

An aerial photograph of a dense urban area, likely a city center, with a strong red color overlay. The image shows a mix of residential and commercial buildings, with a prominent bridge or overpass structure visible in the upper half. The overall tone is somber and intense due to the red tint.

Justice, Community and Civil Society

A contested terrain

Edited by

Joanna Shapland

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Chapter I

Contested ideas of community and justice

Joanna Shapland¹

Over the last ten years, there has been significant disquiet about the relationship between criminal justice and its publics (Hough and Roberts 1998; Mattinson and Mirrlees-Black 2000; Judicature 1997). In some countries this has been disquiet that state criminal justice has moved too far away from the concerns of ordinary people – it has become too distant, too out of touch, insufficiently reflective of different social groups in society. The unease has sometimes been directed at the judiciary and patterns of recruitment to the judiciary ('white, male, middle-aged, middle-class', as they have been termed in England and Wales). Sometimes it has been about the priorities of the police – that they have been insufficiently attentive to ethnic minorities or tackling hate crime, particularly when there has been violence on the streets, as in France, Germany and England. Sometimes it is about the perceived ineffectiveness of state-run criminal justice: that it promised that it would cope with crime, would prevent crime – but crime still continues and, unlike other elements of public services, criminal justice seems unaccountable. Sometimes unease is an expression of general insecurity – that in a climate of increased alert about attacks on our safety, from often indistinctly perceived foes, people crave reassurance and a more personal relationship with those who set themselves up as protectors of safety and justice: they look for local crime prevention strategies, community policing and localised justice.

Governments have sought to respond to these concerns throughout Europe and North America. The particular forms those responses have taken have varied, as will be seen throughout this book, but

some move towards localised crime prevention, more responsive policing, restorative justice or mediation, or locally based prosecution or courts, can be seen in each country. Yet those responses, which combine reaching out towards individual members of the public or social groups, with a greater geographically localised presence, have involved challenging deeply held ideas of what justice is and what the state's role should be. Those ideas are part of the heritage of criminal justice in each country: often deeply held though subconscious, they strongly influence reactions to innovation, localisation and lay people.

The relation between criminal justice and its publics - communities or civil society² - is now deeply contested. Strangely, however, it has rarely been overtly examined, nor is there a strong comparative academic literature. Yet it concerns the fundamental tenet for state criminal justice: its legitimacy in the eyes of its publics. The authors of the chapters of this book, each of whom has researched the impact of innovation in criminal justice in their own country, felt themselves far more challenged when they met together to consider why the reaction was as it was - and, as a group, we began to realise how different the intrinsic cultural attitudes in relation to criminal justice are across Europe. What now is the attitude of state criminal justice to lay people, to localities and to groups in an increasingly multicultural society? Why is it reacting as it is? This is a time when states' monopoly on criminal justice is being questioned and they are being asked on what basis their legitimacy rests, challenged by both globalisation and localisation. The answers, as we shall see, show both cultural specificity and broader moves towards reaching out to citizens and associations representing citizens.

Looking comparatively at criminal justice

The idea that criminal justice is the prerogative of the nation state has held sway for over a hundred years. The corollary - that the state should be the only arbiter of its nature and the main instrument through which it carries out its tasks - was taken for granted by governments and criminal justice professionals. In such a context, localisation and the greater involvement of lay people will be perceived as threats, not only to those who previously had defining power over criminal justice, but also to strongly held but often submerged views about what justice should be and what it should be doing. Justice is perhaps the last bulwark of the modernist state:

what this volume describes are the struggles as the justice terrain has become more contested in late modern society. Nor has there been just one battle in any country, or just one direction of travel from the centralised to the more local. As we shall see, some initiatives towards setting up localised criminal justice have been reversed, as criminal justice professionals prove unwilling to leave their citadels. It has proved sometimes easier for criminal justice to interact with other community professionals than with actual lay people – even if this means creating and funding the new breed of community professionals.

Each chapter in this book takes up the task of describing and analysing these contested domains of justice for a particular country. They are trends which have not previously often been brought together, because they involve considering simultaneously what has been happening in courts, in prosecution, in policing, in crime prevention and in new ways of dealing with offenders and victims. These have often been separate domains of criminological, criminal justice and penal law research.

