

# **Comparative criminal justice policy**

## **Section C: Aspects of comparative criminal policy**

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# Chapter 3: The use of imprisonment

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## Introduction

When discussing a country's criminal justice policy it is always crucial to explore their policy on imprisonment, as very often the state of a nation's prisons is a key indicator of its commitment to a successful criminal justice policy which in turn impacts upon any system as a whole. There are presently over 8.5 million people imprisoned across the world and most of them are concentrated in a few countries with large populations and particularly high prison rates.

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## Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- ☐ demonstrate the extent of the use of imprisonment as a punishment in different criminal justice systems
- ☐ examine and evaluate contrasting policies of expansion, reduction and abolition of the use of imprisonment
- ☐ review and assess the regimes in prison systems around the world and consider the human rights implications of these regimes.

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## Essential reading

- ☐ Cheney, D. et al. *Criminal Justice and Human Rights*. (London: Jordan, 2001) [ISBN: 08253087245], Chapter 6. [In reader]
- ☐ Christie, N. *Crime Control as Industry*. (London: Routledge, 1994) [ISBN: 0415234875], Chapter 8. [In reader]
- ☐ Downes, D. *Contrasts in Tolerance*. (Oxford: Clarendon, 1992) [ISBN: 019825833X], Chapter 3.
- ☐ Mathiesen, T. *Prison on Trial*. (Winchester: Waterside, 2000) [ISBN: 1872870856] Postscript. [In reader]
- ☐ Rutherford, A. *Prisons and the Process of Justice*. (Oxford: Oxford University Press, 1986) [ISBN: 0192819321], Chapter 5. [In reader]
- ☐ Stern, V. *Bricks of Shame*. (London: Penguin, 1987) [ISBN: 0140523839], Chapter 11. [In reader]
- ☐ Stern, V. *Imprisoned by our prisons*. (London: Unwin, 1989) [ISBN: 0044452977]. Chapter 3. [In reader]
- ☐ Stern, V. *A Sin Against the Future*. (Boston: Northeastern University Press, 1998) [ISBN: 1555533612].

### 3.1 A policy of expansionism

The use of imprisonment has seen a steady rise during the past two hundred years. In the US Rothman (1990) charted the rise of the use of imprisonment which took place during the presidency of Andrew Jackson in the 1820s and 1830s. As crime and social depravation became significant social problems so the use of imprisonment rocketed when a vision of social control with the main aim of rehabilitation took hold.

Alternatively Foucault (1979) considered the rise of the prison in France before the Revolution in 1789. The King would use corporal punishment to demonstrate and maintain his power over his citizens. This made punishment a very public spectacle. As public disgust grew so the prison became more popular as it removed the punishment of prisoners from the public gaze and changed its method from being corporal (on the body) to carcereal (on the soul). The result is that even though expansionism in the US was praised because Jackson was enlightened and wished to rehabilitate offenders, so Foucault observed that the rise in the use of prisons in France was not to punish any less but to make the punishment more effective.

From this base some countries in the world have witnessed a huge rise in their use of imprisonment. Those countries now associated with huge prison populations include the US, Russia and China. They have continuously adopted a policy known as expansionism.

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#### Activities 3.1–3.3

**3.1** Read Stern (1998), pp. 36–101 and critically consider why she labels the US as 'the great incarcerator'. Why does she suggest that Russia's prison population is moving towards the New Gulag and why China has another less well-known gulag in the form of the *laoga*?

**3.2** Read Rutherford (1986), Part II, Chapter 5 and consider the following questions:

- ☐ How can a government encourage sentencers to make more use of imprisonment?
- ☐ What other agencies in the criminal justice process could be used as a mechanism of this policy?
- ☐ What are the implications of expansionism in terms of managing the prison estate?

**3.3** Read Christie (1994), Chapter 8 and consider the following questions:

(a) What fear does Christie have about the consequences of an expansionist policy?

(b) Are these concerns limited to involvement of the private sector or are they inevitable regardless of who runs the prison system?

Feedback: see page 39.

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#### Summary

Some countries follow a deliberate policy of expanding their use of imprisonment as a punishment for convicted offenders. This may be because of a lack of alternatives, because they believe that prison is

effective as a punishment or because politically the use of imprisonment is preferable to alternatives. This section explores how and why expansionist policies are developed in some countries and critically assesses the implications of such a policy.

