

Reducing the Use of Imprisonment: Lessons for Policy and Practice

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1. While many European countries have seen rises in their prison populations in recent years, some have bucked the trend. The presentation aims to identify the key factors which contribute to stable or falling numbers in prison.
2. The information I present is based on three areas of work I have undertaken over the last two years. First is some work on changes in the prison population in the UK looking at how the prison population as a whole *doubled* in the twenty years from 1992-2012 but also a particular study of how within this context, the number of juveniles in prison actually *halved* from 3,000 to 1,500 between 2008 and 2012. The second is a series of appraisals of prison reform proposals in five Eastern European countries conducted on behalf of the Norway grants programme. Almost all of these included elements designed to reduce the numbers in prison. The third is a comparative study of recent prison trends in Europe with a focus on those countries whose prison population rate fell between 2004 and 2011. This happened in Germany, the Netherlands, Portugal, Sweden and Switzerland, but I focussed on the first two.
3. I identified a number of structural elements in their criminal justice systems which may be relevant.
4. The structural elements relate to a) the treatment of juveniles and young adults; b) options to divert even relatively serious cases from prosecution; c) milder sentencing tariffs d) better treatment options and e) restrictions on custodial remands.
5. On juveniles 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%. The earlier children are eligible for the criminal justice system, the greater the record they will obtain. The study of falls in the use of juvenile custody in England and Wales since 2008 found that the key change related to diversion out of the system.

6. On diversion more broadly, 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. 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. 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". The prosecutor can also impose a penal order which can comprise a fine, community service or compensation.
7. 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. 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. 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

8. As for treatment, 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. 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.” 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.
9. 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. These kind of proportionality requirements have now been introduced into the law in England and helped to stabilise and reduce the prison population.

10. In addition to these structural factors, four other issues were identified as potentially important in explaining recent trends. The first is 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. 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.

11. The second factor is 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.

12. The third issue 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.” A retired Court of Appeal Judge told the UK parliament in 2011 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.” Finding ways of insulating courts and policymakers from such campaigns therefore seems an urgent priority.

13. Finally there is the role that is played by academic and other non-governmental expert organisations in the formulation of policy. During an inquiry into Justice Reinvestment in 2009-10, the Justice Select Committee of the UK Parliament heard that crime policies in Germany tend to be seen as the realm of experts and bureaucrats, 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.” He drew attention to the fact that in Germany academics are involved “all the time in the mass media”. 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.

14. So where does this leave prison policymakers looking to reduce the use of prison. There are a number of types of policies which can reduce imprisonment. There are some direct methods which I call Route 1. This includes reducing the numbers coming before the courts – as happened with juveniles in England and Wales after 2008; restricting remands; reducing sentence lengths and greater use of early or conditional release from prison sentences, as is happening in some of the Eastern European countries where electronic monitoring and half way houses are being added to strengthen the appeal of such releases. Do these things and prison numbers will almost certainly fall.

15. The second type of methods – Route 2- includes the introduction of alternative community based measures designed to replace short prison sentences; This might be probation or community work or mediation. The reason that these are not Route 1 is because there is a greater degree of uncertainty about whether these will bring about reductions in custody. They may replace other alternative sentences or even add to the prison population if offenders are then punished for failing to comply, although this can be avoided if judges and prosecutors are trained and the sentences carefully targeted.
16. The third type of methods- route 3- involves reducing the rate of re-offending or recidivism among ex-prisoners. Latvia aims to reduce the number of prisoners over the next twenty years to about 5,000, with the reduction of recidivism playing a part in achieving this. Improving drug treatment is one way to do this but I consider this a rather indirect way of reducing prison numbers. It may work but there are many uncertainties. Better prison conditions, with more in the way of education and rehabilitation are much needed. They will help to reduce levels of recidivism, particularly if combined with post penal support. But on their own they will not lead to falls in the use of prison. Other measures are needed.

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