Comparative Criminal Justice

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Francis Pakes

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To my wife Suzanne

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Chapter 1

Comparative criminal justice: a timely enterprise

'In the Netherlands they don't have juries'; 'In Saudi Arabia they cut off your hand for stealing'; 'British judges wear wigs'; 'Police officers in China do people's laundry'. Such generalised statements about criminal justice in other countries are commonplace. In the news media, an interest in looking at criminal justice in far-away places invariably occurs when compatriots find themselves in trouble with the law abroad. Britons subjected to the death penalty in Singapore for drugs trafficking or to imprisonment in Greece for spying receive a great deal of coverage, and so do the criminal justice systems through which their cases are administered. But typically, when a case comes to an end, so does the interest in the criminal justice system of the country at issue.

Comparative criminal justice is the academic study of criminal justice arrangements at home and abroad. By means of documenting, analysing and contextualising criminal justice processes and institutions elsewhere and comparing them to more familiar settings a broader understanding of criminal justice can be gained. The other obvious advantage constitutes the acquisition of specific knowledge about arrangements in other jurisdictions.

Criminal justice forms part of the set of processes, bodies and institutions that aim to secure or restore social control. Social control is defined as 'the organised ways in which society responds to behaviour and people it regards as deviant, problematic, worrying, threatening, troublesome and undesirable' (Cohen, 1985: 1–2). In this book I take a broad perspective on criminal justice. It includes, therefore, a discussion on private policing, and also on extra-legal means of institutionalised social control, such as, for instance, those in place in remote areas of Alaska. The definition of criminal justice is therefore not restricted to

bodies that directly represent the state in aiming to achieve social control.

Why study criminal justice comparatively?

There are theoretical as well as practical incentives to the comparative study of criminal justice. A good starting point is simply academic curiosity. Considering the opening example above you might wonder how the Dutch can manage to enact justice without the involvement of a jury anywhere in their criminal justice process. Such a state of affairs raises various questions. First of all, how exactly does this work? Comparative research would discover that it is professional judges (individual judges in case of minor offences and a panel of three judges for serious offences) who reach verdicts and impose sentences. That might raise the suspicion that seasoned judges are perhaps rather prone to convict defendant after defendant. This is an argument often heard in favour of the jury. Subsequently, we might wonder about how the jury-less state of Dutch criminal justice is perceived by defendants, the legal profession and by society at large (see Kelk, 1995; Tak, 1999).

In Britain, any attempt by the Home Secretary to tamper with the right to trial by jury is likely to be met with protests from the legal profession and civil liberty organisations alike (see Lloyd-Bostock and Thomas, 2001, on the state of the jury in England and Wales). There seems to be widespread agreement within these groups that the jury represents a pillar of the criminal justice system: the jury symbolises fairness and impartiality. It begs the question of whether similar opinions are held in the Netherlands and to what extent these opinions inform law and policy-making. That might lead to a better perspective on criminal justice in the Netherlands as well as on the value of the jury in various contexts and jurisdictions.

A similar argument can be applied to sentencing practices in Saudi Arabia (Souryal *et al.*, 1994). The lay impression is that these are harsh compared to many other countries, with frequent reports of executions and body mutilations. However, we need to know more about these practices before we can reach a balanced judgement with regard to their propriety. In Saudi Arabia, harsh punishment is justified by reference to the country's low crime rates, which are claimed as a sign of its success. When potential offenders realise that they might lose a hand as a result they might think twice before committing theft. The second argument to justify severe sentences carries even more weight. It relates to the fact that law in Saudi Arabia is, to a large extent, based on the Koran and therefore strongly dogmatic. The sentencing practices derived from the

Muslim holy book are considered just and proper, regardless of their effectiveness. Any discussion about their utility is not very meaningful in light of that, in the strongly religious state of Saudi Arabia (Souryal, 1987).

