody at the remand stage**. The proportion of pre-trial detainees in the prison population in England and Wales is relatively low and measures are currently before parliament which would introduce a greater element of proportionality into decision-making about remands into custody. Experience in Germany suggests that there may be scope for further restrictions relating to the need to remand suspects into custody at all and for those who are remanded the length of their pre-trial detention.

The second theme relates to **the way community sentences are used as alternatives to prison**. While many of the community based sentences are common to the jurisdictions in Germany, the Netherlands and England and Wales, there is some evidence that the way they are structured and organised in Europe may increase their effectiveness at diverting offenders from prison and recidivism.⁵⁶ In particular, the system of day fines and suspended sentences in Germany, are worthy of further exploration as is the apparent Dutch success of targeting the Task Penalty at offenders genuinely at risk of custodial sentences. Such exploration could help to find ways of avoiding the “net widening” which has accompanied the expansion of community sentencing in England and Wales. There are dangers of further net-widening in the Ministry of Justice proposals to create more intensive community punishments which will be demanding and rigorously enforced “so that they are as punitive and effective as a custodial sentence if not more so”, but which are not intended to replace short prison sentences.⁵⁷ Such dangers may be offset by the proposals that high level fines should be used as higher tariff sentences than at present, as they can be in the Netherlands.

The third area for learning relates to the **higher thresholds which apply to breaches of suspended sentences and recalls to prison** and the way in which courts approach questions of revocation of orders. Technical failures to comply with directions and even minor offences do not lead to imprisonment as long as they do not subvert the overall rationale for keeping the offender out of prison. In Germany, in particular, returning an offender to prison is not seen as a punishment of the breach but the

result of a revised assessment of risk undertaken by the court. A revocation or recall will only occur when the sentenced offender shows that the expectation upon which the granting of probation was based has not been fulfilled. There are provisions in the *Legal Aid, Sentencing and Punishment of Offenders Act* that are designed to improve breach arrangements by giving courts a wider range of options to respond to breach and encourage compliance, and the Ministry of Justice is also consulting on measures to enable offender managers to impose fines instead of returning an offender to court. Current sentencing guidelines state that custody should be the last resort, reserved for those cases of deliberate and repeated breach where all reasonable efforts to ensure that the offender complies have failed.

Fourthly, there is the question of the **climate of public and political opinion and its impact on decision-making**. The Dutch experience suggests that the tariffs for particular crimes may not have changed that much over time and that courts have been less responsive to external pressures than in some other countries. An analysis of Germany concluded that “the concept that offenders deserve punishment but nevertheless should not go to prison appears to be of high importance in German sentencing.”⁵⁸ By contrast, a retired Court of Appeal Judge told the UK parliament last year that “a relentless campaign accusing judges of being soft on crime and under-sentencing *has led to the escalation of sentencing which has now filled our prisons.*”⁵⁹ Finding ways of insulating British courts and policymakers from such campaigns therefore seems an urgent priority.

The final lesson relates to the **greater role that is played by academic and other non-governmental expert organisations in the formulation of policy**. During their inquiry into Justice Reinvestment in 2009-10, the Justice Select Committee heard that crime policies in Germany tend to be seen as the realm of experts and practitioners, not hot election topics, and are therefore less likely to turn in a punitive direction. They took evidence from Professor Christian Pfeiffer from the Criminological Research institute of Lower Saxony, who described how he had written to politicians, media editors and church leaders about what research and statistics had to say on the factors which contributed to the need for further prison building in Germany. “As a result of the ensuing policy debate the legislature stopped its prison building programme shortly thereafter.”⁶⁰ He drew attention to the fact that in Germany academics are involved “all the time in the mass media”.⁶¹ Churches and the clergy too play an important role in engaging people in issues relating to crime and justice, improving understanding and leading to a more moderate climate of opinion within which penal policy is made and practiced.⁶²

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