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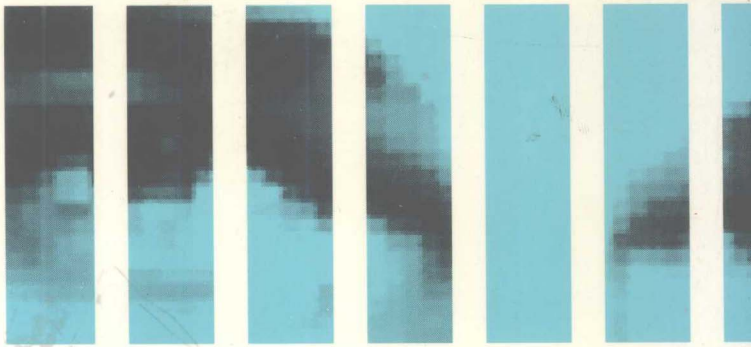

The PENAL SYSTEM

An Introduction

Michael Cavadino
& James Dignan

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Contents

Introduction

This book is concerned with the penal system – the system that exists to punish and otherwise deal with people who have (usually)[1] been convicted of a criminal offence. More precisely, we are centrally concerned with the 'English' penal system (by which we mean the system in England and Wales; Scotland and Northern Ireland have separate systems). However, much of what we say (especially about penal philosophy and penal sociology in Chapters 2 and 3) are of relevance to more than one country. And we have also endeavoured to use comparative material where this might help to illuminate the English (and Welsh) experience. It will not escape readers' notice that, while we have tried to be factually correct, to outline differing viewpoints and to be as comprehensive as is possible in a book of this size, we have not refrained from expressing our own opinions. In a nutshell, these are that the English penal system is unjustly and irrationally harsh, and that our penal practices and attitudes towards punishment require radical revision.

The Criminal Justice System

The penal system is part of a larger entity known as the *criminal justice system*, a term covering all those institutions which respond officially to the commission of offences, notably the police, prosecution authorities and courts. It is often misleading or unsatisfactory to examine the penal system in isolation from the larger criminal justice system. Consequently at times in this book – for example in Chapters 4, 8, 9 and 10 – we deal with the criminal justice system as a whole.

There now follows a very brief and basic guide to the criminal justice system as a whole, to assist readers who may not be familiar with the system or its terminology. Figure I.1 is a simplified diagram of the criminal justice system up to the point where an offender is sentenced by a court, which is the moment when the offender enters the *penal* system.

In many cases when a crime is committed, the agencies of criminal justice never respond at all. For the criminal justice process normally starts to operate only when a crime is reported to the police, and by no means all crimes are reported: one official study estimated that in 1987 about 40 per cent of woundings and