The academic endeavour of comparative criminal justice requires a certain degree of understanding of not just criminal justice processes but also the actors involved in it, and the society in which the system is set. Criminal justice arrangements need to be contextualised so that we can understand how they work in relation to each other, and how the nuts and bolts of arrangements fit together. We also need to find ways of deciding how criminal justice arrangements fit a country, a culture or a legal tradition. As Fairchild and Dammer put it, 'The fact is that a nation's way of administering justice often reflects deep-seated cultural, religious, economic, political, and historical realities. Learning about the reasons for these different practices can give us insight into the values, traditions, and cultures of other systems.' (Fairchild and Dammer, 2001: 9).

Acquiring such knowledge has the added benefit of preventing ethnocentrism from occurring. Ethnocentrism refers to sentiments that regard domestic arrangements as necessarily 'normal' and 'right', and other cultures or customs as 'weird' or 'wrong'. It occurs frequently in the spheres of culture and religion and is no stranger to criminal justice either.

The second impetus for comparative study is of a practical nature. Knowledge of systems in neighbouring countries has been vital in securing basic levels of cooperation. Longstanding agreements exist, for instance, between Belgium and its neighbouring countries with regard to limited cross-border powers. These have been in place with France since 1919, with Luxembourg since 1920 and with the Netherlands since 1949. Such arrangements are handy, for instance when dealing with bank robbers who manage to flee into a neighbouring country while being chased by the police. They ensure that police activity does not come to a complete stop when the border is reached (Geysel, 1990).

As transnational arrangements go, such arrangements are of a local nature. There are more overarching arrangements, which include, for instance Europol, which is a cooperative body within the European Union (see Anderson *et al.*, 1995) and Interpol, which is a policing organisation that is operative on a global scale.

There is no doubt that crime has increasingly become a global issue. This is particularly true for crimes such as terrorism and cyber-crime. However an increasing number of other crimes also have a transnational component. This is because offenders commit their crimes in more than one country, cross national borders themselves or reap the benefits of

their crimes in another country. International cooperation is increasingly necessary in order for offenders to be apprehended, tried and convicted. Because officials of different systems cooperate with increasing frequency, a certain level of harmonisation of laws and procedures is beneficial. In order to achieve this, a certain level of understanding and appreciation of their similarities and differences is important. Harmonisation without understanding will always be very difficult indeed.

A further benefit of comparative research is to learn from the experience of others. For example, prior to the EURO 2000 tournament, the European Nations Football Championship, the co-hosting nations Belgium and the Netherlands passed legislation that would allow them to pro-actively arrest, detain and possibly deport suspected football hooligans. It has been alleged that these two nations used these and other policing powers in rather differing ways, with Dutch policing being more restrained and the Belgian forces using tear gas and water guns more readily (e.g. Adang, 2001). A discussion on how best to deal with travelling football hooligans ensued, not only in the context of international sports tournaments but also domestically. Debates in criminal justice are informed by, or even instigated by, developments abroad, and experiences gained elsewhere might serve to inform decision-making at home.

Criminal justice systems around the world are likely to face similar challenges. It might therefore be instructive to investigate how other systems tackle some of their problems, not just in major events, such as sports tournaments, but also with regard to more persistent issues. It is safe to assume that England and Wales are not the only jurisdiction whose race relations, in the context of criminal justice, have proved to be a challenge. It might be instructive to see what, for instance, the opinions in Australia are on the over-representation of Aboriginals in their criminal justice system. Is there recognition of 'institutionalised racism' in Australia? Perhaps lessons could be learned from there.

A further incentive for comparison relates to the question of 'Where do we stand?' In order to gain insight into states of affairs at home it might be helpful to examine matters abroad. Prison populations are a good example. In England and Wales the prison population is rising and has been for some time (see www.hmprisonservice.gov.uk for data and information). One way of making sense of prison populations is by taking a comparative perspective. The first and obvious place to look might be the so-called league tables that present detention ratios for various countries (e.g. Walmsley, 2002). These statistics invariably show that both the US and the Russian Federation have a lot more people incarcerated (as calculated over their total population) than the UK. It is equally obvious that there are many countries with smaller numbers of

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prisoners on, as well as outside, the European continent. Additionally, it is helpful to dispel the myth that prison rates in every Western country are on the rise. In Finland, in particular, prison rates have gone down for decades, a development that is attributed to the political determination to use incarceration sparingly (Törnudd, 1993). Such, possibly atypical, examples help to put the case across that not every country appears to be heading for a crime complex in which mass incarceration is the kneejerk reaction to growing public feelings of insecurity and fear of crime (Garland, 2001). As Garland himself emphasised, it does not necessarily have to be that way.

