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comparative criminal justice

making sense of difference

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We have to know what we are doing, protecting an order that doesn't exist, to make a security that cannot exist ... it is not possible to change anything until you understand the substance you wish to change ... to change something you do not understand is the true nature of evil. (Winterson 1991: 93, 138)

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 expectations. Someone from India will find Italian criminal justice relatively efficient; someone from Denmark is unlikely to do so. Any cross-cultural comparison emerges from a given cultural context and has to be able to make sense to the audience(s) for whom it is intended. What is found interesting or puzzling will vary depending on local salience. But even questions couched in terms that *are* salient in both (or more) cultures being compared will lead to different answers depending on which culture one starts from. Reichel (2008) begins his book with the dilemma faced by US police agents, who feel justified to continue to pursue a criminal who has fled to Mexico because the police there are notoriously corrupt. He admits that the Mexican government might feel differently about such conduct. But one would imagine a rather different take on the topic in a textbook written for Mexican students.

Should we then say that what is crucial in studying another place is less whether the author has actually got it 'right' and more what the author makes of it? Balvig, for example (1988), tells us that his aim was less to learn about somewhere else than to understand his own country better. Perhaps this is all that 'learning' from others means (and can mean)? Does it even matter if, according to Johnson (2001), Braithwaite may not have properly grasped the Japanese criminal justice practices he used as a model for his highly influential idea of 'reintegrative shaming' (Braithwaite, 1989)? Taken too far, however, this line of argument becomes self-defeating. The reasons we make comparisons cannot provide the only criterion of success. If we have failed to properly understand another system we can hardly make use of 'it' to throw light on our own arrangements. Even if there is no view from nowhere, this does not prove that all starting points are of equal value. And seeing only what is useful for us is a poor way of acknowledging and engaging with the 'other'.

We also have to ask what, if anything, is specific about this subject. It has been forcefully pointed out that all social science is concerned with explaining variation and difference (Feeley, 1997). Comparison was central to the work of both Durkheim and Weber, albeit with rather different strategies. Many would say that comparison is the essence of all social enquiries or even of logical enquiry in general. In principle, then, no line can or needs to be drawn between criminal justice and comparative criminal justice (or between criminology and comparative criminology). In addition, the traditional focus of what is called

comparative criminal justice on different national jurisdictions is mainly a matter of political/legal convention and methodological convenience. There are considerable political, social and cultural differences *within* modern nation-states, for example within the USA (Newburn, 2006), or Australia (Brown, 2005), and even more so in less industrialised societies. For some purposes other 'units', such as towns, organisations and professional groups, can all provide occasions for comparison. And transnational crime activities and responses to them help transform and transcend differences between units defined as nation-states.

The local, the national and the international often interpenetrate. But there may sometimes be good reasons to privilege the nation-state or societal level. States are the locus both for collecting criminal statistics and for administration, and their boundaries often, though not always, coincide with contrasts in language and culture. Franklin Zimring, a distinguished American criminologist, explains that he became a 'convert' to comparative criminology when discovering that Canada had not shared the rise in US prison levels even though its crime rate was not much lower than in the USA, with the exception of homicide and life-threatening robbery (Zimring, 2006). As this example also shows, some of criminology's major debates now involve issues of comparative criminal justice.

Cross-national and cross-cultural research is a fundamental way to show whether criminology's claims are more than local truths (though it does not exhaust this task, in so far as taken-for-granted starting points are also conditioned by other factors, for example gender). But this subject offers a number of other potential benefits (and challenges) that go beyond simply adding to the pool of potential variables that can be used in building criminological explanations. Trying to understand one place in the light of another allows us to move closer to a holistic picture of how crime and its control are connected (what do they know of England who only England know?). For example, it may help us understand the factors that explain why a given society goes through cycles of corruption and anti-corruption. Likewise, it can help us appreciate why reforms that are limited to those that emerge from within the same society often tend to reproduce the problems they are being asked to solve – precisely because they come from the same culture.

In England and Wales, as in the Netherlands, the answer to failures in the system is normally thought to be greater efficiency and speed

(as in reforms of the English Youth Justice system inspired by the reports of the Audit Commission). In Italy, a rethinking or defence of 'values' is more often invoked as the way forward when problems arise (thus the 'obligatoriness' of prosecution decision-making is usually argued about as an issue of principle rather than as a question of learning from the 'best practices' of prosecutors as they struggle to deal with this demanding requirement (Nelken and Zanier, 2006)). 'Governing through crime' may be a particularly American obsession, but suggesting that it be replaced with the metaphor of the fight against cancer still remains firmly within the American ethos of instrumental problem-solving (Simon, 2007). Miscarriages of justice arise both in more adversarial and more inquisitorial types of process. But in each case it is their tendency to count too much on the strengths of their procedures that danger lies (Brants, 2010).

Comparative study can help us escape from such self-sealing cultural logics (Field and Nelken, 2007). There are a variety of strategies that can be used. But each is also subject to pitfalls. Classifications can be controversial, descriptions deceptive, explanations erroneous, interpretations interminable, translations twisted, and evaluations ethnocentric. The difficulties multiply in so far as a satisfactory account of difference usually requires the ability to draw on more than one of these strategies. But the message of this book is that considerable progress can be made in understanding and explaining other systems of criminal justice if (but only if) we face up to these challenges.

Collecting data on legal rules, procedures and distinctive institutions is certainly a valuable first step (one that is both demanding and time-consuming, not least because of linguistic and conceptual difficulties). It can be instructive to learn about the social role of policemen in Japan (as well as the lesser known system of voluntary probation officers), or discover that the way chosen to stop traffic policeman in Mexico City taking bribes from motorists was to appoint less threatening women rather than men to do this job. Careful description can also help get beyond often out-of-date classificatory stereotypes. In many respects, the Netherlands has more similarities with the UK than with Italy, even though the UK has a common law rather than continental system of criminal justice. But the task of comparativists, unlike that of lawyers, cannot be that of providing description for description sake. Even the effort to describe

selected aspects of criminal procedure in Europe runs to over a thousand pages (Delmas-Marty and Spencer, 2002).

Descriptions can provide the basis for explanation and understanding, but for them to serve this purpose we must have an understanding of the way the 'law in action' relates to the 'law in books'. This essential working tool for all social studies of the law was in fact first put forward in the context of studying police (mis)use of criminal procedure. Likewise, the distance between what continental systems of criminal justice claimed to be doing and what research into the law in action showed they were actually doing was the nub of the classical debate about 'the myth of judicial supervision' in continental criminal procedure (Goldstein and Marcus, 1977). The leading recent empirical in-depth study of French criminal justice, by Jacqueline Hodgson, also places stress on how little actual supervision of police is exercised by continental prosecutors (Hodgson, 2005). On the other hand, if we are worried that some criminal justice systems allow the state to use psychological pressure against defendants (Vogler, 2005), a closer look at what goes on in police cars will quickly show us that this is not a problem restricted to the inquisitorial system.

Empirical research has shown that it was rarely necessary to pass 'telephone justice' messages to judges and prosecutors to ensure politically appropriate outcomes of trials in communist East Germany. The methods used to appoint and socialise recruits to these offices was sufficient (Markovits, 1995). More recently, by contrast, corruption investigations in post-communist Poland were themselves used 'corruptly' against political adversaries under direct government impetus (Polak and Nelken, 2010). As this suggests, rules and safeguards can even operate in ways that are the opposite of what are said to be their justifications. The procedures in Italy that are supposed to protect offenders' rights to know as soon as possible that they are being prosecuted (the *avviso di garanzie* notice) ends up having the effect of facilitating 'trial by media' (Nelken and Maneri, 2000).

Paying attention to the 'law in action' is also relevant to making sense of all three of the running examples being used in this book. The reason why young people in Italy, in some respects, 'get away with murder' is that the 1989 reform of juvenile justice was a procedural one brought in at the same time as the introduction of the major procedural reform in that year for adults. It did not change the substantive penalties on conviction available for serious offences by young people, which remain

(in this country where children are so much loved) only prison. The two most important new measures that were introduced – 'irrelevance', for cases that were deemed too trivial for further prosecution (an essential filter in a regime of obligatory prosecution and one not yet available for adults), and 'putting to the test' (*messa alla prova*), a type of probation with in-built requirements of work, schooling etc. – had therefore to be *pre-trial procedures* – ways of putting off and avoiding trial. It is because *messa all prova* is available for all crimes that prosecutions for murder often end up without going to trial provided the conditions of pre-trial probation measures have been successfully met.

Likewise, to make sense of obligatory prosecution, it is necessary to learn how Italian prosecutors actually behave, given the impossibility for handling all the cases on their desk simultaneously. Who or what is it that *de facto* decides priorities – the prosecution office or the single prosecutor – and on what grounds? The rule of obligatory prosecution can in practice strengthen the hands of prosecutors who give priority to some classes of cases rather than others (Nelken, 1997b; Nelken and Zanier, 2006). Finally, to understand the times taken by trials, it is vital to appreciate the workings of the system's own cut-off points for undue procedural delay. This so-called period of *prescription*, within which a case must run its course, applies right up until the hearing of appeal in the final court, after three stages of trial and any number of possible procedural objections. So defence lawyers often try less to prove their client's innocence than to make the case overrun it's allocated time.