Moreover, making sense of the results of the initiatives in each country involves interrogating that country's ideas about its own society and to what extent the nation state is and should be the dominant presence and ideology governing societal reactions to crime. What does 'community' or localisation mean to that country? Does it have warm connotations, which express ideas of solidarity, locality and help from others – or does it have negative connotations of the other and the alien, in the sense of groups different from one's own?

There are several different models for how to do comparative research. One is the simple and descriptive: 'in my country we do it this way', which will be familiar to many of those who have attended meetings of international bodies involved with criminal justice. This book aspires to reach well beyond this, though we hope that there is sufficient and sufficiently accurate description that native criminal justice actors will recognise the processes involved, even if they have often been hidden for practitioners within the daily political struggles of working out how to implement or change initiatives.

As Nelken (2002) describes, another model is the scientific one, which presumes an underlying common reality behind linguistic and cultural difference, so allowing the use of uniform methods across countries. Examples would be the International Crime Victimisation Study (van Dijk 2000) or the International Self-Report Delinquency Study (Junger-Tas 1994). The operation and fate of criminal justice

initiatives, however, cannot conform to this model – because it is clear that deep underlying cultural and historic differences are still active for each nation state. International bodies, such as the EU or the Council of Europe, may facilitate and even mandate similar kinds of initiatives in different countries – and hard-pressed criminal justice policy-makers constantly scan the European environment for potential good ideas from other countries. The ‘sideways look’ has been operative in European criminal justice policy-making for well over a hundred years and criminologists have been making international comparisons for at least that long (Hood and Robert 1990). Yet though initiatives, such as the adoption of community service or restorative justice, may have the same names or look quite similar between countries, their implementation depends upon the routine practices and cultural beliefs of both criminal justice practitioners and members of the public. And so, as we shall see, countries’ individual justice heritage strongly twists the forms the initiatives take and their outcomes.

Should we then retreat to a more nuanced version of the ‘in my country we do it this way’, which allows only in-depth case studies of one place? That might remain true to the lived experience of those involved in that place, but it obviates the influences of the larger European culture or of globalisation which are having clear effects across place. Movements such as the growing importance of victims, consumerism and the hollowing out of the state³, and expectations of accountability and managerialism are impinging simultaneously on many countries and on many public service sectors, even if they are felt as change at slightly different times.

Our task is, therefore, the very difficult one of making transparent for each country their understandings of justice, who should administer justice and communities’ relation to justice, and showing how these have developed in this way. A difficult task, but an interesting one – because it reaches out beyond the criminal justice system itself to people’s deep-seated ideas about how they should be administered and what role lay people themselves should play in that governance. From that, we can proceed to consider the nature of the pressures governments have felt to implement change which involves justice reaching out to its publics and the initiatives they have launched – and their fate.

Nelken has set out three ways in which comparative work on criminal justice could be undertaken: relying on cooperation with foreign experts (‘virtually there’), going abroad to interview legal officials and others (‘researching there’) and drawing on one’s own

direct experience of living and working in the country concerned ('living there') (2002: 181). Each has its drawbacks of selectivity of what is seen and lack of comprehension as to what is meant by what is seen. Foreign experts who do not meet together may not appreciate cultural differences in meanings of terms or criminal justice institutions. A comparison which seeks to look at justice/lay interaction from crime prevention to court cannot rely on short research visits. Living in each place would be a lifetime's task.

We have, therefore, adopted a fourth way of working, bringing together those who have researched lay involvement in criminal justice from each country, with short introductory papers which set out initiatives, their political genesis and their outcomes. But we then asked the authors of the papers in this volume to continue meeting together, in a series of seminars over three years, organised under the auspices of the Groupe Européen de Recherche sur les Normativités (GERN). As they talked and refined their papers, so the differences in meaning, in cultural and political background, and in media prominence of different areas of criminal justice became clear. The contested meanings of community and of lay participation became very obvious. Participants agreed to draw out and expose what had been implicit or assumed in the criminological literature and to include this in their chapters. It is my task to bring together these analyses to show whether and how there are similarities and differences and how they illustrate the nation state's dilemmas in responding to its publics and its publics' demands for justice.

