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comparative criminal justice

David Nelken

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making sense of difference

David Nelken

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introduction: changing paradigms

Comparative criminal justice is the study of what people and institutions in different places do – and should do – about crime problems. More broadly, it looks for links between crime, social order and punishment, and explores the role played by police, prosecutors, courts, prisons and other actors and institutions in the wider context of various forms of social control. In this opening chapter I describe how established undergraduate USA textbooks deal with these issues and contrast this with the types of work found in journals, edited collections and monographs which provide evidence of the paradigm change that this area of enquiry is currently undergoing.

There is little need to insist on the wider relevance of this subject. It is impossible to open a newspaper, watch television or check the internet without coming across matters that involve comparative criminal justice. There are still very real differences worldwide in what is seen as the proper role of criminal law, in resort to criminal justice systems as compared to other forms of sanctioning, in the political independence of the legal system, in the behaviour of police, the powers of prosecutors, lay or expert involvement, the rights of victims, the use of prison or the death penalty, or the extent of 'trial by media'. Such contrasts give rise to difficult political and policy questions. What is to be done – if anything – about what seem like barbaric practices in far away places? Can a society borrow reforms successfully from other places? The media in Western countries tend to magnify news of differences from and in the Islamic world. But there are also puzzling differences nearer among Western countries. How can we explain why incarceration rates in the USA are six to seven times as high as in most European countries – will the use of prison elsewhere follow this lead?

Why, for example, in 2008 did criminal court judges in Italy appeal to the United Nations to save them from the attacks of Prime Minister Berlusconi? Whatever answers are offered are likely to touch on genuine specificities about the current role of courts and prisons in these countries as compared to others.

As these examples also testify, however, it is getting difficult to distinguish what goes on 'here' from what goes on 'there'. In many countries crime is attributed to the growth of immigration – indeed, in Continental Europe unauthorised migration has itself been turned into a crime that ends up occupying much of the ordinary work of the lower courts. The obsession with crime and punishment, in which a large part of the news media is increasingly taken up, not only worries us with criminality next door, but also (selectively) with that taking place in the rest of the global village. In the UK, when the tabloid *Sun* newspaper is unable to find a sufficiently shocking crime at home, so as to create alarm at home, it increasingly refers to events in foreign countries. But even the normally sober *Independent* newspaper carried a leader recently warning its readers:

> the forces of terror do not respect national boundaries. And those prepared to murder and die for a perverted interpretation of Islam are not easily identified. We need to wake up to the fact that we will never be able to safeguard Britain's streets totally so long as violent extremism has its base in Pakistan. (*Independent*, 11 April 2009)

At the same time, if crime threats come from abroad, so too do international institutions increasingly take on judicial or regulatory tasks.

If this were not enough of a challenge, there is more. There are also 'second-order' (and higher) comparative questions to be explored (Nelken, 2007a). In order to decide how (and how far) to harmonise what they do with what others do, comparing becomes an intrinsic part of the practical tasks of many of those crafting and administering criminal justice. Thus in order to study such processes we must also explore the way others make comparisons – which will often reveal the 'interested' interpretations of criminal justice practices by politicians, policy-makers, legal actors, journalists, activists, scholars and others.

Changing paradigms

The aim of this book is to give some idea of the benefits, difficulties and, hopefully, also the excitement, of systematic study of the workings of criminal justice in and across different places. But this is very much a field which is struggling to keep up with the changes it seeks to describe and explain. This can be seen if we turn to consider currently available (typically American) codified 'knowledge' of what comparative criminal justice has to offer. I do not propose to offer here a detailed exegesis of the various American textbooks in this subject, such as Reichel (2008), now in its fifth edition, or Dammer, Fairchild and Albanese (2005), Fields and Moore (2005), and Cole, Frankowski and Gertz (1987), and I take for granted the many positive features they each have as teaching tools for opening students' minds to other ways of doing things, which is their principal purpose. My comments have only to do with the type of theoretical approaches that they mobilise, the political assumptions they make, and the methodological problems they pass over.