For many criminologists, the main interest of comparative criminal justice lies in the help it affords for formulating and testing explanatory hypotheses about levels of incarceration rates, the retention of the death penalty, or whatever. Those looking for explanations of differences in criminal justice practices that translate quickly into policy arguments may be disappointed, however. Asking which penal disposal is better at reducing crime turns out to be more complicated than ever when asked across a range of countries, *many of whose criminal justice systems seem to give low priority to this goal*. We first have to understand why that should be the case. It has been argued that even countries like the USA, which claim to be most concerned with reducing recidivism, are less concerned with crime in its own right than with larger issues of social and moral discipline (Simon, 2007). And critics of penal policies may likewise be

as interested in wider questions of how to create a better society as they are in crime rates as such. In this field explanatory and evaluative issues, what works and what is right, are rarely easily separated.

Those with a normative agenda may seek to assess criminal justice systems as a whole. Is the problem that too many people are being sent to prison, or too few, or does all depend on which offenders we are speaking about? There are also interesting differences between criminal justice systems in what kind of evaluation, if any, is seen as appropriate for different actors in the system. Should judges be evaluated, by whom, for what conduct, and for what purpose? (Mohr and Contini, 2008). More commonly, commentators examine what goes on at a given 'stage' of criminal justice, or in one of its constituent organisations or networks. But because criminal justice practices are sites for contesting values, in order to make sense of what criminal justice agents are trying to do, we need to make sense of their normative commitments and will often be providing contestable interpretations of their behaviour.

In Anglo-American systems, for example, it is debatable and debated when plea bargains are to be considered the result of unfair pressures. Getting our normative bearings can be even more difficult in unfamiliar contexts. In Italy, some judges in corruption cases imprison those who refuse to confess, arguing that extracting a confession is the only certain way they have of being sure that the offender will no longer be trusted by his associates (and so be unable to repeat the offence). But many commentators see this as an abuse of criminal procedure. Should 'we' take one side or the other (and who are 'we')? How much allowance should be made for the larger context of political corruption in which judges find themselves, or for particular historical circumstances such as those that characterised the *Tangentopoli* anti-corruption investigations (Nelken, 1996, 1997b)?

Beyond ethnocentrism and relativism?

To make progress both in learning about and evaluating other systems of criminal justice we need to bear in mind two dangers. On the one hand, there is the risk of being ethnocentric – of 'confusing the familiar with the necessary'. Here we fall into the trap of assuming that the links between social factors, crime and criminal justice that we find persuasive are also ones that apply generally, and that what *we* do, our way of thinking about and responding to crime, is universally shared, or, at least, that it would be right for everyone else. Alternatively, there is the temptation of relativism. Here the claim is that we can never really grasp what others are doing, or that there can be no transcultural basis for evaluating whether what they, or we, do is right (see, for example, Beirne, 1983/1997; Leavitt, 1990/1997; Cain, 2000b; and Sheptycki and Wardak, 2005).

For some leading post-war authors the point of comparative work was precisely so as to 'uncover etiologic universals operative as causal agents irrespective of cultural differences between different countries' (Szabo, 1975: 367). The search for such generalisations continues. Authors seek to show that certain social groups or categories tend to be more punitive than others, or that similar forms of criminal conduct are, as a matter of fact, universally disapproved to similar degrees. Claims are made that, cross-culturally, people have similar preferences for fair trial processes and shared intuitions about how institutions such as the police must behave if they are to be considered legitimate (Lind and Tyler, 1988). A well-organised criminal justice state that reflects such public preferences is seen as the best way of helping victims of criminal behaviour (Newman, 1999).

The currently renewed interest in establishing and spreading 'evidence-based', transcultural knowledge of 'what works' in responding to crime (Sherman et al., 1997) is an important example of the search for universalistic knowledge in this field. On the one hand, this represents a valuable attempt to reverse the unwarranted, and partially unintended, pessimism induced by the earlier slogan that 'nothing works' in terms of dealing with offenders. But this type of 'globalising criminology' can also be less culture-free than it purports to be (Nelken, 2003a). Strengthening dysfunctional families is seen as the major route to reducing crime. Yet Mafia groups, like those of corrupt politicians and all groups of collaborative criminals, seem, if anything, to suffer from having too strong family or family-like ties. This approach also often gives insufficient attention to what different cultures mean by 'working' (especially in reference

to the procedures of criminal justice), as well as for whom it is that crime prevention and criminal justice is supposed to work.

By contrast, there are authors who contest this search for universals and suggest the point of comparative research is rather to undermine the pretensions of positivistic criminology. For them, careful examination of foreign criminal justice practices suggests that it is, above all, the certainties buried in universalising approaches to explanation, such as the claim that all systems find ways of relieving caseload pressures, or that criminal law must always serve the interests of the powerful, that turn out to be cultural rather than scientific truisms. Differences between what societies define and treat as crime can be striking – and not only in the obvious areas of political and sexual deviance. The USA is still sending people to their death in the electric chair, but, in 2008, a fairground owner in Italy was convicted of a crime against public decency for exhibiting a pretend one! The same applies to solutions to deviance. Writers in the UK are convinced that military-style policing always alienates police from the community and so cuts down the supply of information. But in Italy the fact that the militarised *carabinieri* live in barracks apart from society is seen as a guarantee of their independence from potentially corrupting local ties. This is especially important in the South where organised crime groups hold so much sway.

Deciding what is ethnocentric or relativistic is not always straightforward. It is, of course, not ethnocentric to have value preferences – only somewhat suspect if these simply coincide with those we have been brought up to believe in. Thus American textbooks tend to warn of the price that countries such as Saudi Arabia or Japan pay for their low crime or low prison rates. Yes, Saudi Arabia has less crime, but 'we' would not want to have as little 'freedom' as they do. It is true that Japan has low levels of incarceration but some of the things the Japanese do in their criminal process to make this possible we would not find acceptable, and, more generally, 'their 'conformist way of living is not for us (Dammer, Fairchild and Albanese, 2005: 9).

It is moot whether we can use Anglo-American categories, such as 'due process' versus 'crime control' (Packer, 1964), or speak of 'justice' versus 'welfare', as if they referred to universal predicaments. A surprising example of what can be seen as an ethnocentric approach is provided by the great criminologist Edwin Lemert, one of the inventors of the social

reaction and labelling approach, and also a specialist in juvenile justice. In a widely reproduced paper about the Italian system, Lemert noted the enormous disproportion between the number of juveniles arrested and processed in the USA and in Italy. But, rather than see this as an indictment of the American approach, he argued that the Italian system was what he called a 'spurious' example of juvenile justice because it could not be seriously considered as trying to implement a welfare system for juveniles on the American model (Lemert, 1986). As it turned out, it was the USA that moved away from the welfare model that the Italian system has been steadily consolidating (Krisberg, 2006).

An emphasis on the importance of diversity and the particular is not the same as relativism (Dembour, 2006). Different arrangements may indeed – rightly – be appropriate under different conditions, and changing conditions may also alter the relevance over time of given values even within the same culture. Roach, for example, argues that the rise of victims' groups challenges the continued utility of Packer's categories, even in Anglo-American settings, by showing that these were focused only on the roles of the state and the accused (Roach, 1998). Even if some practices work well locally, they may not be easily transferable. It is hard to imagine other places copying the Japanese in seeking to reform a rapist by telling him to write a *haiku* (Johnson, 2000). But their wider applicability should not be confused with understanding how they work as they do *in loco*. If the question was how the continental methods of control over the police would work in the USA, then Goldstein and Marcus were right that such methods would be insufficient to avoid potential abuse (Goldstein and Marcus, 1977). But, in so far as the issue was rather trying to understand what other places were actually trying to do, and sometimes succeeding in doing, *in the context of their own structures and expectations*, then Langbein and Weinreb had the better of the argument (Langbein and Weinreb, 1978).

Conversely, if we wish to avoid ethnocentrism, it is not sufficient to be critical of our own practices. This too can be formulated in ways that take for granted local values which are then projected on 'better' systems elsewhere (e.g. Pizzi, 1999). It is often helpful to ask whether we may have fallen into the so-called 'evil causes evil fallacy' (Cohen, 1970). Just as it can be a mistake to assume that the causes of crime must necessarily be other objectionable matters, we need to be open

to the possibility that aspects of criminal justice that we disapprove of may be connected to positive and not only negative factors (and vice versa for matters we approve of). Criminologists who try to explain which states in the USA have the highest prison rates tend to single out factors that most criminologists would consider negative in their own right, such as lower welfare levels, less effort to ensure economic equality, and less public participation in political life, or the power of only certain groups to participate where it matters. But this can also be linked to the rise in concern for victims, or the introduction of determinate sentencing through sentencing guidelines. To a limited extent even the effort to abolish or limit the use of the death penalty can increase the use of prison (Gottschalk, 2006). Prison building restarted in the Netherlands in part so as not to abandon the principle of one person to a cell. It has been suggested that egalitarianism in the USA led to an increase rather than a reduction in levels of state punishment (Whitman, 2003; Nelken, 2006e).

More individualist and more collective societies can each have their own sort of pathologies, for example dealing with difference by excluding it or by enforced assimilation (Young, 1999). Assuming that places with lower prison rates necessarily operate more 'inclusive' systems of social justice can be the kind of short-cut that can easily lead to a dead end. Learning from what others do is not so straightforward. On closer acquaintance we may well find that we like the result achieved by other systems of criminal justice, but not the means they use to get there, or vice versa. (In Italy it is the politicians' sense of their vulnerability to criminal prosecution that helps explains why criminal procedure is so complicated, and hence why less people end up in prison than might otherwise do so).