Justice, community and civil society

Why is this book called 'Justice, Community and Civil Society'? Readers in some countries, such as the UK, will be very familiar with the term 'community' and, in the justice field, associate it with 'community policing' and 'community crime prevention', both of which are viewed positively. Local people should be involved in at least some areas of criminal justice. In other countries, however, the association of the word 'community' with 'justice' causes profound dismay or lack of comprehension. Here, 'community' means a separate community, one which is seen as setting itself up in opposition to the state, to create a separate justice system in opposition to the state.

Elsewhere, the idea of linking 'community' (meaning a group of lay people) with 'justice' would be perceived as very regressive. Justice is thought to demand competent administration, which is

seen as being able to be undertaken only by professionals who are specialists in this area (the 'managerialist' ethic, which is described in its British form by Crawford (this volume)). Managerialism or 'modernisation' has been an agenda in public administration which has rolled across many countries in Europe in the last two decades – and criminal justice agencies have not been immune. It is an agenda which stresses efficient administration by salaried officials, managed to hit a basket of targets within tight time limits. Justice with a significant community element (which usually requires more time, more persuasion and may be more inefficient, though more effective) is then by definition a poorer, less competent, second choice system – one which may be promoted by administrations eager to save money but which should be resisted.

In other words, in some countries, the linking of 'justice' with 'community' challenges ideal conceptions of justice – either by association with perceived 'different' or 'separatist' groups or by being cast as less efficient or effective. Yet it is acknowledged in every country represented in this book that justice cannot be entirely isolationist. It cannot be entirely created, maintained and developed by justice professionals, divorced from everyone else. One reason is that justice is now a major political topic: justice ministers and ministers of the interior are no longer purely concerned with substantive criminal law (showing toughness, rehabilitation or educational credentials through proposed changes to sentencing law) but have found that whether they are elected – and their continuing tenure of their jobs – depends upon whether it is administered in accordance with public and media wishes. If justice professionals (police, prosecutors, those sentencing or releasing prisoners) seriously misjudge the public mood, demonstrations and marches follow. Justice is now very clearly a political matter, understood as not something which can be left purely to criminal justice professionals.

The public equally do not appreciate it when the hand of ministers rests too heavily or closely on individual justice decisions. The independence of the judiciary from the executive is still a very live political issue. It is more obvious where there is or has been greater dissent between sections of the public, in so-called divided societies or transitional societies. One social group will feel that the criminal justice system, as well as political state power, is biased against it. Unease has, however, also constantly appeared in relation to decisions to prosecute (especially if politicians are the possible offenders) and in decisions about public order and crime prevention at local level. Justice values, the public feels, are not to be the property of

any one political party or social group within that country. The dialogue between justice and the public may, in some countries, not be a dialogue between justice and communities, but there should be a dialogue between justice and civil society (the lay people of that country), not just a dialogue between justice and politicians, or justice and professionals. Essentially, people are saying, justice matters.

As we shall see, the different understandings of community and civil society in different countries have worked through to influence not only the kinds of initiative undertaken to respond to these views that justice matters, but also the points in the criminal justice system at which they have occurred. Where 'community' is perceived as causing more concern or being in greater opposition to justice values, initiatives have tended to remain at the peripheries of justice decision-making or involve less serious cases. They have not affected the traditional criminal justice path of 'investigation – decision to prosecute – court – sentence', which has remained as the majority response to criminality following the detection of an offender. Where liaison with different groups or communities within that country has become seen as imperative, initiatives have approached closer to key decisions in the traditional path (decentralisation of criminal justice personnel, lay judges) or new, parallel paths have been established (mediation, restorative justice, new fora for determining sentence). The key here is often whether the parallel paths or new lay criminal justice actors have remained restricted to those groups or whether they have become more widespread within the country. If they remain restricted, as we shall see, there is the danger that this kind of justice becomes seen as second rate or becomes reabsorbed within the professionalised arena and its 'community' credentials then doubted.

These processes are best illustrated by drawing from the very rich material from the countries represented in this volume.