In the choice between coverage and depth, most textbooks tend to give preference to the former. But in so far as they are often obliged to draw on official reports (or websites), this begs the question of the reliability and validity of the sources chosen. We learn little about the possible biases of the sources consulted, such as the interest they may have in exaggerating or minimising levels of crime, or the need to furnish politically acceptable accounts of law enforcement in justifying intervention abroad or hiding collusion at home. Bureaucratic statistics have well-known limitations: such data are produced for internal purposes, often what they say in furnishing the information to those collecting it more centrally will have financial or other implications for them. No study of domestic criminal justice would now rely on official statistics to this extent – so why do so in cross-national work?

Partly because of the sources that they rely on, the textbooks also concentrate overwhelmingly on conventional crime, and it is rare to find much discussion of white-collar and corporate crime, whether local or imported. Crime is assumed to be a problem for everyone, crime control a blessing, under-enforcement and delay a matter of organisational malfunctioning rather than an indicator of political priorities. Little is

said about the ways responding to (but not necessarily reducing) local and international crime can serve as a way for governments to gain and maintain legitimacy, or about how criminal justice works to control the poor and ethnic minorities. Terrorism is always *against* the state, never *by* the state (or at least not by 'our' state).

The goals of classification and description predominate over systematic efforts at explanation or interpretation. Classifications of types of jurisdiction borrow heavily from the not always illuminating categories used by comparative law, as with the contrast between the common law and civil law or adversarial and inquisitorial systems. But even reference to more sophisticated efforts to develop classifications can be misleading if account is not taken of social change. Many of the textbooks still rely on Damaška's now classic contrast between common law, 'coordinate', systems and continental, 'policy-oriented', systems (Damaška, 1986) even though we are now living at a time when American 'problem-oriented' courts are a major export (Nolan, 2009). Descriptions of the organisation and functions of police, prosecutors and judges tell us whether they are organised centrally or not. But this is of little help in understanding why, in Italy, for example, the two major national police forces continue to co-exist with overlapping powers – a question that points to the significance of 'redundancy' in the organisation of criminal justice and social control more generally. Little is said about the role of actors other than the police in so-called 'pre-crime' measures of surveillance and crime prevention, as seen in the responsibilities placed on truck drivers and airlines to stop illegal immigration, or the increasing importance of private companies in running prisons.

Differences in various jurisdictions are picked out against the reassuring bedrock of the presumed similarity of 'criminal justice', as if this term is a universal cross-cultural category. Discussions of police, prosecution and courts in the different chapters avoid asking what, if anything, it is that makes them part of a larger 'system'. (The USA, for example, has a highly fragmented federal, state and local system but presupposes its overall coherence. Continental countries have more integrated national systems, but do not always expect or get collaboration between the constituent parts.) Above all, accounts of what goes on in other jurisdictions often pay little or no attention to the differences between the 'law in books' – what the rules say about what is

supposed to happen – and the 'law in action' – how the law is or is not used in practice (Pound, 1910; Nelken, 1984, 2009c). Such empirical discussions as are provided give exaggerated 'authority' to dated and controversial empirical forays by English-speaking scholars in the foreign countries concerned. If we are to believe some of the current textbooks, the British are still fighting the IRA. Reliance is placed on a study of juvenile justice in Italy by Edwin Lemert carried out in the 1980s using court data from the 1970s, even though the current system of juvenile procedure has undergone two major changes since then. We are led to believe that such one-off studies can be used somehow to 'represent' the essence of another system of criminal justice – and there is rarely acknowledgement of the differences and internal struggles within each system.

Problems are also created by the disciplinary division in much English-language writing, between those who approach comparative criminal justice from a background in criminology and those who write about it as lawyers interested in criminal procedure. Few of the authors recommending more widespread adoption of common law trial procedures (e.g. Vogler, 2005) address the question of whether this might lead to higher levels of incarceration, even though common law countries are among those with the highest prison rates. In general, little insight is offered about what is involved in making comparisons, the problems of overcoming obstacles of language and culture, and the enormous difficulties that can be faced in trying to understand other ways of life. No real guidance is provided on the actual process of doing cross-cultural research.