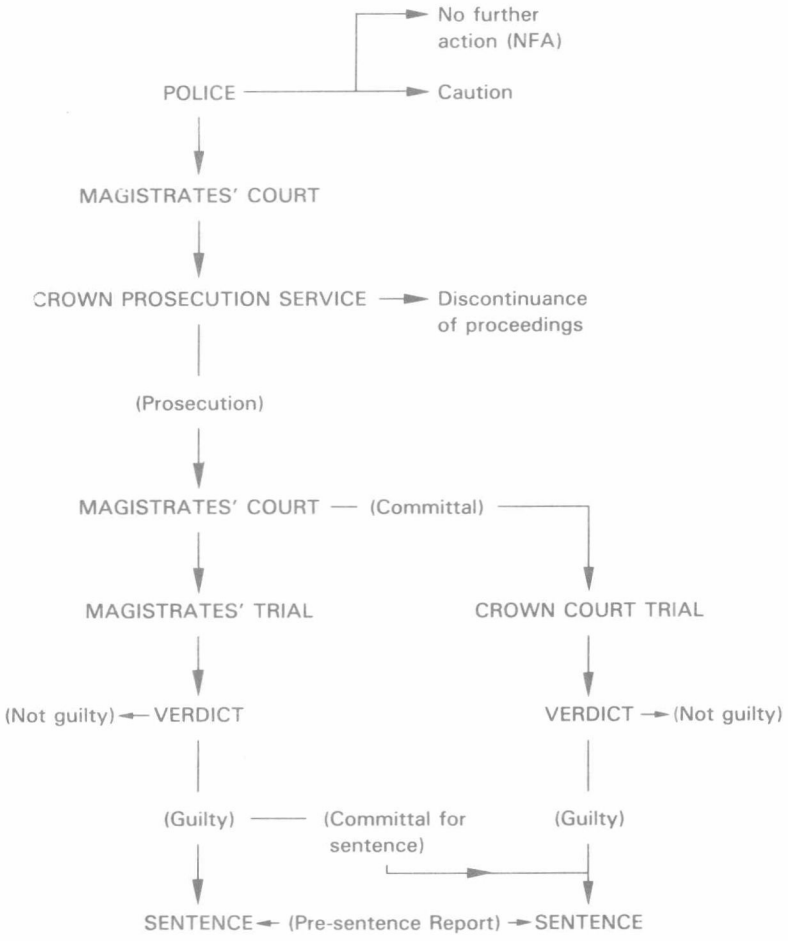

Figure I.1 *The criminal justice system in England and Wales, up to the point of sentence*

robberies and two-thirds of burglaries were reported (Mayhew et al., 1989: 11). If an alleged offence is reported, or otherwise comes to the attention of the police, the police may then investigate it. The police have a wide range of powers (notably those contained in the Police and Criminal Evidence Act 1984) to carry out searches and to arrest and question suspects in pursuit of their investigations. If the police believe that there is sufficient evidence to put the suspect on trial, they may *charge* an arrested suspect with the offence: this is the first stage in the prosecution process.

The police then 'lay an information' before the local magistrates' court alleging that the suspect has committed the offence. The prosecution is then taken over by the Crown Prosecution Service (CPS), a state agency independent of the police which was created by the Prosecution of Offences Act 1985.

There are two alternatives to the charging procedure. One (which accounted for 65 per cent of all prosecutions in 1987) is for the police to seek a *summons* issued by a magistrate. Under this procedure the alleged offender remains at liberty for the time being but is ordered to attend court. Another possibility is to dispense with prosecution entirely and for the police instead to administer a *caution* – an official warning delivered by a senior police officer. A caution should not be given unless the offender admits guilt. No formal punishment ensues, but the caution will form part of the offender's official criminal record. Cautions have been used increasingly as an alternative to prosecution in recent years, especially for young offenders. In 1989, 28 per cent of known offenders were *diverted from court* by being cautioned rather than prosecuted.

When the alleged offender reaches the magistrates' court (and becomes a 'defendant'), the court may have to decide whether to grant the defendant *bail* (conditional release prior to the actual trial) or whether the defendant should be *remanded in custody* for the time being. Custodial remands are usually to prison (or to a remand centre run by the Home Office[2] Prison Department), although in recent years many remand prisoners have been held in police cells because of prison overcrowding.

Criminal offences fall into three categories: indictable only, summary only, and triable either way.[3] Offences which are indictable only (for example murder, rape and robbery) must be tried at the Crown Court before a judge, with a jury of 12 randomly selected lay people to decide on the verdict if the defendant pleads not guilty. In these cases the magistrates' court *commits* the case to the Crown Court for trial 'on indictment'. (Defendants can, but very rarely do, contest the committal by arguing that there is insufficient evidence against them.) Offences which are summary only (for example, common assault, minor criminal damage and most motoring offences) must be tried 'summarily' at the magistrates' court before at least two (normally three) lay justices of the peace or a single stipendiary (professional) magistrate. In the case of offences which are triable either way (for example theft, arson and most burglaries) the magistrates' court can decide whether to commit for Crown Court trial or to offer the defendant the option of summary trial; defendants in these cases can always insist on

Crown Court trial. In practice about 80 per cent of triable either way offences are tried in the magistrates' court.

At the trial itself, whether in the magistrates' court or the Crown Court, the defendant can plead guilty or not guilty. If the plea is not guilty the burden rests on the prosecution to prove to the magistrates or jury that the defendant is guilty 'beyond reasonable doubt'. But the great majority of defendants plead guilty: over 90 per cent in the magistrates' court and about 70 per cent at the Crown Court.