The need to give attention to the local and the particular does not mean that we cannot ever talk about 'best practice', as evaluated according to widely shared standards. Even if considerable caution needs to be used in interpreting cross-national ratings, some places may be doing better or worse in terms of such standards. If one in ten children in Denmark who grow up in local government care homes go on to further education, whereas in the UK only one in a hundred do so, then we would do well to try to learn how this is achieved. But comparative research should not be treated only as a means of identifying

universally valid best practices to be adopted wholesale. We can also explore what happens elsewhere so as to engage in 'internal critique' according to our own standards. Those in common law systems could learn that paying more attention to 'due process' considerations could also help achieve the goal of 'crime control' (by increasing legitimacy, public confidence and cooperation). Conversely, French authors could discover that strengthening the role of defence lawyers in their system could help increase the chances of truth emerging from the process – a key value for them.

What this implies is that *the best practice for 'us' to learn from may not always be best practice as such*, but rather that which stretches our imagination about what is possible. Moving a little nearer to what we would otherwise never normally think of doing may be just what is needed. It may seem obvious to many observers of Italy (as well as to some Italians) that the Italian criminal justice system could benefit from increased pragmatism and managerialism. But vice versa, Italy may have something important to teach more pragmatic countries about the possible counter-productive consequences of too much concern for 'efficiency' in their penal systems.

Take the three running examples being used in this book. The Italian juvenile system may seem to offer insufficiently robust procedures for dealing with the type of problem situations that Anglo-American systems face. But, in England and Wales, the government's recent stress on dealing with caseloads more expeditiously mainly led to a substantial rise in youth custody, in contradiction to its general commitment to reduce this number. As far as the rule of obligatory prosecution is concerned, it is not obvious that those who want to bring about a more equal society can or should immediately seek to achieve this by opting for the Italian rule of mandatory prosecution. Even the Italian system achieved the effects it did only during an exceptional period of political transition, though it is also fair to add that the judges themselves played an important part in bringing about that transition. Under 'normal' circumstances, the degree of independence possessed by Italian prosecutors can lead to continual and distracting tests of strength with governments, which weakens collaboration in organising much needed reforms of the criminal process. Nonetheless there may be much to be learned – for countries where prosecution is less independent – about the different

possible meanings of prosecutorial independence, and the social and political preconditions and consequences of such independence.

The example of Italian trials raises even more issues. Certainly, justice delayed may often simply be justice denied. Delay reduces the chance of conviction because of its implications for the witnesses' memories, willingness to collaborate, vulnerability to being got at, etc. Once it has accumulated, delay itself produces more delay and uncertainty, and, because final trial verdicts are so slow in coming, Italy is increasingly experiencing trial by media as the daily newspapers treat even information about the earliest stage of an investigation as a token of presumed guilt. But, in so far as delay is produced by given rules of criminal procedure, this should lead us to think more carefully what 'due process' (what the Italians call *garanzie*) should actually require. How many stages of appeal should there be? How much need is there for separate scrutiny at each stage by different judges (and how appropriate is it to restrict all such decisions to legally trained people)? Why is it not enough to trust to the system's own internal legal definition of when cases have overrun the time in which they must be disposed of?

We can even ask whether slowness can ever have value. At a conference in Padua on the topic of legal delay in which I participated, it was surmised that delayed trials could give victims time to get over their upset so as not be so emotional. This may seem less strange a suggestion if we treat criminal justice, as one important progressive Italian theorist does, as primarily a means to restrain vendetta in the interest of the offender (Ferrajoli, 1989; Nelken 1993). This is certainly a very different perspective from the current trend to make the victim and his and her feelings play a more central role. Criminal justice also reflects wider social values. A more efficient or speedy court system in Italy would often come into conflict with a social structure and culture in which many people place reliance on slowly built-up forms of group co-optation and clientalist sponsorship, sometimes even in defiance of legal rules. On a more positive note, Italy has been called the spiritual home of the slowness movement, the call to all of us to slow down so as to get more out of life (Honoré, 2004). Perhaps slow food and fast trials are incompatible?

TWO

just comparison

What makes for a fair comparison? Where do and should we start from in making comparisons? Should we be looking for similarities or for differences? What do we mean by comparing like with like? The answer to these questions depends in large part on the point of the exercise, on what is being compared, and on why. Hence the discussion in this chapter is connected to all the others in this book. The main point I seek to make here, however, is that difficulties in finding answers to these questions should be seen less as practical obstacles to be got over or got round and more as clues to understanding difference.

Starting points

Where we begin is all-important in any comparison. It is too easy just to fasten on differences in national statistics about criminal justice and then seek to explain them. Too often, however, this means we presuppose rather than learn how to change our intellectual coordinates. To do this we need to seek out puzzles and then make sense of them. But enigmas do not exist in the abstract; they emerge when relating what is considered salient in the place concerned – its own starting points in thinking about crime and criminal justice – to what is salient for the investigator. Once, when I remarked impatiently that a particularly convoluted bureaucratic requirement in Italy was 'Kafka-like', a colleague

replied sharply 'It's Kafka to you!' (But perhaps that is also what the good citizens of Prague may have said to Kafka?).

There certainly are criminal justice practices that can be considered strange even in supposedly more pragmatic cultures. What sense is there in allowing, as the Dutch do, the retail sale of marihuana to customers in 'coffee-houses' while continuing to prohibit the wholesale supply of it to the same places at the back door? How would Americans explain to foreign observers that one Reagan appointee to the Federal Office of Juvenile Justice and Delinquency Prevention carried a bumper sticker on his car reading 'Have you slugged your kid today' (Krisberg, 2006: 8). The UK government allows shopping malls to deter unwanted bands of young people by using 'mosquito' machines that emit annoying sounds that can only be heard by youngsters; the not always as effective alternative, apparently, being to play popular music records from the 1950s (Crawford, 2010). That these last two examples both have to do with young people is not happenstance.

The point is that unless we can somehow get a grasp on the ways our cultural assumptions shape our comparative projects we are unlikely to make progress in understanding another society. For example, as compared to socio-economic factors, the role of religion and the family currently finds little space in many cross-national explanations of prison rates. But this may have mainly to do with the socio-cultural starting point of those doing the comparing. What are considered problems and solutions varies from place to place, and from time to time. Zedner reports that she had difficulty in convincing colleagues at Chicago during a visit there that gun-carrying by teenagers was not in fact the pre-eminent problem of crime-control everywhere (Zedner, 2003: 167). If we keep reading about corruption in Italy and less so in the UK (at least until recently) this could be not only because there actually is more corruption in Italy but also because it is more salient there (Eve, 1996). Starting points also shape what are seen as appropriate solutions. To a large extent, in Anglo-American countries (as Continental Europeans refer to them) a solution is widely considered right because it 'works'. But, in the less policy-dominated discourse in Italy and some other continental countries, it would be as true to say that, for many commentators, a response 'works' because it is 'right', and less attention is given to what actually happens as opposed to what ought to happen.

In Italy, until recently, it was common for the victim (or relatives of victims) of horrendous crimes to be asked by journalists if they were willing to forgive the offender (rather than being enlisted by politicians or journalists so as to show the need for greater severity). But things change. For one leading author writing about Italy in the 1990s, the concern was less about 'governing through crime' (Simon, 2007) than 'ruling through leniency' (Melossi, 1994), as shown in the willingness of governments to rule without contesting the power of organised crime groups. But, even in Italy, campaigns against crime by immigrants have become an excuse for giving more attention to 'victims' (usually ignoring the relatively high proportion of immigrants who end up as victims of serious crimes). Melossi himself now focuses his work less on leniency than on the serious problem of the criminalisation of immigrants. If Zedner's colleagues from Chicago had visited London in the summer of 2008 they would have found considerable concern over deaths caused by knife-carrying youngsters.

These points about structures of relevance have important implications for projects involving collaboration between experts in a various countries. Sometimes the hope is that important cross-national similarities and differences will emerge from detailed descriptions of what goes on in different places. Michael Tonry, for instance, assembled leading scholars to describe what was happening to crime and punishment in their respective countries (Tonry, 2007b). Junger-Tas and Decker (2006) collected reports from a large range of experts more specifically on developments in juvenile justice. At other times editors explicitly invite their contributors to address a common issue. Thus Pratt et al. (2005) and Muncie and Goldson (2006) ask their contributors to focus on the issue of where the countries and systems they are describing stand on the issue of growing punitiveness. Alternatively, a more elaborated hypothesis may be put forward for testing cross-nationally. In their study of police integrity, Klockars, Ivkovich and Haberfeld (2004) standardised a survey instrument to be administered to police organisations in a variety of countries. This was intended to measure the extent to which reported expectations about possible internal sanctions likely to be forthcoming from the organisation were correlated with reports of the frequency of inappropriate behaviour actually taking place.

There is much to be learned from these books. But, while the chapters are often of high value in their own right as guides to local developments, what emerges is often only of tangential relevance to cross-national generalisations. Junger-Tas and Decker's main finding, for example, says little more than that there are consistent differences between what has been happening in Anglo-American and Continental European jurisdictions. Contributors to these types of collective work are themselves often caught in a dilemma of how far to tell us all about their own country in terms of local concerns and how far to follow the editor's guidelines and refer to the common trend or hypothesis. The best way to explain what is happening locally may be neither in terms of the system following a common trend nor in terms of it resisting it (see e.g. Nelken, 2005).