## 3.2 A policy of reductionism

It is becoming increasingly common for governments to regard imprisonment as a scarce expensive resource which should be used as a last resort. This may be based on a perception that prison is ineffective in achieving the core aims of punishment. Alternatively, it may be because governments develop a sense of shame about the restriction of liberty as a form of punishment or possibly that for managerial reasons a reductionist policy makes economic sense.

For example, in the Netherlands the government and criminal justice practitioners believed that long-term prison sentences do little to rehabilitate and indeed may pre-empt recidivism. They also regarded the practice of denying a prisoner his liberty as a severe (but legal) infringement of a person's basic human rights about which they had ethical misgivings. Indeed, de Haan (*The politics of Redress*. (London: Unwin Hyman, 1990) [ISBN: 0044454422]), described this as the 'politics of bad conscience'.

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### Activities 3.4–3.5

**3.4** Read Downes (1992), Chapter 3 and answer the following questions:

- (a) What was peculiar about the way in which this reductionist belief was perpetuated among practitioners?
- (b) How did the Dutch manage to sustain their reductionist policy for so many decades?
- (c) To what extent was the Dutch experience a product of the legal, political and cultural ideology of that country?
- (d) Would it be possible to apply the reductionist agenda more universally?

**3.5** Read Rutherford (1986), pp. 171–189 and critically consider the nine points of the reductionist agenda that he advocates. Do you find some of them more acceptable than others?

Feedback: see page 40.

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### Summary

Some countries follow a deliberate policy of reducing their use of imprisonment as a punishment for convicted offenders. This may be because they favour alternatives to custody, because they believe that prison is ineffective as a punishment or because politically or ethically the use of imprisonment is considered undesirable. This section explores how and why reductionist policies are developed in some countries and critically assesses the implications of such a policy.

### 3.3 Abolitionism and prison reform

A logical extension of the reductionist agenda is to suggest that for various reasons the prison system should be abolished altogether. This may seem a radical idea but given that history has shown us that abolition is possible in the context of both slavery and the death penalty any attempt to move this agenda towards the use of imprisonment is worthy of consideration. Abolitionism in the context of imprisonment is an idea mooted by academics of the liberal tradition and has received some serious academic comment. Most notably the Scandinavian criminologist Thomas Mathiesen has argued strenuously that prisons do not serve as a useful function in society and that they are a waste of public money.

Mathiesen's argument centres round the four key aims of punishment – namely, retribution, rehabilitation, deterrence and incapacitation. In his view not only are these aims of punishment fundamentally flawed but prisons do nothing to satisfy them.

#### Activity 3.6

Read Mathiesen's postscript to *Prison on Trial* (2000) and complete the following table:

Aim	Flaws	Prison's failings
Retribution		
Rehabilitation		
Deterrence		
Incapacitation		

Feedback: see page 40.

Once we appreciate that prison fails to fulfil the key elements of punishment it becomes somewhat easier to justify abolitionism. However, it is still necessary to convince the citizens of any society that their community is safe and offenders can be appropriately punished outside of a prison system. This is a difficult task, but Mathiesen argued that it is not impossible.

It is possible to find examples of partial prison abolition in various countries from time to time. Indeed the successful implementation of a reductionist agenda may result in certain categories of prisoner such as young offenders being kept out of prison. However, this does not challenge the existence of the prison in itself. Another approach which similarly fails to challenge the prison as an institution, as Mathiesen desires, is to conduct a programme of prison reform. The rationale behind this strategy is that if prisons are to be utilised at all then the conditions in which prisoners are held ought to be maintained to a satisfactory standard.

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**Activities 3.7–3.8**

**3.7** How does Mathiesen claim that we can learn to live in a society without prisons?

**3.8** No country in the world has managed to sustain a programme of prison abolition. Is this because there is little political inclination to do so or does this suggest that abolition is impossible?

Feedback: see page 40.

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**Summary**

Having considered why some countries choose, for various reasons, to reduce the use of imprisonment, this section examines how that policy could be extended to abolish the use of prisons entirely. Some commentators argue emphatically that prisons are ineffective, ethically inappropriate and unnecessary in fulfilling the aims of punishment. These views, however, are controversial and where such a policy has been implemented at all it has been only partially successful.