If the defendant pleads guilty or is found guilty (ie is convicted of the offence), the magistrates or judge then pass *sentence*. The sentence is the punishment (or other disposal) that the defendant is ordered to undergo as a consequence of committing the crime. A few offences have mandatory or semi-mandatory penalties attached: for example, there is a mandatory penalty of life imprisonment for murder, and for driving with excess alcohol in the blood disqualification is semi-mandatory (ie automatic unless there are exceptional circumstances). Most offences, however, have a statutory maximum penalty – for example, seven years' imprisonment for theft – but no statutory minimum. The magistrates' court also has statutory limits on its sentencing powers: it cannot sentence an offender to more than six months in prison for a single offence or to more than 12 months in total, nor can it impose a fine of more than £5,000.[4] (However, a magistrates' court can at this stage commit an offender it has convicted to the Crown Court for sentence if it feels that its sentencing powers are inadequate.) But as long as these maxima are not exceeded, the court usually has a wide range of sentences to choose from. These include the *custodial* sentences of imprisonment (for adults) and detention in a young offender institution (for offenders under the age of 21). *Non-custodial* penalties (to which we devote Chapter 7) include suspended prison sentences, probation, fines, compensation orders, community service orders, and absolute and conditional discharges. The court may be assisted in its choice of sentence by a pre-sentence report (formerly called social inquiry reports or 'SIRs') prepared by a probation officer (or sometimes, for juvenile offenders, by a social worker). Pre-sentence reports provide the sentencer with information about the offender's social and family background, may comment on the reasons for the offender's behaviour, and include advice about possible non-custodial penalties.

Convicted defendants may appeal to a higher court either against their conviction or against the sentence which has been passed, or both. The Attorney-General (a government law officer who is a

Member of Parliament) additionally has the power, introduced by the Criminal Justice Act 1988, to refer a sentence passed by the Crown Court to the Court of Appeal on the grounds that it is too lenient.

A sentence of imprisonment means that the offender is allocated to a prison by the Home Office Prison Department. Prisoners do not usually serve the full term of the sentence pronounced by the court: for example, an offender sentenced to eight months' imprisonment will normally be released after four. Early release can take the form of parole, which is discretionary release decided upon by a body such as the Parole Board. Parole is combined with compulsory supervision by a probation officer in the community and the parolee can be recalled to prison to serve the unexpired portion of the sentence. It is also possible for prisoners to be released automatically at a certain point of their sentence, with or without compulsory supervision or being at risk of recall. (Automatic release was known as 'remission' until 1992.) Chapter 6 gives details of the system of 'early release' from prison sentences.

Non-custodial sentences usually require the offender to carry out some action, such as pay a fine or compensation or perform community service. Or the offender may be required to *refrain* from acting in certain ways, in particular to avoid re-offending within a given time limit (for example, if the sentence is a conditional discharge or a suspended sentence). Offenders who 'breach' the terms of their sentences either by disobeying their requirements or by re-offending can be brought back to court as a result, and the court will then have a range of sanctions available. These sanctions often include the power to pass custodial sentences, which may be additional (or 'consecutive') to any custodial sentence imposed for a fresh offence.

The Penal Crisis and Responses to It

The riots at Strangeways Prison in Manchester and at more than 20 other prisons in April 1990 is perhaps the most dramatic symbol of the *penal crisis* which is a major theme of this book. Strangeways was followed by Lord Justice Woolf's formidable report into its causes,[5] leading in September 1991 to a White Paper on prisons entitled *Custody, Care and Justice* (Home Office, 1991d). In the meantime, the government had already passed the Criminal Justice Act of 1991, of which more below.

We introduce the crisis in Chapter 1 and we discuss responses to it not only in the concluding Chapter 10 but throughout the book.

Chapters 2 and 3 may be heavily theoretical, but unashamedly so, for they are also intimately connected to the crisis theme. Chapter 3's exploration of penal sociology underpins our analysis of how the crisis should be explained and how it could be solved, while our investigation of the philosophy of punishment in Chapter 2 should contribute to an understanding of why the penal system suffers from its crucial 'crisis of legitimacy'. Chapters 4 to 9 deal with various aspects of the system and its crisis. Chapter 4 identifies the decisions of courts – not only their sentencing decisions but also their actions in relation to bail and committal – as the crux of the crisis. Chapter 5 investigates the troubled prison system, while Chapters 6 and 7 deal with two developments which have so far had less than total success in relieving pressure on the prisons: early release mechanisms and the proliferation of non-custodial penalties. Chapter 8, on young offenders, provides two contrasting object lessons from recent history on how to exacerbate a penal crisis and how to relieve one. Chapter 9 investigates the burning issue of bias within the criminal justice system. Finally, in Chapter 10 we discuss whether the crisis is on its way to being solved, and we put forward our own agenda for change.