As far as testing hypotheses is concerned, it is not easy to move between the general and the particular. Klockars, Ivkovich and Haberfeld were searching mainly for cross-national and cross-cultural explanatory 'universals' about the relationship between organisational culture, police misbehaviour and the responses to it. They claimed to show that police officers in general agreed about the relative seriousness of forms of police misconduct, but their survey instrument was particularly apt for the decentralised USA, where different police agencies vary enormously in how far they tolerate police misconduct. However, the authors of the Swedish contribution paid little attention to local variation, and much more to that between the sexes. For them, the problem of public police running private security businesses had a symbolic importance that was not necessarily generalisable. More radical still, the survey of Japanese police showed an impressive level of integrity. But the author cautioned that this could be due to the cultural norms that oblige the police in Japan to reply to enquiries in certain ways, and suggested that the real problems of police integrity lay at the top, in particular in police collusion with gambling and organised crime.

The question of salience is also linked to the units that we do or should use as the reference points of our comparisons. The assumption is that some places are more important than others for the contribution they can provide in clarifying issues in comparative criminal justice. Many textbooks talk, for example, about model nations, prototypes, archetypes, etc. (Pakes, 2004; Dammer, Fairchild and Albanese, 2005).

But the choice of which nations to discuss seems somewhat haphazard. Some places, such as Japan, Switzerland and Saudi Arabia, have lent themselves to be used as exemplars of large possible differences in crime rates or prison rates. Among Western industrialised countries the USA is, in some respects, the most exceptional country (not only for the size of its prison population, but also in the centrality of criminal justice as a form of social control). But, given that it is the place where most textbooks are written, much writing about criminal justice assumes it as a background, and its approaches often spread by imitation elsewhere. By contrast, some other countries, such as the allegedly more 'inclusive' and tolerant Scandinavia countries, are currently idealised because of their relatively low incarceration rates. But such places are much more complicated when taken in their own terms and not only treated as exemplars of leniency. Thus Finland is strongly committed to repress drug dealing, and Sweden to cutting down prostitution.

The units of comparison to which scholars refer tend, mainly for reasons of convenience, to be nation-states, although categories taken from comparative law are also common. More imaginative comparisons use units which reflect differences in religious affiliation, between 'guilt' and 'shame' societies, or ideas about 'high-context' and 'low-context' cultures, and so on. In addition to comparing states or societies, some authors compare sub-units, subcultures, organisations and even actors within criminal justice systems. So-called 'epistemic communities' (Karstedt, 2002) of regulators or scholars also represent possible units for comparison.

It is not always clear when we should favour multi-sited research as compared to single case studies. (Even studying a single society counts as a comparative study if it is being conducted as an implicit comparison with one or more other societies.) Zimring distinguishes between what he calls 'distributional' and 'contextual' comparative work (Zimring, 2006). To see variations across places, he claims, is useful if we are dealing with Italy, but essential if we are studying Belgium. On the other hand, a focus just on the USA, he argues, can be justified so as to isolate what is special about it. But we could also say that, depending on our purposes, even smaller jurisdictions could sometimes need to be studied contextually. What is clear is that the larger the number of societies being compared, the more difficult it will be to formulate variables that are salient cross-culturally. On the other hand when only a limited

number of places are compared, it is possible to be misled by missing the larger picture. Some early comparisons between the American and Japanese criminal justice systems left out of consideration the fact that it was European Continental models that shaped legal institutions in Japan – something which would have done much to explain features which to American eyes were taken to be characteristically Japanese. The much lower incarceration rate in Italy as compared to the USA is less interesting once Italian rates are seen to be in line with those in Europe more generally. Indeed, it ceases to be something that tells you much about Italy as such.

Depending on our purposes a large variety of 'units' may be usefully compared. We can compare whole societies, as in identifying distinct patterns to European and American ways of responding to threats like drug trafficking (Fukumi, 2009), or nation-specific approaches to stopping human trafficking (Munro, 2006). Or we may seek to sharpen our understanding of different features within criminal justice systems, whether they be police practices, prosecution procedures, the rights of victims and defendants, negotiated justice, or the influence of the media (Delmas-Marty and Spencer, 2002). We may thus discover that the antibodies to political corruption in Europe are (or were) mainly to be found in the bureaucracy in Germany, in the judiciary in Italy, and in Parliament in the UK (Della Porta and Meny, 1997).

Just as many comparisons in criminology consider the influence of general trends, such as the growing period before young people find work or increasing immigration, so the same applies to developments in dealing with crime problems. We can look for differences across places in the rise of preventative measures or restitutive justice, the decline in the power of the state as compared to the market, or the loss of faith in some professions accompanied by the rise of new ones. But working out the various implications of trends can be complicated. There may, for example, be growing intolerance of some kinds of behaviour but increasing tolerance of others. Hence, in addition to examining differences in criminal justice systems seen statically, we must also investigate their dynamics as they each react differentially to similar kinds of challenge over time. Litigation or administrative remedies may offer two contrasting, though not necessarily equally effective, routes to protecting prisoners' rights, but the balance between them may change

(Lazarus, 2004). Often a *cause célèbre* provides a good opportunity for comparative analysis. Consider, for example, the different responses in the UK and Norway to extreme cases of murder by young children (Green, 2007). Interestingly, the Italian juvenile justice system, despite allowing most juveniles accused of murder to be dealt with by pre-trial probation, drew the line in the so-called Erica and Omar case, where a pair of middle-class teenagers killed the girl's mother and younger brother. Their lawyer did in fact ask for this disposal, but they actually received 16 and 14 years in prison.

On similarities and differences

All comparison involves the identification of similarities and differences over space and time. Why do nation-state prison rates tend to group together at the same level by geographical areas? (Aebi and Stadnic, 2007). If Italy and Spain share many similarities in their criminal justice systems (including their current criminalisation of immigrants), how much this is to do with their political economies and how much to do with their histories and religious traditions? Or comparative work can involve arguing that what seems different is really similar, and vice versa. Showing similarities or difference in itself, however, is not enough. We must have theoretical justifications for showing why our findings are interesting (because unexpected). It is usually of limited interest to demonstrate that societies do not behave as would be expected according to ideal-type classifications of families of law. Such discrepancies may only tell us about the weakness of our starting points.

If the issue is how to look for the unexpected, it may be helpful to bear a number of rules of thumb in mind. First, we need to avoid assuming similarity at all costs. As Geertz puts it, 'the comparative study of law cannot be a matter of reducing concrete differences to abstract commonalities ... law is local knowledge not placeless principle' (Geertz, 1973: 215). Indeed, some leading comparative sociologists have insisted that at a time where forces conducing to homogenisation are so strong, we should focus more on differences than similarities. The particular is not only often more interesting than the general; politically speaking, it is

the right choice, because we should be seeking to preserve particularity and diversity (Sztompka, 1990). Sexual offences and corruption are particularly rich areas for cross-cultural comparison. In Japan, President Clinton's wife would have had to apologise for her husband's conduct (West, 2009). Such differences remind us of the need to descend from the high level of abstraction, where it is too easy to assume that there must be more similarities than differences.

On the other hand, we also need to be aware that differences can be and often are exaggerated (although the 'social achievement' of constructing such purported differences may in fact be what we want to explain). It has been plausibly claimed by a leading author that Continental Europe is more receptive to rationalistic technology transfers whereas England and the USA are more resistant to abstract ideas (Tonry, 2001). But the idea of rights is crucial in the USA and even the UK played an important role early on in drafting the UN Declaration of Human Rights. Thus, although I have given this book the subtitle *Making Sense of Difference*, sometimes the challenge may be more to explain similarities than differences (in so far as they are different from what we would expect). *Comparative work is both about discovering surprising differences and unexpected similarities*. Setting out to demonstrate that all higher courts play a central and less than independent role in ensuring governmental social control becomes a provocative argument if the cultures surveyed are as different as Muslim, Chinese, French and British (Shapiro, 1981). We may want to explain why judicial power is growing in places otherwise as different as Italy and Thailand.

The search for differences is often motivated by the desire to show the limits of supposedly universal claims (though without necessarily assuming a priori the impossibility of finding cross-cultural truths and values). Johnson's work on prosecutors in Japan was intended not only to show their lack of interest in producing convictions, but also to criticise those (largely US) scholars who argued that 'all prosecutors', by the nature of their job, aim to maximise convictions (Johnson, 2000). Italy, too, can provide valuable examples for this purpose. Criminal justice usually targets the poor and less powerful and offers immunity to the more powerful. Yet in the 1990s the judges managed to use the criminal law there so as to cancel all the traditional parties of government (Nelken, 1996).

One clue to interesting similarities and differences can be found in 'significant absences', as Lacey and Zedner argue when describing and explaining the historical reasons for the absence of a discourse about 'community justice' in Germany (Lacey and Zedner, 1998). In Italy, why are policemen rarely seen as authoritative spokesmen on the crime problem? Why do popular newspapers there still have less power to shape political action over crime than in the USA and the UK? Understanding the causes, consequences and meaning of such 'significant' differences in fact requires interpretation and explanation of both *absence* and *presence* in each of the cultures concerned. To understand the role played by laymen in criminal justice in Britain as opposed to Italy, it would be necessary to investigate *both* the reasons why the involvement of laymen is favoured in Britain as well as what state officials symbolise in Italy. If the Italian system of criminal justice has relatively more built-in leniency than the Anglo-American system, we need to explain both the comparative indulgence of the first and the harshness of the other.