Do rates of punishment have anything to do with levels of crime? When (and why) do places punish too much? Why do countries borrow criminal justice innovations from cultures they affect to despise? How can practices be both culturally embedded and yet transferable? How and why do different systems respond as they do to the challenges of transnational crime? Questions such as these cannot easily be addressed within the old descriptive/classificatory paradigm. To get nearer to answers to such matters we need to tackle interpretative problems such as how different societies conceive 'disorder', and how 'differences in social, political and legal culture inform perceptions of crime and the role of criminal agencies in responding to it' (Zedner, 1996).

The choice to cover a lot of ground rather than go into these and other matters certainly reflects the type of student market and the priorities of undergraduate education in a large and varied country such as the USA, where knowledge of even the most basic facts about what goes on elsewhere in the rest of the world cannot be taken for granted. In fairness, too, these authors are often the first to acknowledge the difficulties of finding satisfactory data, and not least, the handicap of working without sufficient studies in depth of the 'law in action' to rely upon. For many of the places being described, it is only recently that relevant empirical material about the 'law in action' has begun to become available. But it can hardly be denied that something of a gulf has grown up between what they present as 'knowledge' and the wider, more varied and ambitious criminological literature that would problematise such 'knowledge'. Moreover, as will be seen in the course of this book, my critique of the field also goes well beyond the textbooks to encompass other scholarly enterprises, including those I describe as 'comparison by juxtaposition', whereby it is assumed, rather than demonstrated, that local experts' accounts of different places are speaking to the same issues, as well as the many studies that place reliance on the commensurability of indicators such as prison rates.

Better answers to why practices of punishment take the form they do in different places have to make reference to the vast historical and social scientific literature available. We need to be able to demonstrate how larger forces shape and are shaped by the details of institutional structures and criminal procedure. We need to pay close attention to the definition and reach of the concepts of crime, of criminal justice and of social control which the observer and the observed employ; the persuasive tropes used in the discourse of criminal justice officials, politicians and criminologists themselves; the changing local and global social contexts which shape what is being studied; the sources of the standpoints being adopted; and the practical purposes and possible implications of research itself. The resources to draw on include, most obviously – but strangely neglected – criminology itself (a 'rendezvous subject' of various disciplines), comparative law, legal theory and philosophy, political economy, political science and sociology, social theory, international law and international relations, and cross-cultural psychology. And this list is far from exhaustive.

Obviously, we should not expect all these disciplines to speak with one voice. For example, history and anthropology in particular, unlike, say, much work in political science or economics, tend to favour interpretation over explanation. Although comparative criminal justice usually borrows from or draws on other disciplines, it may sometimes become a privileged site for challenging them. It may seek to show that the penal state has transformed questions of social inequality, public policy and citizenship (Waquant, 2009a, 2009b), or that comparative criminology may have a better way of estimating the level of killing in Darfur than can be achieved by demographic and health-related approaches (Hagan and Wyland-Richmond, 2008). Finally, even fictional accounts of detective work, trials etc. in books, films and other media may reveal valuable 'truths' about other places, often providing more complex and ambivalent accounts of the motivations and conduct of governments and legal actors than are found in the official sources on which textbooks or other accounts so often choose to rely.

Limits of space in a short book of this kind will not allow me to document all the progress that has already been made towards building the sort of comparative criminal justice being outlined here. But it should be noted that recent contributions increasingly take a broader and more critical approach to the field (e.g. Larsen and Smandych, 2008; Drake, Muncie and Westmorland, 2010a and 2010b). On the other hand, challenging the assumptions of state-centred 'administrative criminology' (Young, 1988) does not in itself provide us with the tools or sensitivities to make sense of rather than impose our own expectations when explaining other peoples' practices – and it is this which is the focus of this book.