The 'Just Deserts' Package

The Criminal Justice Act of 1991 represents – along with the 1991 White Paper on prisons (Home Office, 1991d) – the government's current response to the penal crisis. The government has referred to the measures contained in this Act as its 'Just Deserts' package.[6] It was heralded by a Green Paper in 1988 (Home Office, 1988a), and a White Paper in 1990 (Home Office 1990a),[7] before becoming an Act of Parliament in 1991; it is due to come into effect in October 1992.[8] The Act follows what the government has called a 'twin-track' strategy, which we also term 'punitive bifurcation' (see especially Chapters 1, 7 and 10). One central intention is that sentencers (judges and magistrates) should, although losing little of their discretion over sentencing decisions, increase sentences for violent and serious offenders on the one hand, but on the other hand sentence more property offenders to non-custodial penalties instead of sending them to prison. (The crucial sentencing aspects of these reforms are mainly discussed in Chapter 4.) At the same time, non-custodial penalties are to become more punitive, with the aim of giving offenders their 'just deserts' assuming greater precedence over such aims as attempting to reform offenders. (The general aims of punishment are explored in Chapter 2, while the use and changing nature of non-custodial penalties is the subject of Chapter 7.) The system of early release

of prisoners is to be altered so that many prisoners will serve a longer proportion of their sentences actually in custody (as explained in Chapter 6). A great deal depends on the success or otherwise of these reforms. We, as readers will discover, remain sceptical.

A Note on Terminology: 'System'

Perhaps the title of this book is misleading. Arguably, one of the salient features of the English penal and criminal justice '*systems*' is their highly *unsystematic* nature, with different agencies working in relative isolation from each other, exercising wide and unaccountable discretionary powers, and subject to no overall coordination or strategic control: some writers have even described criminal justice as a 'non-system'. Although we will be following common usage in referring to the penal and criminal justice systems, we do not claim that there is anything particularly 'systematic' about them. They do, however, constitute 'systems' in the sense that they are composed of different agencies which are *interdependent*: their activities intimately affect each other and they need to be studied within this context of interdependency (see eg Feeney, 1985). We see this kind of 'systems analysis' as an important tool in understanding the penal system and attempting to bring about positive modifications. (This is a particular theme of Chapter 8.)

Notes

1 There is one very important exception to this. *Remand prisoners* accounted for 22 per cent of the total prison population in 1990. Most of these are prisoners who are remanded in custody while awaiting trial; a minority have already been convicted and are awaiting sentence.

2 The Home Office is the state department which has responsibility for prisons, the police and the probation service.

3 Unless otherwise stated, statistics for offences and offenders which we present in the book normally relate to 'indictable' offences, which include offences triable either way.

4 This maximum will apply from October 1992. The sum is raised from £2,000 by the Criminal Justice Act 1991. Fines are discussed at greater length in Chapter 7.

5 Woolf and Tumim, 1991. The Woolf report was co-authored by Her Majesty's Chief Inspector of Prisons, Judge Tumim. It is for convenience, and not out of any wish to disregard Judge Tumim's contribution, that we refer to 'Woolf' in the singular throughout this book.

6 Unfortunately, the 1990 White Paper consistently misspelt this phrase as 'just desserts'.

7 A Green Paper is a government consultative document. A White Paper contains firmer proposals for legislation.

8 In this book we assume that the Criminal Justice Act 1991 will come into force as planned in October 1992 without major alterations. Otherwise the contents of this book are up to date as at October 1991.

1

Crisis? What Crisis?

The penal system is in a state of crisis.

Few if any British readers of this book will be surprised by this statement. Almost everyone in England and Wales is aware that the penal system is in 'crisis', even people who have little idea of what 'the penal system' is, except that it has to do with prisons and punishment. Media reports have acquainted everyone with the notion that rocketing prison populations, overcrowding, unrest among staff and inmates, and especially prison riots (such as those at Strangeways prison in Manchester and at over 20 other prisons in April 1990) add up to a severe and deepening penal crisis. The term 'crisis' has been common currency in both media and academic accounts of the penal system for over 20 years now; the word recurs in newspaper headlines and in the titles of learned books and articles (eg Bottoms and Preston, 1980; Rutherford, 1988).