Statistical comparisons are not necessarily straightforward. A simple comparison of prison figures in isolation is not particularly informative as they can only say so much. For a proper comparison on, for instance, nations' tendencies to use imprisonment as a means of social control, more information is required than just prison rates. This information should at least include crime figures, but we might also wish to include information on the relative wealth of countries and the distribution of wealth in society. Unemployment rates and information about political stability might also be relevant in understanding comparative prison rates. The same is true for policing and sentencing practices. Do similar crimes attract similar sentences in different countries? What about the differences between sentences imposed and actually served? What alternatives to prison are there for sentencers to consider?

A further consideration is the extent to which these figures themselves are comparable. Do they include only convicts, or remand prisoners as well? Are those detained in mental hospitals incorporated in the figures? The comparison of criminal justice statistics across countries is fraught with difficulty, as any available data require a great deal of interpretation. That requires intimate knowledge about the acquisition of the data itself and a thorough understanding of the system and the society that produced them. We will explore these methodological issues further in Chapter 2.

Criminal justice systems are undoubtedly less self-contained than they have been in the past. Laws in England and Wales nowadays are strongly influenced by international treaties and by European legislation and rulings. Such supernational arrangements add a global element to criminal justice systems. Comparative criminal justice as an enterprise increasingly involves the study of such transnational and international arrangements. A good knowledge of the bodies and processes that make international law is therefore vital in order to understand how criminal justice is developing across the globe.

What this book is about

A text on comparative justice can be written from various perspectives. In these perspectives certain themes might receive emphasis possibly at the expense of others. First, it is important to note that this book emphasises *criminal justice* rather than crime. This of course does not mean that crime and its patterns and impact are ignored. However, this book particularly examines how criminal justice is enacted across the world rather than patterns of crime or any explanations of such patterns. In other words, this book is not about comparative criminology.

Second, this book focuses more on *procedural* aspects of justice than on substantive law. Thus, for instance, prosecution systems and the way trials are conducted are analysed in depth, but for example, the difference in legal definitions of murder and manslaughter in various jurisdictions is not discussed. Nevertheless, it would be nonsensical to adhere over-rigidly to such a distinction, and I have no intention of ignoring comparative matters of substantive law. Legal definitions of criminal behaviours are of particular interest in certain contexts. This includes, for example, the definition of genocide as adopted by the Yugoslav War Crimes Tribunal in The Hague in the Netherlands. Similarly, the way in which terrorism is defined by various national and international bodies is also a topic of discussion. Nevertheless, the emphasis remains on procedures.

Similarly a comparative book could primarily examine either criminal justice *structures* or criminal justice *processes*. Criminal courts can serve as an example here. A structural description would involve a description of higher and lower courts and their relative competencies. An emphasis on process would look at what actually happens inside these courts, and that is what will be discussed in Chapter 5.

A related distinction is often made between *law in the books* and *law in practice*. Law in the books is obviously how it is written up in codes, acts and constitutions. It would however be naive to assume that what it says in the law books is the sole determinant of how justice is actually administered. There are extra-legal arrangements that do not occur in statutes but which have, nevertheless, gained widespread acceptance within criminal justice systems. Similarly, any law book contains many a dead letter. These are laws or statutes that are no longer used and which therefore have lost their practical value. In the UK there are many local laws stemming from centuries back that are no more than inconsequential remnants of days past, even though they were never formally revoked.

Nevertheless, not every so-called dead letter should be considered meaningless. In many countries where the execution of convicts is no

longer the practice the death penalty might still linger in the law books. While on the one hand it could be said that it is merely a harmless trace of a more punitive past, it could, on the other, be argued that such dead letters could be resurrected relatively easily, so that a reinstatement of the death penalty in such countries would be easier – and therefore possibly more likely – than in countries with no such traces left in the law books.