The social actors we are studying will not have all the answers to our problems (or their own). But whatever our objectives in studying criminal justice comparatively, we will not get far if we do not do all that is possible to make sure we have a fair grasp of what they think they are doing (as well as what they are actually achieving), and try to find out why it makes sense *to them* – to the extent it actually does so. If, on the other hand, our study of what is thought and happens in other places merely confirms *what we already think is true and right* (the need for more social inclusion, solidarity, tolerance, and respect for difference, for rational policy making and listening to the professionals, etc.), this will

often mean that we have projected our ideals and not given sufficient care to analysing all that may lie behind the practices we are studying. The problem is that learning how to avoid this is not easy given that our perceptions of others will always be coloured to some extent by our own cultural starting points.

Policy-makers in the Netherlands, for example, tend to look for pragmatic, practical, workable solutions to crime – just as they do when seeking to resolve other social problems. In Dutch cultural common sense, being pragmatic means *not being dogmatic*. But, in Italy, pragmatic is often taken to suggest behaviour that is not guided by principles, and that therefore borders on being *un*principled. Likewise, the idea of a 'managerial' approach to criminal justice is one that finds little favour, and is widely thought to be something that can potentially interfere with the proper functioning of legal procedures. This is not to say that Italians in everyday life are not often pragmatic, and the Dutch never principled. Far from it. The point is rather that it can be difficult to see the (culturally shaped) limits of a given way of seeing – and to realise, for example, that what we think of as being pragmatic may not actually be that sensible (Brownlie, 1998; Harcourt, 2006). If we insist that pragmatism must have its place, what is its place? If the question is when it is appropriate *not* to be pragmatic, a pragmatic approach may not be able to provide the answer we need.

Outline of book

In seeking to develop these claims further, the following chapters will illustrate their relevance to a number of fundamental issues in comparative criminal justice. Chapter 1 asks why we do comparative research. In Chapter 2 I discuss what is involved in identifying similarities and differences. Chapter 3 examines possible approaches to doing comparative research, concentrating on the differences between explanation and interpretation and the significance of culture. Chapter 4 takes as a case study of explanatory enquiries the debate over differences in prison rates in developed industrial countries. Chapter 5 then addresses the question of how far comparative criminal justice has to change at

a time of globalisation. Chapter 6 ends this introduction to the field by providing an account of the role of knowledge itself in the process of comparison. Though these issues are dealt with separately for ease of exposition, an important claim of this book is the need to appreciate how they are related; so there will be frequent cross-references. My aim will be less to take part in the various debates I review than to connect them to my overall theme.

Continuity to the argument will also be provided by the use of examples drawn from the wide range of studies that seeks to contribute to the subject of comparative criminal justice – as well as some that do not. But, in addition, I give special attention to illustrations based on my own empirical research into the workings of criminal justice in Italy, the country whose system I currently know best. As running case studies in each of the chapters, I make reference to three features of criminal justice in Italy that are puzzling, especially to those from an Anglo-American background (see Nelken, 2009b, 2010). The first of these comes from the realm of juvenile justice and has to do with explaining how it is possible that the majority of young Italians charged with murder not only do not go to prison but do not even receive a criminal conviction. What happens to these offenders? Why did this come about and why is nothing done about it? The second has to do with the so-called 'myth of obligatory prosecution', the fact that prosecutors are required – by the constitution itself – to take proceedings in all cases for which there is evidence (if they do not do so, this is itself a violation). Is this principle really respected? How – and how far – is it possible to honour this obligation given the number of cases that are dealt with and the problems of prioritising cases? The final example focuses on the role of delays in Italian courts. What explains why cases take so long – often many years – to go through the various stages and procedures of the trial process? Why has nothing been done about this? Is such a system more or less favourable to the accused than one with effective 'speedy trial' protections?

