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A SURVEY

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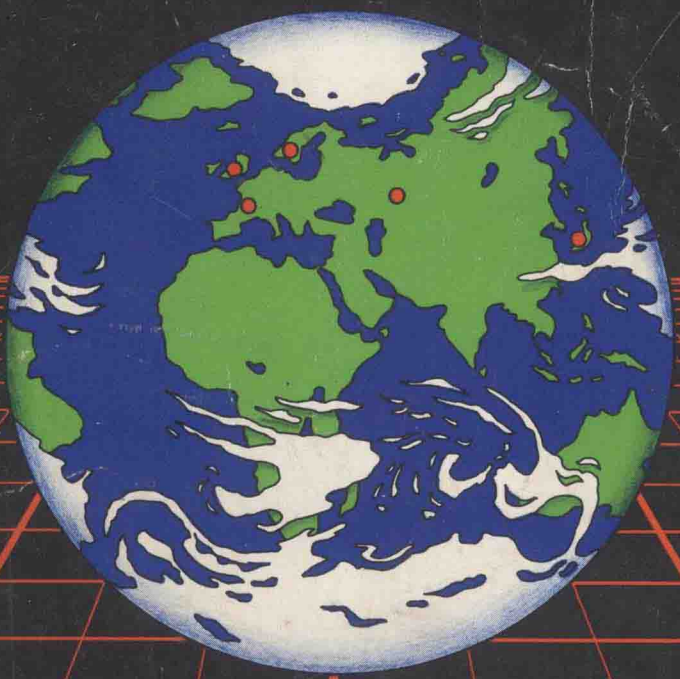

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A SURVEY

RICHARD J. TERRILL
Assistant Professor
Department of Criminal Justice
Wayne State University

CJ Criminal Justice Studies
Anderson Publishing Co./Cincinnati, Ohio

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PREFACE

The significance of comparative and international criminal justice has been recognized in the past few years by two of the largest professional societies in the United States that are dedicated to improving our understanding of criminal justice: the Academy of Criminal Justice Sciences and the American Society of Criminology. Each has established a committee within its organization to encourage the study, teaching, and dissemination of information about foreign criminal justice systems and cross-cultural issues on crime. This book was conceived and written in the hope that it might be used as a tool to enhance American students' understanding of foreign justice systems. It attempts to describe the political, historical, organizational, procedural, and critical issues confronting five justice systems that are found in five of the more industrialized countries in the world. The fact that each is an industrialized nation serves as a common point of comparison with the justice system in the United States. Moreover, each country represents a different kind of legal system. Since all criminal justice systems are profoundly influenced by the legal system from which they have evolved and are associated with, this serves as yet another useful point of comparison.

Although the book was principally designed for use in college-level courses created to study foreign justice systems, it could also be utilized in other criminal justice courses or by other disciplines that have a tangential interest in the study of criminal justice. Moreover, it should also prove beneficial to the criminal justice practitioner or the general reader who appreciates the value of considering problems in our justice system from a different cultural and geographical perspective.

As is the case with any large project such as this, the author is indebted to a number of facilitators. Appreciation, therefore, is extended to a number of people, too numerous to mention individually, who work for either governmental or non-governmental justice agencies in the countries that are presented in this book. They were most helpful in

sending me information on their justice systems that was not readily available in this country. A special note of thanks is extended to the editors of the *Criminal Justice Review* who permitted me to use parts of my 1982 article, "Approaches For Teaching Comparative Criminal Justice To Undergraduates," in the Introduction to this text. I also wish to thank Professor John Delaney of New York University's School of Law and Mr. Fred B. Rothman for permission to cite from the American Series of Foreign Penal Codes the translated laws of France and Sweden; to Mr. Fukio Nakane, Managing Director of Eibun-Horei-Sha, Inc., for permission to cite translated laws of Japan; and to Mr. Mervyn Matthews, M.E. Sharpe Inc., who publishes *Soviet Statutes and Decisions*, and Martinus Nijhoff Publishers, who published F.J.M. Feldbrugge's translation of the 1977 Constitution of the USSR, for permission to cite various translated laws of the Soviet Union.