Working out the significance of absence and presence can be even more complicated than this. *Absence has a shape*, in the sense that there may be a definite sense of what is missing. Many Italians bemoan the lack of a well-functioning state, and though they mainly lambast their politicians, they also sometimes blame themselves (the expression 'we don't have the sense of the state' is heard frequently). But the state they feel the absence of is quite definitely the French or German idea of the state, with its collective project taken forward by the organs and officials of the nation, rather than the 'foreign' English or American liberal conception of government as the servant of civil society (Dyson, 1980). In the European tradition 'the legal system is the way the state makes ethical the system of needs of civil society' (Melossi, 1990: 100–2). From this continental perspective it is the Anglo-American ideas of the state, one in which popular sovereignty replaced the role of the ideal representative of social and political stability, and in which private interests have an inherent legitimacy, which seemed, and can still seem, strange (Ferrarese, 1997).

When it comes to identifying distinctiveness on the basis of 'absence and presence', we need to be aware that legal and political discourses may have only an uncertain relationship to social practices. The observer may find the 'problem' or threat to be similar, but the rhetoric very

different – or vice versa. Both practice and discourse therefore need to be studied independently as well as in relation to each other. In one country, the debate may centre on public order policing, while, in practice, police surveillance goes on unnoticed; another culture may be concerned about the risks of private surveillance, but take for granted the role of public police patrols (Zedner, 1995: 526–7). The relationship between discourse and practice can also be paradoxical. The Italian national state is, *in theory*, a collective impersonal project. *In practice*, however, its survival with any sort of credibility often comes down to the calibre and integrity (or the lack of these qualities) of a very limited number of individual politicians, judges or policemen, some of whom risk martyrdom in its name. In Britain there is much less use of the notion of 'the state' as compared to simply talking in a relatively personalised way about the government of the day. But there seems to be no contradiction at all between this talk of individuals and strong identification with the nation-state (helped by, but surely not reducible to, the institution of the monarchy).

Comparing like with like

It is commonly said that a comparison is only valid if we are comparing 'like with like', but teasing out what this means is not easy. As Sztompka (1990: 47) asks: 'What makes a difference a difference? When is the same really the same, when is the same really different?' For some purposes, it can even be useful to compare like with unlike, as when Hagan looks for similarities in 'exclusion' in the global north and global south (Hagan and Wyland-Richmond, 2008). Could the way the UK deals with white-collar criminals have at least something interesting in common with the methods Italy uses for handling juvenile delinquents in the way it seeks to avoid criminalisation at all costs? What some see as the 'narcissism of small differences', others may regard as very important, as when scholars insist on the differences in the USA and English versions of 'zero tolerance', or point to considerable differences in the way common law countries interpret the role of problem-solving courts (Nolan, 2009). Continental Europeans often talk of the Anglo-American

type of law, but common law scholars point to profound differences between the formalism of the English system of law as compared to the substantive approach of American law.

Considerable argument and evidence may be needed to show whether or not extraneous matters undermine the point of a comparison. On the one hand, what is being compared will always be different in some respect or else there would be nothing to compare. On the other hand, unappreciated differences in respect of relevant features of what we are trying to understand can be so significant as to undermine the value of any given comparison. Can juvenile justice in Italy be properly compared with that in the UK, given the larger role of the family in Italy? Is that the key to the comparison or rather a factor that takes away its point? When Savelsberg and King (2005) point out how much more Germany has institutionalised efforts to seek public atonement for the Holocaust/Shoa than American governments have done for their genocide of Native Americans (or for the victims of slavery and the slave trade), there may be some who think it debatable whether this is comparing like with like. But it is a debate worth having.

What is meant by comparing 'like with like' is the effort to hold constant in our comparison those factors – regarding time frames, threats, legal systems, economies, politics or whatever – which would otherwise take away the point of a given comparison. At the same time, however, it is usually reference to those factors that will also form part of our explanation of difference. It is the apt choice of constants which set up the puzzle at the heart of any worthwhile comparison: the more the constants would seem to cover relevant factors, the more surprising and instructive the finding of difference. Why do different countries in the European Union deal with similar European Union frauds so differently? (Passas and Nelken, 1993). If victims have the 'same needs' in Germany and the UK, why is the police response and the activity of victim groups so different? Why are victims even more satisfied in Germany despite getting less attention than they do in the UK? (Mawby and Kirchoff, 1996). Why, under the same type of communist system was the role of prosecutors weak in Poland but strong in Russia? And why does that still remain true? (Polak and Nelken, 2010).

The central claim of this book is that we will face difficulties in identifying what to hold constant unless we already know quite a lot about

the places being compared (and the larger the number of units being compared the more tricky this can be). To compare levels of punitiveness it is not enough just to compare prison rates. We can and must go beyond mere quantitative measures of penal sanctions so as to add a qualitative dimension of 'harshness', for example with respect to the way prisoners are treated (Whitman, 2003). But even this may not be enough to be sure we are comparing like with like. What should we do about other types of social control that exist in a given society? What of the fact that, in some countries, the numbers held involuntarily in other types of total institution, especially mental asylums, have fallen almost in proportion to the rise of the numbers in prison? Even if there is no simple transfer of populations going on here, we should not lose sight of this reverse trend to decarceration. A generation back the fear was that the proliferation of such 'soft' social control would lead to the growth of the 'punitive city' (Cohen, 1985). Are we now just to ignore such types of punitiveness? Current 'penal technologies' bundle together risk prevention and welfare strategies for different offences and offenders in ways that undifferentiated talk of punitiveness fails to capture.

If the number of black people imprisoned in the USA rose seven times in the later nineteenth century after the abolition of slavery, this surely must have implications for measuring the level of punitiveness before and after that event. Limiting our discussion only to changes in prison rates would certainly be misleading. But, if this is true in looking at US prison rates over time, we can imagine at least as great difficulties when we engage in cross-cultural comparisons. What of the fact that the police in Pakistan, Brazil and elsewhere are said to be involved in thousands of semi-institutionalised killings yearly? (Johnson and Zimring, 2008). Both the Mafia in Italy and the *Yakuza* organised crime groups in Japan are involved in social control (with, at the extreme, their own form of death penalty). Why should this not count when considering the statistics of penal control?

Some American textbooks do bring in so-called 'informal' social control as the explanation of differences in criminal justice in discussing low prison rates in Japan and Saudi Arabia. Japan may have comparatively few people in prison, but the risks of ostracism for rule-breaking may often be considerable. Sociologists of the family in Italy speak of

a generation living in a 'gilded prison' that has had little chance to have any political role in society. But it is not simply that other forms of social control supplement official criminal justice. Criminal justice itself may be understood primarily as the control of the poor (Waquant, 2009a, 2009b), or a way of reinforcing the restrictions on racial or ethnic groups (Tonry, 1995), though how (far) this is true will vary from place to place.

In addition, and contrary to the claims of some behavioural sociologists of law (Black, 1976), there is no reason to assume that repressiveness in the wider society ('informal social control') and the use of prison ('governmental social control') are inversely correlated. We can, for example, identify societies, such as China, that are both repressive and have high prison rates, and others that are repressive but have low prison rates, such as present-day Saudi Arabia, or Spain under Franco. Where the USA, with its high prison levels, fits into this picture is more uncertain. Certainly, law enters in detail into every part of life – and criminal law since 9/11 and the Patriot Act has been ever more ubiquitous. Simon's celebrated analysis of 'governing through crime' (Simon, 2007) argues that the metaphors and methods of criminal justice have been replacing other forms of social control in the family, the school and the workplace. But relative to many other places, the USA still, in some respects, bestows an unusual level of political and religious freedoms on groups and individuals.

The fact that we are always holding some things constant means that we are rarely dealing only with similarities or differences. Rather, what we will usually need to explain is the *unfamiliar mixture* of both in any given case. Noting this can help us avoid the common error of seeing patterns of criminal justice elsewhere as made up of only their differences – and not also by their similarities to us. Cities in the USA and Europe are governed differently but social control is built into urban design in both places (Body-Genrot, 2000). Surveillance in Japan has similarities with that found in Western countries, but it also has suggestive specificities (Wood, 2009).

When we set out to 'tell difference' (Nelken, 2000b) we always need to think 'as compared to what?' It would not be difficult to point to much that is special about crime and criminal justice in Italy: the level of organised crime (with four powerful crime groups conditioning

political and economic life in much of the south), the unresolved problem of political corruption, the struggle between the long-standing Italian premier Berlusconi and the judges he regularly accuses of persecuting him, the delays that afflict the legal system, and so on.

But there are also many similarities in how criminal justice works in Italy and advanced Western societies, and the commonalities between Italian and many other Continental European approaches are even greater. We can find parallels in Italy to many of the developments and concerns that are at the centre of research on criminal justice in Britain and other English-speaking countries. In both settings there is considerable discussion of the exponential increase in crime since the Second World War and the more recent apparent growth in the fear of crime. The same types of socially and economically marginal people fill up the prisons, usually for offences involving theft or drug dealing. Likewise, the evolution of crime prevention follows much the same pattern and local government initiatives are taking on some of the responsibilities previously monopolised by the state. Along with increasing resort to technology, such as investment in closed-circuit television, there is a massive growth in private policing in securing the safety of banks, and the 'public-private' spaces of shopping malls, though not as yet so much as an essential part of housing developments for the rich.

In Italy, too, we can discover experiments in mediation between offenders and victims, especially in cases involving juveniles. It also takes part in international victim surveys and organises annual victim surveys for internal monitoring of its crime problem. Slogans such as 'zero tolerance' are used by political campaigners of different persuasions, both by the mayor of Milan responding to social alarm over increased street crime, and by women's groups taking forward their struggle against assault and harassment in the home and at work. All over the world, Italy included, public opinion about crime is increasingly shaped by the 'virtual' knowledge produced by the media and this in turn shapes police action as they seek to build legitimacy and defend their resources.