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**3.4 Prison regimes**

The quality of the conditions that prisoners face is an important facet to any discussion on imprisonment because their impact is often felt in a prison in two ways. Tired of oppressive and unhygienic conditions prisoners may collectively decide to riot. Alternatively, if a prisoner feels they cannot live with the conditions any more they may decide to take their own life. The debate therefore has to move to consider what basic conditions and regimes we can expect, or indeed prisoners can demand.

**Summary**

Having assessed the use of imprisonment on a policy level, this section now begins an examination of the conditions in which prisoners are held in any particular state.

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**3.5 Bricks of shame**

Back in 1987 Vivien Stern wrote a damning account of British prisons which she entitled *Bricks of Shame*. She considered, in depth, the problems which faced British prisons and decided they were ‘an affront to civilised society’. She argued that too many people were unnecessarily in prison and this led to extreme examples of overcrowding which often placed a strain on the conditions prisoners found themselves in. Stern was appalled that prisoners continued to ‘slop out’, which meant they would have to urinate and defecate into a bucket whilst locked in their cells and then empty this bucket the next day. She was also concerned that prisoners were often left in soiled clothes for nearly a week. Her observations about the conditions of prisons are particularly damning because she explains that nearly every aspect of the prison system is left wanting.



Another criticism Stern makes is about the lack of structured regimes in prisons which do not expect or allow for prisoners to lead 'a good and useful life'. There is a tendency for activities to be limited in scope and as prisoners are often given very little to do they will attempt to amuse themselves, albeit sometimes with illegal activities.

Stern's indictment of English prisons was all the more potent because she explores the idea that other countries are doing better.

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### Activity 3.9

Read Stern (1987), Chapter 11 and answer the following:

- ☐ What does Stern think about Rutherford's claim that 'new generation' prisons can be as repressive and brutal as 'old ones'?
- ☐ Why is Stern encouraged by the Dutch system?

Feedback: see page 40.

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By 1990 English prisons were rocked by a series of serious riots, most notably at Strangeways in Manchester, and this led to the publication of a report entitled *Prison Disturbances April 1990*, known as the Woolf report, which examined some of the conditions in prisons and identified three key ideas that ought to be in place in every prison – namely, that there should be security, control and justice. Conditions post-Woolf have got better and Stern's view is to some extent an old one when considering prisons in this country. That said, the conditions endured by prisoners around the world continue to be a question of concern.

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### Activity 3.10

Visit the web site for Amnesty International ([www.amnesty.org](http://www.amnesty.org)). Look at their examination of prison conditions around the world and write a 500-word summary of some of the countries where Amnesty continue to have concerns about their prison conditions.

No feedback provided.

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## Summary

It is the view of some commentators, including Vivien Stern, that prisons may serve a more useful function and can be better defended as institutions if their regimes are improved. There is much information on the problems with the conditions in which prisoners are held around the world and Stern provides guidance on how these conditions can be improved.

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## 3.6 A culture of human rights in prisons?

The Charter of the United Nations was adopted in June 1945. In 1948 the Universal Declaration of Human Rights was passed which led to the European Convention on Human Rights. Article 5 of this Convention argues that 'No one shall be subjected to torture or

cruel, inhuman or degrading treatment or punishment'. This has been a guiding principle for over 50 years, but is it applicable to prisoners? The prison environment is governed by rules and the United Nations Standard Minimum Rules for the Treatment of Prisoners. These rules are now out of date but they do offer some guidance as to societies' expectations concerning how prisoners should be treated.

Stern (1989) makes the point that the US has never observed the UN Rules. When measured against the rules, Japan and China are often left wanting. The point to be made here is that it is not just less-developed countries who adopt prison regimes which do not meet international requirements.

### Summary

The conditions in which prisoners are held in some systems may be so appalling that they breach the fundamental human rights of prisoners. Stern has conducted a review of prison regimes around the world to highlight some of these breaches.

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## 3.7 Prisoner rights

The Human Rights Act 1998 saw the UK implement the European Convention on Human Rights. This obliges courts to find legislation compatible, or not, with the Convention. Traditionally prisoners have been viewed as bereft of rights due to their surrender when they arrive at the prison gates. However, this view is not popular in a changing culture of human rights. This last aspect of imprisonment requires you to consider the European Convention against prisons throughout Europe.

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### Activity 3.11

Read Chapter 6 of Cheney et al. (2001) on prisoner rights. Critically consider the case law presented when the articles of the Convention are considered. Do you think being in prison is, by definition, degrading and inhuman?

Feedback: see page 41.