Finally, and most importantly, I wish to thank my wife, Sue, who once again served as my initial editor, critic, and typist and my son Justin. Both were very supportive throughout this project. To them, this book is dedicated.

RJT

INTRODUCTION

Criminal justice has emerged as a field of study rather than an academic discipline. In many respects, this approach is analogous to the study of medicine. Medical students must be proficient in chemistry, biology, zoology, physics, and other academic disciplines before they are recognized as medical practitioners. Students of criminal justice must also have an understanding of a number of disciplines prior to considering themselves knowledgeable in their profession. Sociology, psychology, law, and public administration are a few of the more obvious disciplines in which students should possess some proficiency.

Many criminal justice programs are designed to train future practitioners in the techniques of problem solving and in the analysis of issues confronting the system. Among the paramount goals of this educational philosophy is the teaching of techniques for making more meaningful decisions for the system. The ability to understand and to utilize the decision-making process is central to this endeavor. Students are taught that the decision process involves a number of factors: 1) the availability of data on the status quo; 2) the decision-maker's understanding, albeit a limited one, of the future state he wishes to achieve; 3) the comprehension of cost-benefit analyses which determine the direction and processes of moving from the present to the future; 4) the social-psychological make-up of the decision-maker (i.e., biases, prejudices, priorities, and assumptions); 5) the decision-maker's understanding of his agency's place within the total system; and 6) the decision-maker's skill at comprehending the environment existing beyond the justice process which enables the system to work. With the utilization of these techniques, significant strides have been made at improving the criminal justice system.

Even so, these processes and the academic field do suffer. They fail to recognize other approaches or points of focus that could improve the decision-making process in particular, and benefit the academic field in general. For our purposes, the issue centers on our culturally provincial

view of the administration of criminal justice. Criminal justice educators, practitioners, and students have had a tendency to think that the concerns within our system are in some way indigenous to it. They were not considering the possibility that another country has confronted or may be facing a similar concern and that their means of resolving the issue may be of assistance to us. The technique designed to rectify this oversight is known as the comparative approach. To illustrate, the following is an example of the utility of comparative analysis. The participation of citizens in the complaint process against police has been an intensely debated issue (at least since the late 1950s when the city of Philadelphia experimented with a civilian review board). Currently, there appears to be a renewed interest in this debate. The obvious question is: how do we propose to address ourselves to this delicate issue? Will the policymakers attempt to supply solutions—based on our past experiences in this area—or will we look elsewhere for possible solutions or models? During the 1970s, England, Canada, and Australia addressed themselves to the police complaint issue. Each examined complaint procedures in terms of their national context, yet solicited advice and models outside their territorial boundaries. For example, the Canadians made a number of visits to the United States, England, Holland, and Sweden to explore how each country was coping with the complaint problem; thus, they examined alternative models. We can only assume that this process helped reduce the likelihood that their decision-makers would be inhibited by a provincial view of the issue.

This example should suggest the value of employing comparative analysis to our problems. Comparative criminal justice could prove to be indispensable as a tool for the study of our own system as it allows us to understand it better. It can play a role comparable to the study of history by giving us a perspective necessary to comprehend the dimensions of our system. It provides us with an associational view of our criminal justice institutions and rules that, without such a comparison, could lead us to a false belief in the necessity and permanency of the status quo. If criminal justice is only studied within the boundaries of our country, without taking into consideration foreign ideas and experiences, it will reduce significantly the knowledge and possible approaches to solving our problems. Therefore, the comparative approach does two things for the current and future practitioner of criminal justice: it improves their personal freedom, as things are not absolute, and it permits a broader formulation of a philosophy toward the field of criminal justice.

Comparative Method

The comparative approach is one of the older methods of research and instruction. Since the time of the ancient Greeks, it has been utilized in some format by leading thinkers in the Western World. Aristotle, Machiavelli, Montesquieu, Karl Marx, and Max Weber employed it in some of their more significant works. Today, the comparative approach is used in anthropology, economics, law, history, political science, and sociology.