To some extent it is a matter of choice whether to emphasise similarities or differences, and this choice will often depend on the purposes of our comparisons. We may be tempted to argue that we cannot learn from practices in another society because it is 'too different' from ours.

But sometimes an institution is borrowed in the hope it will actually help make the borrowing society more similar! Claims about both similarities and differences, or normality and exceptionality, can have consequences and be exploited for political purposes. The elites in post-war Finland sought to bring down their incarceration rates so as to be more in line with other Scandinavian countries. The Canadians keep a watchful eye on their own rates so as to show how very much lower they are than those in their powerful neighbour but seem less concerned that their rate is higher than those in Europe. Policy-makers in Scotland would like to think that their criminal justice system is more enlightened than that of England and Wales – and sometimes it is.

Societies, institutions, places, rates, ideas can all be exceptional or 'normal'. But findings about the existence of difference or similarity are not in themselves 'progressive' or otherwise. This depends on the specific arguments advanced. As Maureen Cain has argued, we need to take care that our comparisons do not fall into the vices of either Occidentalism or Orientalism, i.e. making other cultures seem necessarily similar to ours, or intrinsically 'other' (Cain, 2000b). *Pace* Sztompka (1990), too much insistence on difference can also sometimes be a form of 'othering'. There is no denying that external influences often produce pressure for change to 'normality', but sometimes they also come from within. A variety of Italian writers, just after the *Tangentopoli* investigations had revealed widespread political corruption, wrote books bemoaning the fact that Italy was not a 'normal' country. On the other hand, 'best practice', by definition, is also not normal.

THREE

ways of making sense

The theoretical approaches we draw on to develop persuasive accounts of the workings of criminal justice in different places will vary according to the topics being investigated. As is seen in some of the most powerful recent analyses, such as those of Garland (2001) or Waquant (2009a, 2009b), we need to draw on both the materialist and symbolic dimensions of punishment. In line with the major theme of this book, I limit myself here to discussing the basic question of how we attribute or grasp meaning. First, I contrast explanatory and interpretative enquiries and say something about how such strategies can be brought together. I then go on to consider how the choice of approach shapes the place of terms like 'culture' and 'legal culture' in our attempts to make sense of difference.

Explanation versus interpretation

The choice between causal explanation and empathetic interpretation, or between nomothetic and idiographic approaches to social behaviour, are vexed and still controversial questions within the methodology and history of the social sciences. On one approach, still dominant in the influential USA criminological literature, our task is to search for cross-culturally valid explanations. The role of science is to get beyond common sense and the individuals we are studying may not know the

causes and consequences of their actions (especially the unintended ones which are often the result of unexpected combinations with others). In categorising countries or societies as more or less religious (for example, in relation to the retention of the death penalty) we do not necessarily need to approach this causal factor as participants themselves would understand it. The choice of which variables to study will be based on previous research by the community of scholars; each new research then seeks to take matters further.

By contrast, for more interpretative approaches, intentional social action is what produces social outcomes. Religion as a key factor effecting outcomes must therefore be religious teaching as understood by those involved. This can help us understand why links between religion and aspects of criminal justice can be different in different places and at different times. Social actors can draw selectively on their cultural heritages as a 'tool-kit' or resource (Melossi, 2001). For classical writers, such as Weber our accounts must be persuasive both at the level of cause and the level of meaning. But there are even those who would reject any search for causes and move enquiry more into the realm of 'how' than that of 'why' questions. They would focus on the shared construction of meaning – on how and when the efficacy of 'religion' is invoked, and by whom.

There are leading writers in this field of social research, just as in others, who line up more towards one or other end of this continuum. On the one hand, we could take Greenberg and West (2008) as a model example of a cross-national study of variables carefully correlated with the use of the death penalty (that shows religion to be the decisive determining factor). At the other extreme, in his subtle account of policy-making for victims of crime in Canada, Paul Rock tells us that developments cannot be analysed with 'clear cause and effects' since events 'fold back on each other' and 'officials make causes through their arguments rather than vice versa' (Rock, 1986: 67ff). But it would be a pity if comparative criminal justice were to become just a battle-ground for proponents of different approaches to explanation (Travers, 2008).

To stress the value of interpretation in cross-cultural enquiries does not imply, as some argue, a commitment to relativism (Pakes, 2004: 13), or make it impossible to establish 'non-contextual truths' (Edwards and Hughes, 2005). There is nothing relativist about the claim that the

correlations we investigate or discover become 'explanations' only when given 'sense' by theoretical hypotheses shaped by our different cultural experiences (which accounts for why we find some explanations more 'plausible' and normatively attractive than others). Rather than claiming that interpretative understanding should replace the search for explanation, I have insisted on the need to combine these two approaches (Nelken, 1994b), arguing that 'understanding' must come 'before', as well as 'after', 'explanation' (Nelken, 2002). Urging comparativists to be more reflexive about which variables they select for their explanations is a goal that only a non-relativist would bother to pursue.

The choice between explanation and interpretation often also overlaps with – even if it should not be confused with – the difference between quantitative and qualitative approaches and macro-social and micro-social levels of analysis. Large-scale quantitative cross-cultural comparisons in particular require some sort of common denominator of meaning for key dependent variables such as rates of crime and punishment. But these cross-national penal 'indicators' can often obscure what needs to be understood. Take, from among the wealth of tables classifying different aspects of criminal justice to be found in Van Dijk's recent comprehensive sourcebook, the one that has to do with judicial independence. We are told that Italy's judiciary comes rather low down on the criterion of 'independence'. The judges in the UK, by contrast, are among the very highest (Van Dijk, 2007: 376; the UK gets a score of 6, the USA 5.7, Italy only 4.4.).

Perhaps this is so. But a lot depends on what is taken to be 'independence'. Independence from whom? (The government? The public?) This indicator is in fact built out of the perceptions of businessmen as to which judiciaries are most independent of undue pressure of government, private persons or firms. But theirs is not the only relevant perspective, especially when it comes to issues of criminal justice. In Italy, for much of the past twenty years, following its anti-corruption successes, the judiciary has been under constant attack by politicians, who see it as having far *too much* independence (Nelken, 1996). As in most places on the continent, judges are neither appointed nor elected, but selected by public examination immediately after university. They therefore represent a wide range of the political spectrum. In addition, in Italy, prosecutors are considered part of the judiciary and are, like

them, constitutionally immovable from their posts. Their promotion and pay is almost entirely tied only to seniority (even without the need of changing job) and not to the dictates of politicians who, it is feared, might otherwise exercise a conditioning effect on their decision-making. Decisions over who gets senior administrative roles, internal discipline and so on are made by the judiciary's own elected parliament, which protects what they call their 'autonomy' from government.

By contrast, until recently, judges in England were appointed by the government from successful middle-aged lawyers – on the advice of a senior judge who is also a minister. Sensitive prosecution decisions are in the hands of another government minister, and in a number of recent cases there have been real doubts about how far government interpretations of the national interest have been placed above the normal rules of criminal law. Turning to the USA, many judges are elected by the citizenry, while, for those who are appointed, the ability to curry political favour and mix with the local elites is an essential part of the job. Of course there is always more that can be said. There are documented cases of some Italian judges who have been found to be corrupt, and it is a moot question whether the allegiance that many judges in Italy have to the quasi-political groupings that elect their representatives in the judges' parliament weakens their independence as single judges. Is the low score intended as a measure of the political attacks to which judges are exposed? But resistance to these attacks might equally be seen as proof of how independent they are.

Interpretative types of enquiry, on the other hand, are the preferred option where the aim is to show congruence between meanings and values in criminal justice and the larger culture. For example, how ideas about the state and citizen are reflected and reproduced by the role assigned to the accused in French criminal justice (Field, 2006). They are also essential when we set out to make sense of puzzling events. How can it be, asked a well-informed American commentator on Italian affairs in 2008, that on the very day that Prime Minister Berlusconi's English lawyer was convicted in an Italian court of lying to protect the prime minister, it was the leader of the Italian opposition who resigned. As Becker reminds us, the first rule when we are faced with a strange social phenomenon should be to assume that there is some sense to be found if we can only find a way to grasp it (Becker, 1997: 28).

There are important differences between explanatory and interpretative approaches. We risk inconsistency if we insist on the 'embeddedness' of meaning but also try to use 'objectified' prison rates as part of our explanations of different penal climates (Nelken, 2006a). But they can also be complimentary. We could, for example, distinguish among the different tasks of enquiry. If the interpretative approach is an essential step in generating hypotheses and insights, the explanatory approach is the only way we can test their applicability to a wider range of cases. We could also draw on each approach so as to examine variables from more than one point of view. As an explanatory factor, Catholicism in Italy could be treated as an important institution, one that is sometimes united with and sometimes in competition with the political system (as seen, for instance, in its efforts currently to moderate the effort of right-wing governments to criminalise immigrants). But, and at the same time, on an interpretative approach, Catholicism can also be seen as the source of ideals concerning what should be penalised and obligations of tolerance and forgiveness which help shape – or compete with – the ideas developed in the state system.