Nevertheless, a cynic could be forgiven for finding the penal crisis uncannily reminiscent of the supposed 'crisis of capitalism', which some Marxists were once ever assuring us was real, severe, ever-worsening and likely to prove terminal in the near future. Yet both capitalism and the penal system seem to keep going somehow, making an ironic contrast with regimes, parties and theories founded on Marxism. No one disputes that the penal system has serious problems – but is it really in a state of *crisis*? Then again, how long can a crisis last while remaining a crisis rather than business as usual? Surely there is something paradoxical in claims that the crisis has lasted for decades, or even that the system has been 'in a perpetual state of crisis since the Gladstone Committee report of 1895' (Fitzgerald and Sim, 1982: 3).

If to be in crisis means that the whole system is on the brink of total collapse or explosion, then we probably do not have a crisis. (Although it should not be forgotten that when systems do collapse or explode – like the communist system in Eastern Europe in the late 1980s and early 1990s, or the system of order within Strangeways in 1990 – it tends to happen with great suddenness.) But it can be validly claimed that there is a crisis in at least two senses, identified by Morris (1989: 125). Firstly, we have 'a state of affairs that is so acute as to constitute a danger' – and, we would add, a moral challenge of a scale which makes it one of the

most pressing social issues of the day. Secondly, we are at a *critical juncture*, much as a seriously ill person may reach a 'turning point at which the patient either begins to improve or sinks into a fatal decline'. In other words, either the present situation can be used as an opportunity to reform the system into something more rational and humane, or else it will deteriorate into something much worse even than the present. In this book we will be using the 'C-word' in these senses to refer to the present penal situation in England and Wales, albeit with slight embarrassment and the worry that it has been used so often and for so long that there is a danger that it may be losing its dramatic impact.

There are various competing accounts about how the different problems of the penal system are related to each other and what the underlying causes of the crisis are. We now proceed to examine these rival accounts.

The Orthodox Account of the Crisis

The *orthodox account* is the one most often encountered in the mass media, and is also regularly found in some official reports purporting to explain phenomena such as prison riots. It is well exemplified by the 1980 book *Prison Crisis* (by the journalist Peter Evans), and is even better summarized by the following extract from a newspaper article of 1977 (Humphry and May, 1977):

> Explosive problems remain in many of Britain's prisons – a higher number of lifers, often with strong political faiths, who have nothing left to lose; overcrowding which forces men to sleep three to a cell and understaffing which weakens security. Prisons, too, are forced to handle men with profound psychiatric problems in conditions which are totally unsuitable.

This passage gives us almost all the components of the 'orthodox account' of the penal crisis. The crisis is seen as being located very specifically *within the prison system* – it is not seen as a crisis of the whole *penal* system, or of the criminal justice system, let alone as a crisis of society as a whole. The only implicit link between the problems of the prison and national politics is the cryptic reference to politically motivated prisoners (presumably meaning Irish Republicans). The immediate cause of the crisis is seen as the combination of different types of difficult prisoners – what has been called the 'toxic mix' of prisoners (Home Office, 1984a: para 124) – in physically poor and insecure conditions which gives rise to an 'explosion'.