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### Summary

This section reviews the ways in which various human rights conventions seek to protect the human rights of prisoners whose liberty is restricted.

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## 3.8 What needs to be done?

If you take the view that prisons are a necessary evil to contain some people who have committed particularly heinous offences, then the most important aspect of comparative criminal justice policy would appear to be a focus on prison conditions. Stern (1998) has noted what needs to be done in prisons in the UK and around the world. To adopt a policy of reform is crucial if we are to be viewed as a civilised society. Poverty and disease are common features of societies outside of the prison and these are often

exacerbated within its walls. Human rights abuses are also rife but these two, with the work of Amnesty and others, should be identified and the perpetrators brought to justice. Many people go into prison having made mistakes of varying importance. They go in as human beings. It is important that our prisons don't let them out as monsters, equipped and willing to commit another more serious offence.

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### Activity 3.12

Read Stern (1998), pp. 307–343. What steps for reform does she present for 'a better way'? Which of these do you think are more attainable than others?

Feedback: see page 41.

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### Summary

Having reviewed ways in which the conditions that prisoners live in are unsatisfactory, we can then begin to consider what may be done to improve such conditions. Stern's survey of prison conditions around the world produces some such suggestions.

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### Useful further reading

- ☐ Fairchild, E. and H. Dammer *Comparative Criminal Justice Systems*. (Belfort: Wadsworth, 2000) [ISBN: 0534514804], Chapter 11.
- ☐ Foucault, M. *Discipline and Punish: The Birth of the Prison*. (New York: Vintage, 1979) [ISBN: 014013722x].
- ☐ Mathiesen, T. *Prisons on Trial*. (Winchester: Waterside, 2000) [ISBN: 1872870856], Chapter 1.
- ☐ Morgan, R. 'Imprisonment' in Maguire, M., R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology*. (Oxford: Oxford University Press, 2002) [ISBN: 0199249377], Chapter 30.
- ☐ Newburn, T. *Crime and Criminal Justice Policy*. (Harlow: Longman, 2003) [ISBN: 058236955X], Chapter 2.
- ☐ Pakes, F. *Comparative Criminal Justice* (Cullumpton: Willan, 2004) [ISBN: 184392031x], Chapter 7.
- ☐ Rothman, D.J. *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1990) [ISBN: 0316757454].

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### Reminder of learning outcomes

By this stage you should be able to:

- ☐ demonstrate the extent of the use of imprisonment as a punishment in different criminal justice systems.
- ☐ examine and evaluate contrasting policies of expansion, reduction and abolition of the use of imprisonment.
- ☐ review and assess the regimes in prison systems around the world and consider the human rights implications of these regimes.

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**Sample examination question**

'If prisons around the world continue to fail to meet their aims the time has come to abolish them.' Discuss.

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**Advice on answering the question**

*This question requires a good grasp of all the arguments concerning the use and reform of imprisonment. There are a number of key authors that examiners will be expecting you to consider the work of and you should expect to read particularly widely to secure high marks for your response. Begin with looking at what the aim of imprisonment is. Any official measure will prove useful. The English statement that hangs outside every prison which suggests that the aim of imprisonment is to assist prisoners to better themselves and to be looked after with humanity is a useful start. Then you can present your argument. If you believe that prisons are places where people are rightly punished under oppressive regimes then do not be afraid to present your argument in this way. That said, examiners will not tolerate polemic and you will need to defend your position. If you consider prisons to be places of harm then explain why. Look at the work of Vivien Stern and describe how prisons are documented in *Bricks of Shame* and *A Sin Against the Future*. Having identified problems you then need to think about reform and/or abolition. Consider the arguments presented by Stern, Rutherford and Mathiesen and decide which you find the most attractive. If we do abolish prisons what will the alternatives be? Examiners will be looking for lively responses. Pedestrian accounts of why we punish offenders will attract few marks.*

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**Feedback to activities: Chapter 3**

**Activity 3.1** *This activity can be approached like an examination essay question. See feedback to Activity 2.5 for general guidance on structuring an essay. This time split your essay into three parts to examine each of Stern's claims in turn. Consider opposing views to those of Stern and in relation to each claim critically assess whether you agree with Stern or find problems with her analysis.*

*Although still comparatively low in terms of prison rate per 100,000 population, which is the usual measure of prison numbers, some countries have in recent years followed an expansionist policy with regards to the use of imprisonment. In the UK for example the prison population continues to rise, but it is important to understand how such a policy can be implemented in practice.*