Where 'community' is seen as problematic to justice and the only relation is with the civil society

Perhaps the most vehement response to the idea that justice might be associated with 'community' comes from France. As Wyvekens (this volume) states, 'The word "community" is not French at all. One could even say that French people, and French institutional personnel, *hate* the word "community". They hate it because in French culture it has almost entirely negative connotations.' She goes on to explain

the deep-rooted cultural view of the French state that justice means the same response to every individual. 'Community' has resonances of difference, of social groups seeking deliberately to set themselves apart and hence in opposition to the hegemonic uniformity of French society. Similar connotations for the word 'community' arise for Germany and for the Netherlands (Groenemeyer, van Swaaningen, this volume).

Milburn (this volume) makes similar points: talking about 'community' would be interspersing an intermediate political entity between the state and the citizen, which would be entirely antithetical to French republican political and cultural philosophy. Geographically restricted collective entities within France, such as local authorities, are seen as part of the state, not as separate bodies.

Of course, cultural identity for the French is not in every sphere uniform. There is a lively appreciation of regional characteristics, culture and gastronomy. Moreover, local administration has considerable power, with the *préfet* and the local mayor being able to wield both financial and administrative clout in relation to devising plans to fight criminality and maintain social order. The Bonnemaison (Commission des Maires sur la Sécurité 1982) reforms in relation to crime prevention involved action plans at national, regional and local level – and many of the initiatives which resulted drew their energy from individual towns and smaller localities. The Police Nationale is indeed national, with most officers being trained in Paris before seeking transfers to their home region (Cassan 2005). But policing is increasingly being operationalised between different national and town police forces.

The negative reaction to the idea of 'community' seems partly to be a reaction to the concurrent consideration of justice and community. Justice is a state matter; justice should be republican. But, as both Wyvekens and Milburn point out, there has been a considerable perceived need to reach out to civil society. The response to disaffected local areas, especially when there have been riots, has been seen to be with advantage more localised. So decentralisation is fine; proximity justice is to be applauded. But recognition of difference between local areas is not a good idea. Proximity justice has in essence been a national rolling out of a more localised approach to justice. What is not permitted is accommodation of that justice to local conditions or different values.

In addition, as Milburn (this volume) describes, the state thinks citizens as well should be actively reaching out to the state – but as individuals, not forming rival associations to the state. Of course,

such a view creates tensions in implementing such reaching-out policies – the state wishes to keep control, but no longer to be the direct implementer of all such action. Yet it cannot recognise local groups.

Under the rubric of proximity justice, in fact the kinds of initiatives that have been taken have been far more radical and more quickly created than in countries where there is a more positive association between justice and ‘community’. Proximity justice is not one coherent masterplan, but a variety of initiatives created whenever and wherever it has been thought politically helpful or appropriate to bring justice closer to the people. Initially, it was intended to provide the courts with new responses to perceived rises in petty crime and nuisance for which the traditional route was too cumbersome. Because the areas seen as most afflicted by this were the disadvantaged urban areas, it was these areas which were given local prosecutors, working out of offices initially based in the same neighbourhoods (Wyvekens, this volume). The strategy was in fact to allow parallel modes of justice administration to function at the same time as the traditional route. In other countries, that might have been seen as a direct challenge to criminal justice judicial hegemony. But here, it was operated by criminal justice personnel and so within the system. Moreover, whenever there was a need for different, more localised components, these were set up not as criminal justice policy, but under the umbrella of general urban policy (literally, city policies). So crime prevention policy, with its necessarily different elements which had to be attuned to local characteristics to have any chance of fitting crime profiles or town priorities, could become urban policy. Indeed, as Wyvekens (this volume) comments, local criminal justice professionals did not involve themselves with the mayor’s crime reduction partnerships, but instead developed their own responses separately.

The nature of those responses reflected criminal justice’s own workload pressures. Minor offences clogged up the system and could not all be dropped without an outcry from residents of those areas. The answer was to propel them into a parallel system which used mediators. The ethos of that parallel system was to build on the already existing tendencies to use social and educational measures with the young and with family conflict. However, mediation was not allowed to become a separate system with its own values and a more leisurely timescale suited to neighbourhood conflict (Dignan 2000). Instead, its activities had to be administratively registered (and thus controlled) by state criminal justice. Moreover, in some areas, separately employed mediators became eclipsed by deputy