The orthodox account points to the following factors as

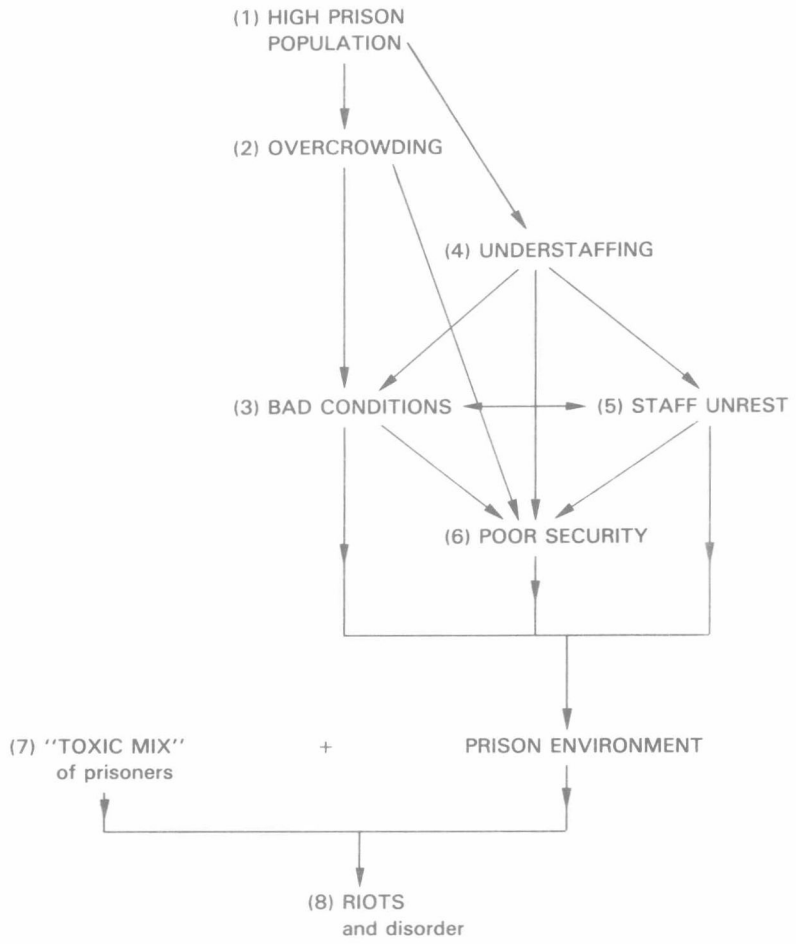

Figure 1.1 *The orthodox account of the penal crisis*

implicated in the crisis: (1) the high prison population (or 'numbers crisis'); (2) overcrowding; (3) bad conditions within prison (for both inmates and prison officers); (4) understaffing; (5) unrest among the staff; (6) poor security; (7) the 'toxic mix' of life sentence prisoners, politically motivated prisoners and mentally disturbed inmates; (8) riots and other breakdowns of control over prisoners. These factors are seen as linked, with number 8 – riots and disorder – being the end product which shows there is a crisis. We think it is roughly correct to say that the orthodox account sees the different factors interacting as in Figure 1.1. The high prison

population is held responsible for overcrowding and understaffing in prisons, both of which exacerbate the bad conditions in England's ageing prisons. The combination of poor conditions and inadequate staffing have an adverse effect on staff morale, causing unrest which (through industrial action, for example) serves to worsen conditions still further. The four factors of bad conditions, overcrowding, understaffing and staff unrest are blamed for poor security. Finally, the combination of the 'toxic mix' of prisoners with these deteriorating conditions within which they are contained is thought to trigger off the periodic riots and disturbances to which the prison system is increasingly prone.

We do not believe that the orthodox account provides a satisfactory explanation of the crisis, for reasons we shall be giving shortly. But most of the factors this account points to are real and important, as we shall now detail.

The High Prison Population (the 'Numbers Crisis')

One of the few things about the penal system that almost everyone agrees on is that England and Wales have an alarmingly high (and most of the time rapidly rising) number of people in prison. In 1975, in a statement that has been much quoted ever since, the then Home Secretary Roy Jenkins said that if the prison population in England and Wales 'should rise to, say 42,000, conditions in the system would approach the intolerable and drastic action to relieve the position would be inescapable' (quoted in Stern 1987: 38). Jenkins' figure of 42,000 was reached in October 1976; by July 1981 the figure was 45,500; the 50,000 mark was passed in June 1987. On an average day in 1988 there were 49,979 people in prison in England and Wales, in a prison system which had room for only 44,179.[1] The position improved somewhat in 1989 and 1990, and on 31 March 1991 the prison population stood at 45,106 in a system with accommodation for 43,262 (NACRO, 1991b). But it began to worsen again in 1991, a trend which seems likely to continue (see Chapter 10).

There are several factors implicated in this increase in prison numbers in recent years. In Chapter 4 we discuss the relationship between some of these factors, and conclude that the most crucial is the pattern of *decisions by the courts*: not only about what sentences offenders should receive (whether they should be sent to custody and, if so, for how long), but also decisions about which courts they should be tried in and whether they should be remanded in custody in the meantime.

Even before these recent increases, the United Kingdom had a prison population which was extremely high in comparison with neighbouring countries. In proportion to the population as a whole,