Comparative research involves the study of similarities and differences in cultures, societies, and institutions. The value of this kind of research may include one or more of the following purposes: to test generalizations based on data collected from a single unit of analysis, such as one society, to replicate the findings from one study—that centered on a single unit of analysis—with other studies that focused on other similar units of analysis, and to determine under which conditions the conclusions of one study may be valid in the analysis of other studies that are similar.

As such, the comparative approach is not a true method of analysis. Rather, it is a particular approach which is dependent upon an established method of analysis. For example, if one decides to compare the sociological characteristics of two societies, we would expect the researcher to utilize a method compatible with the kinds of information necessary for comparison. Sociologists often employ the following methods: descriptive survey (questionnaire or interview), analytical survey (statistical), or experimental (pre-test/post-test or experimental/control group design) to achieve such ends. Thus, the methodological problems found in comparative studies are similar to any research endeavor that utilizes one of these standard analytical tools. The problems are often compounded, however, because of the emphasis placed on studying more than one unit of analysis cross-culturally.

Comparative Criminal Justice

The first question that should be resolved is: how can one study criminal justice from a comparative perspective? Fortunately, there are a number of approaches or models that are available. These models are borrowed from the more traditional academic disciplines that have been involved in comparative study for some time. It would appear that there are at least five approaches to comparative criminal justice that are readily accessible at this time.

The Anthropological-Historical Approach Many criminal justice courses are guilty—by commission or omission—of portraying criminal justice as a static science. Students, however, should be prepared to expect changes in the social ideas they are grappling with and with the institutions that they will encounter professionally. If this is not achieved, students may be guided by dated or faulty theories of the past. Advocates of the anthropological-historical approach argue that the study of criminal justice emphasizes the present and future, with little regard for the past. They contend, therefore, that the future decision-makers of the system lack a clear understanding of the system's past. An understanding of the evolutionary nature of society, its institutions, the profession, and its philosophies is essential. The anthropological-historical approach prepares students to be part of a world of change. If this approach has value for the student studying his own criminal justice system, surely, it is useful for understanding foreign justice systems.

The Institutional-Structural Approach Here the central goal is to acquaint the student with a panoramic view of a country's justice system. Proponents of this approach argue that students should be cognizant of the institutions, policies, and terms that give structure to a system. Just as students of one's own system need this kind of introduction, this is also true of the student of the comparative approach. Thus, this approach is directed at presenting organizational profiles of various foreign institutions in criminal justice.

The Political-Legal Approach Politics and the law are significant factors in our own justice system. Both go a long way toward explaining how and why we treat and process those individuals who have been characterized as deviant by our society. Proponents of this approach argue that the study of foreign criminal justice systems must also be placed in the realm of politics and the law. What is the role of government in relation to the justice system? What type of legal system exists in a country? These are two of the kinds of questions raised by this approach.

The Social-Philosophical Approach This approach places emphasis on the need to understand a society's consensus, or lack of consensus, regarding its criminological perspective. What are the prevailing views regarding the causes of crime and deviancy in a society? What are the philosophical approaches to resolving or coping with these views in the penal setting? The value of this approach rests on the idea that students should be introduced to the criminological perspectives of foreign coun-

tries. This approach would enable students to think through their own tentative views on criminal justice with this added dimension. If students are not exposed to different criminological views, they will be limited in their attempts to offer solutions to problems in our society.

The Analytical-Problems Approach This final approach emphasizes the development of theory (be it organizational, legal, or criminological) and the testing of such theories with problems associated with the justice system. The analytical-problems approach defines problems, identifies goals, determines possible solutions, and considers the consequences of those solutions. This approach, more than any of the others mentioned, is future oriented in terms of the state of the system.

Because this book is a survey of selected world criminal justice systems, it would be inappropriate to focus solely on one of the aforementioned approaches. It would also be impossible to give equal weight to each. Thus, this text is designed to synthesize the significant benefits derived from each view.

Two issues had to be resolved in developing the format for this book. The first dealt with deciding on employing either a macro-or micro-approach. Macro-comparison compares entire systems (i.e., one country's justice system with another country's system) whereas micro-comparison involves comparing a more detailed issue or problem (i.e., an examination of search and seizure legislation in two countries or the policies of more than one probation department). Because of the nature of this text, the macro-approach is utilized.