One author who has recently set out to explain why the criminal justice systems in southern European countries are now sending a disproportionate number of immigrants to prison has demonstrated a statistical correlation between the propensity of immigrants to commit crimes and indicators of the generally poor functioning of local political institutions – as seen in the extent of the black economy and disrespect for law (Solivetti, 2010). But a broader approach to the same issue (apart from bringing in the role of criminal justice institutions themselves) would also seek to grasp the meaning and role of talk about the immigrant crime problem. Thus a book of thoughtful interviews in the Netherlands provide us with a variety of perspectives on why the murders of Pim Fortuyn and Theo van Gogh in the Netherlands had such an impact in such a historically 'tolerant' country and helps us understand why the proportion of immigrants in prison in that country is almost at the level of southern Europe, despite its local institutions being Northern European ones (Baruma, 2006). On the other hand, those interviewed may not be representative, and it can be easy to make too much of them. An interpretative approach should also not distract us from investigating the structural factors linked to problems of integration

that can help explain why the number of immigrants in prison is so high in that country.

A related issue that highlights these differences in explanatory approaches is the role of agency as compared to structural constraints in the defining and application of criminal sanctions. At one extreme we have the functionalist approach, which has roots both in social science and comparative law. This treats agency as substantially irrelevant; function does not equal purpose. It invites us to look for the manifest or latent functions of any given element of criminal justice in relation to other elements, to the rest of the legal system, or to the society of which it is part. It explores the way other agencies of social control, from private police to illegal associations such as the *Yakuza* in Japan, serve some of the same functions of the official system (Vagg, 1993), or suggests that the individualising of sentences by judges is *de facto* forestalled by sentencing commissions (Wandall, 2006).

A standard move of comparativists is to ask questions such as what do different jurisdictions use instead of bail to make sure that offenders turn up for trial? Conversely, they may tell us that bail decisions themselves sometimes have other functions. Although judges in 'drug courts' in Ireland cannot bring back cases for review as they do in the USA, they can and do achieve much the same aim through the way they set bail conditions (Nolan, 2009). Even in a regime of obligatory prosecution, decisions or non-decisions on priorities are being made (Nelken and Zanier, 2006). Knowing the answer to such questions is essential if we are to avoid introducing 'reforms' that duplicate or distort already existing local 'best practice' (Feeley, 1983). With some imagination we may also see that what appears at first to be only 'noise', aspects of procedure involving inefficiency and delay, may be playing important functions. (It would be interesting to compare the role of delays in criminal proceedings cases in Italy with those in the USA for death penalty cases).

But functional language, as sociologists have long ago shown, can involve a number of traps. We need, for example, always to ask functional for what, and for whom? The search for 'functional equivalents' has been a matter of fierce controversy in debates over the comparability of continental penal procedures and alleged alternatives to 'plea bargaining' (Langbein and Weinrib, 1978; Volkmann-Schluck, 1981). There is no a priori reason to think that something must be doing a given

job – bail or otherwise. Perhaps the news about a given system could be that there is, in fact, no equivalent. It is misleading to assume that modern criminal justice systems all face the same 'problems' even if they deal with them in different ways. 'Problems' – and 'solutions' – are perceived and constructed differently within different cultures. As I wrote soon after moving to Italy:

> Functionalism is a good servant but a poor master. ... Living in another country has given me a jaundiced view of the sort of comparative research which sets out to show that all societies face basically similar problems even if they may solve them in somewhat different ways. What is more striking is the power of culture to produce relatively circular definitions of what is worth fighting for and against and the way institutions and practices express genuinely different histories and distinct priorities. (Nelken, 1992/1996: 356)

I would now add that what culture means can be equally problematic.

The strengths and weaknesses of functional explanation can be well illustrated from our running example concerning the rule of obligatory prosecution in Italy. On a functionalist view, it would be assumed that all criminal justice systems of a certain complexity must face similar operational problems of coping with overload and the efficient throughput of cases. Certainly, the Italian criminal justice system faces similar, or even worse, problems of management to those found elsewhere. The criminal law has enormous reach – judges and prosecutors often taking upon themselves the task of 'substituting' for the government where there are insufficient or contradictory signals about how to handle a pressing social problem, for example unaccompanied young immigrants arriving in Italy who are not allowed to work but cannot be expelled.

A function of legally permitted discretionary decision-making is that it makes it easier to manage problems of priorities. We would therefore expect to find that where prosecution discretion is heavily restricted there would be other 'functional equivalents' and we can in fact identify numerous features of the Italian criminal process which do provide the chance to filter out cases or exercise priorities. The threshold decision whether or not there is enough evidence to take a case to trial, or whether instead to opt for what is called *archiviazione*, provided some

opportunity for exercise of choice. Another sort of (somewhat random) flexibility is provided by competing and overlapping jurisdictions of types of law and courts and the three stages of trial. The Italian criminal justice system thus has some functional equivalents of discretionary decision-making, though not necessarily where they would be found in other systems. Although little of this would be described in Italy as the exercise of 'discretion', for the sociologist it can be important to discover how flexibility is built into the system and not only how the actors label it.

But we also need to be cautious not to go too far in searching for 'functional equivalents', especially if this is based in the idea that every system is predestined to reach a certain level of efficiency. In Italy even apparently minimal functional operating requirements are not met and it is frequently not easy to determine what is functional and for whom. Many judges and prosecutors believe the courts are underfunded and left dealing with an overload so as to keep them from pursuing politically sensitive matters. The apparently irrational distribution of courts around the country is explained mainly by political pressure not to lose the courthouse as a sign of local prestige. Formalities and complicated division or overlapping of responsibilities help produce enormous delays for which Italy is regularly condemned by the European Court of Human Rights at Strasbourg. The language of functionalism is especially misleading if it suggests that all criminal justice systems operate with a managerial vision of their purposes. This itself varies by culture.

By contrast to most work in the mainstream, interpretative approaches focus more on trying to present a clearer picture of such purposes. They speak of reasons and motives rather than functions and causes and give more importance to agency. They would draw attention to the fact that politicians, in the UK, such as Margaret Thatcher and Tony Blair, had characteristic ways of approaching the issue of crime, and that Douglas Hurd, the mandarin Tory minister (the Home Secretary), who was responsible for criminal justice matters in the 1990s, relied heavily on policy advice from his senior civil servants, whereas Michael Howard, a later successor, took a more populist approach, insisting on the basis of his own reading of the evidence – that 'prison works'. In Italy, many 'reforms' of criminal procedure were directly connected to Berlusconi's attempt to extricate himself from pending court proceedings.

Other individuals can also make a difference (think of Darrel Vandeveld, the catholic prosecutor who resigned rather than continue to be involved as military prosecutor in the trials in Guantanamo). But agency is not just a matter of named individuals. In Italy, the organised left-leaning group of judges *Magistratura Democratica* sees itself as playing a vital role in defending what it calls *jurisdizione* from political threats. Reductions in prison rates in other countries have been attributed to decisions of bureaucratic elites, as in post-Second World War Finland (Van Hofer, 2003; Lappi-Seppala, 2007). Vice versa, the growth in incarceration rates in other countries is attributed to the 'fall of the Platonic guardians' (Loader, 2006), such as the reduced reliance by ministers in England and Wales on senior civil servants in the Home Office (Ministry of Justice), even if this has also been seen as greater democratic responsiveness (Ryan, 2003).

For many of those who use interpretative approaches, it is only by finding out what criminal justice actors and others actually think they are doing that we can make sense of it. As West puts it, 'to understand scandal cross-culturally we need some way of exploring people's belief about it' (West, 2009: 4). But interpretative approaches do not have to limit themselves to this. Jim Whitman, for example, in his interesting study of relative leniency in punishment in Continental Europe describes the 'structures of feeling' that derive from egalitarian and inegalitarian social orders (Whitman, 2003). At the same time, however, he rejects explanations offered by some of his interviewees who attributed leniency in Europe to the experience of having been German prisoners of war or in concentration camps.

On culture and concepts

An obvious route to making sense of differences in criminal justice practices would seem to lie in the idea of culture, seen as a historically shaped sets of habits, understandings, values and priorities that shape or exemplify what societies choose to sanction and how they do so (e.g. Karstedt, 2008). Thus the textbooks tell us that the fact that in Japan prosecutors dismiss many cases is affirmation of their Japanese 'norm of avoidance'

of formal judicial processes (Dammer, Fairchild and Albanese, 2005: 157). As often, however, culture is contrasted with instrumentality. Some writers conclude that on the continent judicial supervision is only 'a myth', or claim that terms such as 'zero tolerance' have 'only' symbolic importance. A more culturalist perspective would stress that there are few things more important than myths and symbols as a way of creating identity, expressing commitment and serving as regulatory ideals.

'Legal culture' (Friedman, 1975), a term that focuses on legal aspects of culture, may be of particular relevance for the study of comparative criminal justice. I have elsewhere redefined this term for comparative purposes as

> one way of describing relatively stable patterns of legally-oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers, or the ways judges are appointed and controlled, to various forms of behaviour, such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are, not just what we do. (Nelken, 2004a: 1)

Using this idea could help us decide what sense to give to the idea of criminal justice as a set of supposedly interconnected legal decisions. Cross-culturally, 'criminal justice' may not always be the term used to get at this, but in most systems the various actors involved are likely to claim that there ought to be some overall coherence to these decisions. What is certain is that, wherever one looks, decisions at one point have implications for others (with consequences that are sometimes unintended). Abolish capital punishment and the use of prison is likely to go up, reduce police discretion and more falls to the prosecution. The various features of criminal justice in Italy that we have been discussing also interact. For example, the way prosecutors implement the rule of obligatory prosecution can lead to counter-intuitive outcomes in practice. The length of time before a case becomes time-bound (i.e. prescribed) is statutorily related to the gravity of offence – the more serious the offence, the more time is available. Under orders (from either or both the head of the office and the ministry) not to allow cases to become time-bound, prosecutors therefore often feel the

need to focus their effort on *less* serious cases with impending prescription dates, rather than more serious cases which have longer times still to run (Nelken and Zanier, 2006). When prosecutors increase their speed of throughput a new bottleneck appears at the stage of court hearings (Sarzotti, 2008).