**Activity 3.2** *Take each question in turn.*

- ☐ *First think about the nature of the judiciary who are implementing the sentencing policy (refer back to Chapter 2 of this section if necessary). Then consider how the government can give instructions to judges in a way which does not compromise their independence and which may appeal to their own working ideology. Then think of precise mechanisms that the government can offer to judges to make sure they use imprisonment more often (e.g. guidelines, sentencing legislation, limitations on alternatives).*
- ☐ *Look again at Chapter 1 of this section and consider ways in which the pre-trial agencies may use their discretion at an early stage to ensure that later, more offenders are sentenced to imprisonment.*
- ☐ *This question requires a more practical consideration of the resource implications of an expansionist policy.*

*This trend has not been without its critics. Nils Christie (1994) has argued that the only way of managing an expansionism policy effectively is to resort to a greater use of private sector involvement. This can lead to a greater emphasis on doing well financially rather than doing good in any kind of humanitarian aim.*

**Activity 3.3** *This activity seeks to ensure that you have fully understood Christie's argument, developed through his book, regarding the consequences of an expansionist policy. Ensure that you read the book in its entirety and summarise briefly what you understand his argument to be.*

*The second part of the activity requires you to think about whether Christie's view is a critique of privatisation in the prison system in particular, or a more general critique of expansionist policies.*

*Finally, think about your own views. Do you agree with Christie? Do you think his arguments are flawed in any way?*

**Activity 3.4** *This activity requires you to review the Dutch experience of implementing a reductionist policy in relation to imprisonment.*

*Take each question in turn.*

*(a) Assess the ways in which a particular working ideology, which opposed the use of imprisonment, was adopted by practitioners at all stages of the Dutch criminal justice process at this time. Consider their legal education, their communication of this ideology with each other and the impact of policy documents from the Ministry of Justice.*

*(b) List the ways identified by Downes in which the policy was implemented and sustained through practice initiatives, legislation and guidance to practitioners and other methods.*

*(d) This question requires you to consider whether this reductionist policy was peculiar to the Dutch system at that time, bearing in mind their legal and social culture and the prevailing politics of the era. You might consider whether it is possible to replicate this policy in your own country. If not, why not?*

**Activity 3.5** *This activity seeks to ensure that you have understood Rutherford's analysis of reductionist penal policies. You should also take a critical perspective here and assess whether such policies are appropriate, possible to implement and desirable.*

**Activity 3.6**

<b>Aim</b>	<b>Flaws</b>	<b>Prison's failings</b>
<b>Retribution</b>		
<b>Rehabilitation</b>		
<b>Deterrence</b>		
<b>Incapacitation</b>		

**Activity 3.7** *Summarise Mathiesen's argument in no more than 1,000 words. Assuming abolition has been adopted as a desirable policy, how can we convince society that we do not need a prison system?*

**Activity 3.8** *Now you are asked to critically appraise a policy of abolition. List the advantages and disadvantages from both a principled and practical perspective of an abolitionist policy. Which list provides the stronger argument in your view?*

**Activity 3.9** *First you are asked to examine the debate between Stern and Rutherford in their respective works. Summarise the views of each: Stern's view that prison regimes may be satisfactorily improved and Rutherford's less optimistic view. Then discuss which view is preferable to you and why.*

*To answer this question you need to read Stern's appraisal of Vinson's work and assess why she is impressed by it. What improvements were made to the Dutch system, according to Vinson, which she claims reinforce her view that you should have discussed earlier in this activity.*

**Activity 3.10** *No feedback provided.*

**Activity 3.11** *One way of approaching this comprehension exercise is to list each relevant part of the European Convention on Human Rights and what the requirements of those parts are. Then consider ways in which we know, from the case law, that these rights may have been breached. What claims have been made by prisoners in Europe? Critically assess the response to these claims by the European Court of Human Rights. Is their response satisfactory? Are they adequately protecting the rights of prisoners? Is it inevitable, given the institutional nature of prisons, that they will breach the Convention Rights? Might this be a further argument in favour of abolition?*

**Activity 3.12** *List and critically review Stern's suggestions for improving prison conditions around the world.*

*You may wish to revisit your answer to the previous activity. Do Stern's suggestions change your view about the inevitability of human rights breaches in prison?*