The other issue involved identifying factors used to define appropriate units of comparison, and two were selected. One pertained to those countries that are considered industrialized states, versus emerging third world countries. If the value of comparative criminal justice is to reduce our provincialism and expand our choices of action in resolving the problems plaguing our justice system, it is reasonable to assume that the countries examined in this text would have similar problems. One could further assume that similar problems and issues could be facing different industrialized countries. Therefore, this text is limited to the study of five countries: England, France, Sweden, Japan, and the Soviet Union, each recognized as a modern industrialized state.

The other factor that was used to identify the appropriate unit of analysis was the legal system which is operable in these five countries. This factor is especially significant, because all criminal justice systems are so profoundly influenced by the legal system that they have evolved from and with which they are associated. According to Rene David and

John E. C. Brierley, there are four legal families that exist in the world today: common, Romano-Germanic, socialist, and religious or philosophical [1968]. Only the first three families are represented in this text with the religious or philosophical omitted. Although the religious or philosophical family is interesting to study, it is not normally found in a modern industrialized country.

The common law family originated in England, therefore, it is appropriate to illustrate the characteristics of this law within the British context. Its development is linked to the establishment of royal power in medieval England. It was formulated primarily by judges, and its purpose was to resolve individual disputes on a case-by-case basis. Because of this tradition, the common law is not as philosophically abstract as the other legal families.

The Romano-Germanic family developed on the continent of Europe. The basic source of its creation was Roman law. Throughout the middle ages and the early modern period of European history, this family was further developed by legal scholars. The significant characteristic of this family is its emphasis on the development of law in a codified form rather than on the resolution of individual disputes. French legal scholars were especially instrumental in the modern development of this legal family. Their legal tradition is traced directly to the Roman law. Thus, France represents one country's use of the Romano-Germanic law in this text.

Another country that is part of the Romano-Germanic family is Sweden. It differs from France in that its development was not only influenced by Roman law, but also by characteristics indigenous to many Germanic countries. Although Sweden's legal system is a part of the Romano-Germanic family, it illustrates that not all countries within this family have their origins solely in Roman law.

Some scholars have argued that the differences among legal families are not as pronounced as they used to be. A number of countries, that in the past were categorized under one family, are now borrowing ideas from other legal systems. It is alleged that in time the differences among these families will be negligible. David and Brierley recognized that development and pointed out that some countries do not fit precisely into their scheme. They referred to these countries as using a mixture of influences from the other established legal families. To date, this has been especially noticeable in countries borrowing from the common law and Romano-Germanic families. Japan represents a country that has been in the throes of that process. Since the Meiji Restoration, the Japanese have been assimilating a good deal of Western law and legal

science into their legal system. During the nineteenth century, there was a significant French influence. This was followed by a strong German influence during the first half of the twentieth century. Thus, Japan was borrowing from the Romano-Germanic tradition. Throughout this period the common law was virtually unknown to them, but with the Allied Occupation following World War II, the Japanese were introduced to the common law family and utilized it in the post-war years. Some scholars consider the period from the Meiji Restoration through the post-war years as a transitional period in the evolution of Japanese law. The desire now is to synthesize the benefits of both systems—Romano-Germanic and common—within the Japanese context.

Socialist law is the third major legal family. Countries that ascribe to its tenets often were formerly part of the Romano-Germanic tradition. Many of the legal rules and terminology utilized in the socialist family are traced to the Romano-Germanic system. What makes the socialist family unique is the revolutionary nature that is often attributed to it. This family originated in the Soviet Union and has been emerging as a significant family since the 1917 Revolution. In addition to its Romano-Germanic foundation, the country's legislature—which is influenced and directed by the Communist Party—is the source of socialist law. The country representing this legal family is the Soviet Union.