In using these practices as my illustrations I am not suggesting that they are more important in themselves than the major events that have dominated Italian public life over the last twenty years that have all had, in some way, to do with 'law and order': the series of corruption investigations known as *Tangentopoli*, the vicissitudes of the fight

against the mafia and other organised crime groups, the criminalisation of immigrants, or Berlusconi's personal battles with the judges. Certainly, it is only by placing them in context that these practices can be made to seem less strange. But I would insist that giving attention to criminal justice procedures is essential to understanding the shape of such struggles – and sometimes what the struggle is about. And, in terms of comparative enquiry in this field more generally, these case studies allow me to offer a different, and dissenting, perspective on claims about the overall rise of the so-called Penal State that dominate much of the English-language literature.

This said, giving so much attention to Italy, a European, economically developed country with a continental legal system (though one considerably modified as far as criminal justice is concerned) certainly limits the kind of topics in comparative criminal justice I am able to consider. Starting from the experience of the workings of criminal justice in, for example, China, Middle Eastern Islamic countries, or focusing on African forms of dispute resolution, could illuminate different issues – even if it might also obscure others. The textbooks try to cover the larger canvas, and if it could be done well, there would be much to be said for this. But it would be inconsistent with the argument of this book for me to pretend expertise about places that I have never even visited. As I shall argue repeatedly, there is no 'view from nowhere', and no 'global' or 'world view', even if there can be less, or more, parochial perspectives. Hopefully, though, at least some of the theoretical and methodological points that emerge in discussing Italy and the other places touched on may also be applicable in examining criminal justice practices elsewhere.

ONE

why compare?

It may be easy enough to find striking examples of differences in criminal justice, but what is less clear is how these can contribute to make up a coherent subject matter. What is the comparative analysis of criminal justice (good) for? In this chapter I first describe some of the theoretical and policy goals of this subject and how the literature seeks to contribute to them. I then go on to discuss how far this sort of work can overcome the risks of ethnocentrism and relativism.

The goals of comparative criminal justice

There are a variety of theoretical and practical reasons for wanting to know more about what others do about the sanctioning of offensive conduct (Nelken, 1994b, 2002). Whatever misgivings they may have about how their own system works, many people are even more suspicious of what goes on when their fellow citizens end up being tried in courts abroad. Such ethnocentric thinking can easily lead people to assume a priori that their own local arrangements must be superior in general, or at the very least better fitted to their own society. But, fortunately, there are also those who have a more open-minded interest in apparently strange ideas and practices, seeking to make sense of rather than reject difference outright.

Many writers seek to learn from other systems how to improve their own. Hence we get articles with titles like 'English criminal justice: is it better than ours?' (Hughes, 1984), or 'Comparative criminal justice as a guide to American law reform: how the French do it, how can we find out and why should we care?' (Frase, 1990). Those who undertake studies of this kind seek to borrow an institution, practice, technique, idea or slogan so as to better realise their own values, or sometimes to change them. They may aim to learn from those places with high incarceration rates what *not* to do, or they may seek to help others change their systems, for example exporting new police systems to South Africa, or restoring the jury system in Russia. Or again they may just be concerned to cooperate and collaborate in the face of 'common threats'.

But the practical importance of this subject brings us up against one of the most troubling of questions regarding the goals of our comparisons. How far are we intending to learn more about our own system and its problems, and how far are we trying to understand another place, system or practice 'for itself'? For some authors, we can choose between seeking for 'provincial' or 'international' insights, or engaging in 'national' or 'cosmopolitan' enquiries (Reichel, 2008; Zimring, 2006). For reform purposes, comparative researchers deliberately use accounts of practices elsewhere as a foil. Lacey (2008), for example, deploys evidence of differences in prison rates in Europe so as to prove that growing punitiveness is not the only game in town and suggest to UK politicians that they can find a way out of outbidding each other on being 'tough on crime'. In other cases, we may set out to understand the other but end up knowing ourselves. As T.S. Eliot (1943) put it:

> the end of our exploring,
> Will be to arrive where we started,
> And know the place for the first time.

What, on the other hand, could it mean to try to understand another society only in 'its own terms'? Even the society being reported on is likely to *understand itself* in relation to points of similarity and difference in relation to some places (those to which it compares itself) rather than others. To a large extent it is impossible to make sense of things except against some background of previous expecta-