Additionally, the treatment of offenders receives more attention than that of victims in this book. This is arguably against the worldwide trend of securing a more prominent place for victims throughout the criminal justice process (see Zedner, 1997). However, an exhaustive review of comparative criminal justice is simply impossible. It is equally impossible to include each and every development in all corners of the globe, which is why the choice is made for the more traditional emphasis on criminal justice with the perspective on the offender.

I have chosen a thematic approach, as opposed to a country-by-country approach, in which descriptions from a limited set of countries are utilised throughout the book. The rationale behind this choice is that I assume the reader to be more interested in general issues in criminal justice rather than in criminal justice in specific countries. Therefore, this book will use examples to fit the issue to be discussed, rather than exclusively focusing on a pre-determined set of countries. Whatever country can serve as a suitable example will be used as such. For that reason, Japan will feature in detail when we discuss policing styles. However, when it comes to prosecution, we will look more in depth at the state of affairs in the Netherlands. Suitable examples are often typical examples, although on occasion it makes sense to discuss the exception to the rule and use deviant cases instead, and the process of decarceration in Finland serves as such a case. In other areas I have chosen to discuss the archetypical example, the example that bred a category. The jury in England and Wales constitutes one of those, as does the practice of zero-tolerance policing in New York City.

This thematic approach is carried out in what can be called a kaleidoscopic fashion. While some of the major criminal justice systems in the world receive extensive coverage, I have attempted not to stick to these. Australia, England and Wales, Japan, France, the Netherlands and the US do feature in various chapters. However, arrangements in many other countries have also been examined. In making such choices I have aimed to highlight the diversity found in criminal justice arrangements around the world. This is why the rise of the death penalty in Trinidad and Tobago, the gender balance of the judiciary in the Czech Republic, and police corruption in Hong Kong are all discussed.

Diversity is a key word in comparative criminal justice. The way in which justice is administered around the world is surprisingly diverse

and there is no need to travel far to encounter it. Not many people, even in England and Wales, might appreciate the substantial differences in arrangements between England and Wales, Northern Ireland, Scotland, the Isle of Man, and the Channel Islands of Jersey and Guernsey. This is true in particular when we look at the jury system. The composition of the jury in these places is spectacularly different, even though they are geographically and culturally very close to home, as we shall see in Chapter 6.

The same argument applies to the federal states of Australia and the US, where many arrangements are made at a local level, allowing for substantial differences across the country.

Federal and local law enforcement in the US

A circumstance that complicates foreign understanding of the US criminal justice system is the distinction between federal law enforcement, and state and local criminal justice. At one point in time, probably at least a century ago, this distinction was quite straightforward. The bread and butter of everyday law enforcement were local matters. Only when the position of US states was at issue in some shape or form, or when a crime was clearly transcending state borders, was there a reason for federal (roughly speaking, national) law enforcement to get involved. Counterfeiting, for instance, was seen as an offence of federal importance. The same was true for offences involving mail. These offences and their effects were likely to affect not simply individual states, but the US as a whole. The protection of the President also was a federal matter. However, the distinction between what is federal and what is local in terms of law enforcement is no longer sharply defined:

> Explaining the boundary that separates Federal enforcement concerns from state and local is a daunting task indeed. The more one knows, the harder it gets. Federal agents still seek out counterfeiters. But they also target violent gangs and gun-toting felons of all sorts, work drug cases against street sellers as well as international smugglers, investigative corruption and abuse of authority at every level of government, prosecute insider trading, and pursue terrorists. Until recently, about the only area of criminal enforcement that seemed immune from Federal activity was domestic violence. (Richmond, 2000: 82)

The areas of federal involvement have tremendously increased and the Federal Bureau of Investigation (FBI) has grown accordingly. Federal legislation is now seen to supplement local legislation in many areas, so that crime can be dealt with more effectively.

This state of affairs regularly raises issues relating to competence on one hand and to the harmonisation of local and federal rules of procedure on the other hand. There is certainly room for tactical decision-making about whether to deal with a crime as a local or a federal matter. Laws of evidence and resource allocations are not necessarily identical so that practical considerations might be decisive in the determination of whether an offence should be dealt with by the local or the federal law enforcement machinery.