Before one begins the study of these criminal justice systems, one caveat is in order. Although this text purports to be a comparative study of foreign justice systems, some purists might take issue with a liberal use of the term "comparative." The book is not an in-depth narrative comparison among these countries. As previously indicated, its purpose is to survey foreign justice systems. Thus, the book's format is similar to an introductory text on the criminal justice system of the United States. Occasionally, points of comparison are made between countries represented in the text. Also, many books of a comparative nature (especially political science and economic texts) tend to include the United States. The United States is not included here because there are a sufficient number of books published that introduce the reader to that system. Although points of comparison are made throughout the text between the United States and the countries represented, it is assumed that the reader who is interested in learning about foreign justice systems has already acquired at least a survey knowledge of his own system.

Conclusion

Criminal Justice is a relatively new field of academic study. If it is to mature and become a viable academic endeavor, as well, as to assure excellence in what it purports to be doing, it would be well served to learn from some of the more traditional disciplines in the social sciences. The comparative method has been included in sociology, political science, law, history and economics for a number of years, and each discipline has benefited from it. If there is no reason to doubt that the problems in criminal justice are numerous and the issues are significant, then we should consider employing the comparative method as a tool to help analyze and resolve these difficulties. This text is designed to serve as a foundation on which to utilize the comparative approach.

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ENGLAND

INTRODUCTION

Britain is a small island country which is situated off the northern coast of France. Throughout its history the country has been referred to as England, Great Britain, and the United Kingdom. The official name changes occurred as a result of England's political union with its territorial neighbors. For example, in 1706, England and Wales united with Scotland. This geographic alliance became known as Great Britain. When the southern counties of Ireland formed the Irish Free State in 1922, the official name of Britain again changed to the United Kingdom of Great Britain and Northern Ireland. For our purposes, we are only concerned with the geographical area known as England and Wales. The reasons for this are quite simple. Scotland is not a common law country as its criminal justice system consists of a mixture of common and civil law. This was a result of its political association with France in the sixteenth and seventeenth centuries. Scotland retained some of the legal characteristics that are indigenous to civil law countries like France. The reason Northern Ireland is not included in this study is a result of the problems that exist between the Protestant and Catholic factions of that country. Because of the serious nature of these problems, the criminal justice system has been somewhat altered from the common law system that exists in England and Wales.

England and Wales encompass an area of 58,350 square miles, which is a little larger than the state of Michigan. Many of the roughly 50 million inhabitants live in the highly industrialized cities of the country. Although England no longer retains the industrial supremacy it once possessed, the country continues to be a world leader in the manufacture of heavy machinery. Agriculture, fishing, and oil are some of England's other important industries. For a country of its size, the legacy that the people of England have given the rest of the world is significant and indeed remarkable. Englishmen and women have made

major contributions in science, philosophy, literature, and the arts, but their most important and striking contribution to the historical evolution of civilization has been the creation of the common law and the development of parliamentary democracy.

THE GOVERNMENT

The Constitution

Many countries of the world have a written document called a constitution in which the political and legal beliefs of the country are expressed. England does not have this type of constitution; it has an unwritten or, more appropriately, an uncodified constitution. The British constitution is a blend of statute law, precedent, and tradition dating back to the time of King Henry I (1100). A large part of English constitutional law is based on statutes passed in Parliament. Statute law is an important factor in the creation of this kind of "organic" constitution and is best illustrated by citing some of the significant statutes that were instrumental in developing British constitutional principles (which in turn have had a profound impact on the creation of written constitutions in other countries).

Magna Carta The first document that carried with it this kind of significance was Magna Carta. In the year 1215, King John was forced by the English nobles to sign this charter which was an expression of the rights and privileges of the upper class in medieval England. The charter consisted of 62 chapters (or issues) that the nobles had identified. Chapter 39 was the most important and famous of these and happens to be particularly pertinent to criminal justice.
It stated:

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.

For a number of years, some of the chapters in Magna Carta were misinterpreted. For example, the thirty-ninth chapter was described as originating trial by jury and the writ of *habeas corpus,* but both assumptions were false. To the twentieth-century reader, the real value of Magna Carta is that it is the first attempt to explain—in legal terms—the germ of the idea of government by a constitutional process.

The Bill of Rights Another important document is that statute