Richmond (2000) argued that the increased federal involvement in criminal justice is the result of a shifting of the balance of power between the states and the federal government. Over the last century, this balance has shifted toward the federal government along with the realisation that crime, law and order are national, if not international, issues.

Shifts of power from local to national and vice versa occur regularly in most criminal justice systems. A movement towards localisation is often motivated by the intention to better serve local communities' needs. A shift towards centralisation might occur because of central government's desire to control criminal justice matters more tightly. That desire for control might originate from the wish to enhance the extent to which the criminal justice system serves the interests of the state, or might stem from tendencies to secure a more uniform treatment of offenders and offences throughout the country.

Throughout this book, case studies such as the one in Box 1.1 serve as examples. In many instances they pertain particularly to the issues described in the main text. Sometimes, however, case studies are included for illustration purposes. An example is the one on the history of foreign influences on Japanese legal procedures in Chapter 5. They cover issues that are less pertinent to the chapter in which they are placed, but are included for general interest purposes.

Depending on the issues concerned the comparative approach is sometimes quantitative and sometimes qualitative in nature. A discussion about policing styles and principles is almost inevitably qualitative, as they require a deeper understanding of the contexts in which they are applied. I have therefore chosen to conduct a limited number of in-depth case studies and focused comparisons, to illustrate styles of policing in the context of different societies.

In other areas a more quantitative approach was the appropriate choice. A discussion regarding detention is likely to feature detention ratios as a starting point. However, it is important to reiterate that the collection of such numerical information does not usually suffice to answer any question. Nevertheless, such figures do provide for a foundation on which meaningful comparisons can be made. The discussion of the differences in pre-trial detention rates between Finland and Estonia serves as an example.

Box 1.1 Differences between the criminal justice systems of Scotland and England & Wales

People outside the United Kingdom could perhaps be forgiven for assuming that criminal justice in Scotland is identical to that in England and Wales; but it is not. Whereas England and Wales constitute one criminal justice system, Scotland has a separate system with its own characteristics. Whereas Wales does not have a separate police service, court or prison system, Scotland has, and they have evolved quite separately from those of its southern neighbours. Scottish scholars tend to argue that there is an additional difference in criminal justice culture. Scottish criminal justice is often said to be less adversarial, less punitive, and more welfare-oriented (see Duff and Hutton, 1999). A number of specific differences between both systems can easily be identified.

In Scotland, a jury can return three verdicts: guilty, not guilty or *not proven*. Guilty and not guilty are essentially the same as elsewhere, but the third category, of not proven is probably unique to Scotland. The not proven verdict is returned quite frequently and it results in the acquittal of the accused, so that it is by virtually all intents and purposes identical to a verdict of not guilty. The answer to why this verdict exists lies in history. There was a time that the only verdicts a jury could return were proven or not proven. While the verdict of proven has long since been replaced, that of not proven has survived the test of time.

The suggestion is that when a jury returns a not proven verdict instead of a not guilty one, they might nevertheless feel that the accused actually committed the offence but that there is insufficient evidence to justify a conviction. A not guilty verdict could then be taken to mean *really*, or factually not guilty. But it has been argued that the not proven verdict is only confusing. Proponents, however, stress the purity of the not proven verdict. After all, the role of the jury is not to decide on guilt but on whether the prosecution has proven the charge beyond reasonable doubt. A verdict of not proven might more accurately reflect the actual decision that jurors are asked to make (Duff, 1999b, 2001).

Whereas in England and Wales there are 12 jurors, in Scotland a jury consists of 15 members. They are randomly pulled from the voters' register in the jurisdiction of the court where the accused stands trial. Until recently, both prosecution and defence had the right to peremptory challenge. Nowadays, however, prospective jurors cannot be removed easily before trial and this action requires both parties' agreement. In Scotland there is no need for a unanimous verdict. For a guilty verdict a simple majority of eight versus seven will suffice. Because there is a choice of three verdicts, it could, for instance, happen that seven jurors favour a guilty verdict, five a verdict of not guilty, and three a verdict of not proven. If this is the case a not guilty verdict should be returned. An accused is not convicted unless at least eight jurors find him or her guilty

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