A useful distinction made by Friedman is that between 'internal legal culture', the ideas and practices of those working for or within the legal system, and 'external legal culture', the opinions, actions and pressures brought to bear on law by those outside it. This could be helpful in exploring differences in the involvement of lay people in the system of criminal justice, or the significance attached to surveys of public attitudes to sentencing and of the fear of crime. The respect in which internal legal culture is open to external legal culture is a key aspect of criminal justice. If we want to understand why practices such as victim–offender mediation have had less fortune in some countries in Continental Europe than in Anglo-American type jurisdictions, we have to take into account, *inter alia*, the way the European 'state' project limits the kind of role individual victims are expected to play in the criminal process (Crawford, 2000a). In Japan, whose borrowing of the continental model reinforced its top-down approach, internal legal culture has been, until recently, relatively immune to public opinion. According to David Johnson: the lack of external pressures clearly privileges 'internal legal culture', the ideas, values, expectations and attitudes that prosecutors have about criminal law, behaviour and justice. But the ideas mobilised by prosecutors – and others in the legal system – also relate to wider aspects of Japanese culture. Johnson attributes particular significance to the Japanese belief that human nature is perfectible, in contrast to the Christian doctrine of original sin (Johnson, 2000).

But terms like 'culture' and 'legal culture' are highly controversial (Nelken, 2006d, 2007b). It is often objected that explaining behaviour by reference to culture tends to assume that it is determining, bounded and unchanging. As compared to seeing it as the 'cause' of certain behaviours, it is usually better to see culture as a matter of struggle and disagreement. The purported uniformity, coherence or stability of given national cultures will often be no more than a rhetorical claim projected by outside observers, or manipulated by elements within the culture concerned. Much that goes under the name of culture is no

more – but also no less – than 'imagined communities' or 'invented traditions' (but again these may of course be real in their effects). It is essential to avoid reifying national stereotypes. Think, for example, of the transformations in elite attitudes towards 'law and order' from Weimar to Hitlerian Germany. Because of their all-embracing referents, cultural explanations run a serious risk of tautology.

Should we define culture as 'attitudes, beliefs and values' and see practices as what result from these? This works better when explaining a single system as opposed to comparing systems. How should we demarcate legal culture from what else is going on? How, if at all, can we draw a line between legal culture and 'institutions' (Brants and Field, 2000) or 'structures' (Nelken, 2006a). The pioneering work of David Downes on Dutch tolerance shows us that as social structure (the system of political coordination known as 'pillarism') changed, so did cultural attitudes to inclusion (Downes, 1988, 2010; Downes and Van Swaaningen, 2007). On the other hand, culture can also explain the lack of change. There are ironic continuities in the way attempts to purify the state of communism in Poland (in the name of religious and patriotic values) relied on patterns of prosecution which were very similar to those used under communism (Polak and Nelken, 2010).

Not surprisingly, reference to culture tends to reproduce the division between explanation and interpretation we have been discussing so far (and different social science disciplines, such as political science and anthropology, also tend to treat it in correspondingly different ways). We can use culture to explain differences (Hofstede, 1980) or we can seek to explain culture itself. Treated as an explanatory variable, culture may be relevant in some cases more than others. As Johnson writes:

> In one sense everything is culture, but with respect to capital punishment that approach may not shed much insight on some questions we consider important, such as: why China is the world's execution leader, or why 'other Chinas' such as Hong Kong and Taiwan have such different death penalty policies compared to the PRC, or why North and South Korea have such wildly different death penalty policies, or why Hong Kong evidenced no backlash against the stoppage of executions or the abolition of capital punishment, or why Singapore went through a huge execution surge and then a 90% drop in the course of only 15 years, etc. (Johnson, email to me, 21/2/2009)

The interpretative approach, by contrast, treats culture less as a variable than as part of a flow of meaning, 'the enormous interplay of interpretations in and about a culture' (Friedman, 1994: 73) to which social actors, including scholars, also contribute. On this perspective, cultural sensibilities, a result of historical contingencies and collective experiences and memories, support (or can be made to support) some action strategies and delegitimate others. Christopher Birkbeck has pointed to fundamental differences between the meaning of prisons in North and South America, making reference, *inter alia*, to contrasts in the idea of prison as a warehouse and in the concept of 'doing time' (Birkbeck and Pérez-Santiago, 2006; Birkbeck, forthcoming). More generally, scholars explore the different meanings of the 'Rule of law', the '*Rechtsstaat*', and the '*Stato di diritto*', relate Italian '*garantismo*' to English 'due process', or 'law and order' to the German '*innere sicherheit*', or probe the meaning of '*lokale justiz*' as contrasted to 'community crime control' (Zedner, 1995).

Even the local idiom may be complex. Edwards and Hughes note that 'crime', 'harm', 'safety' and 'security' might be used interchangeably in English-language policy and academic discourse, but they often 'signify competing political constructs of what constitutes order' (Edwards and Hughes, 2005: 346). In Italy, until very recently, the expression adopted both in newspapers and academic discussions to describe conventional crimes, including even burglary, rape and robbery, was the term '*micro-criminality*'. This was contrasted with corruption, terrorism and organised crime, which threatened the state itself – these were the implicit but never so denominated macro-crimes. Largely as a result of becoming a country of immigration, there is now less tolerance of micro-crime and the term increasingly being substituted is the Italian equivalent of 'street crime' or 'diffuse crime'. Likewise, the past shadows the present. In Italy, in the spring of 2009, as part of a new law on security, there was much discussion of what role could be found for local-level citizens patrols acting in concert with the municipal police. The junior political ally in Berlusconi's coalition, the Northern Leagues, was pressing for them to be introduced in the areas under their control. They were happy for them to be called '*le ronde*' despite the term's fascist connotations. But Berlusconi himself expressed a wish that a different name could be found to describe the same thing, and proposed 'associations'.

The interaction between relatively standardised and more local terms can be a valuable area of research. For example, in comparing Italy and the UK, the concept of trust – 'whom do you trust, when do you trust, how do you trust, how much do you trust' – can frame a series of issues about variation in matters relevant to criminal justice without using terms from given domestic systems. It could help explain and measure a range of differences. For example, why it tends to be easier to get a job in the UK and the USA, but also easier to lose one as compared to Continental Europe, or the ease of collaboration between official agencies as compared to the crime world itself. But at the same time such an approach needs to be accompanied by an exploration of the local meanings of the word *fiducia* (trust), as seen, for example, in Italian proverbs about the risks of trusting (Nelken, 1994b).

On the other hand, terms with wider currency can be emptied of or changed in their meaning in local contexts. Take the requirement of the 'independence' of judges from political control. In the early post-2000 period, the so-called 'law and justice' governing party in Poland, despite its name, was seen as representing a threat to the autonomy of legal institutions. In recent interviews concerning the autonomy of prosecutors in Poland in dealing with corruption, we were informed in the course of our research that the local quip was that 'prosecutors' independence means that nothing depends on the prosecutor' (Polak and Nelken, 2010). Terms can also live on, zombie-like, when taken out of their usual context, or perhaps given new life, as when the idea of prison as a place for re-socialisation is endorsed by transnational bodies even though abandoned by some of the national prison administrations they are monitoring.

Whether terms have cross-national applicability has both intellectual and political implications. In his efforts to build global legal theory with concepts that can have purchase transnationally, William Twining contrasts the terms used in the fight against corruption with those used to criticise and raise the standards of prison conditions worldwide. Whereas definitions of corruption have only imperfect cross-cultural applicability, there has been more success in finding a common language for talking about prisoners' rights (Twining, 2005). One reason for this, he suggests, could be that the modern prison, as an institution, diffused out from a common origin in the USA. While we can agree

in principle that some concepts may, as Twining says, 'travel well' as compared to others, any given example of this can be controversial. In fact, Transparency International seems to be quite successful in imposing some sort of common definition of corruption, while, conversely, Birkbeck claims that prison has quite a different meaning in North and South America (Birkbeck, forthcoming; Nelken, forthcoming b). Even concepts that have no readily obvious local meaning can somehow get domesticated, as when the sentencing reform based on the idea of 'three strikes and you are out' is proposed in places that don't play much baseball! (Jones and Newburn, 2008).

Wider and more local terms are thus not insulated from each other, and scholars are among those who play a major and consequential role in bringing about their mutual interaction. The influential criminological notion of 'moral panic' (Cohen, 1972), used to describe alleged repressive over-reaction to deviant behaviour, has by now spread across Europe and been applied in literature describing increasing concerns about street crime in Scandinavia, Spain, Italy, Greece and Japan. The local Italian term '*allarme sociale*' may be subtly different, conjuring up as it does less a disproportionate reaction to a threat than the need felt by professionals in the legal system to keep distance from emotional over-reactions. But increasingly the two terms are merging. The Japanese have two words for scandal: *shuba*, meaning disgusting news, and *sukyandaru*, essentially an imported word designed to capture Western meanings (West, 2009: 7). If people in Russia learn to think of the policing they experience as 'predatory policing', their attitude to the police is likely to change (Gerber and Mendelson, 2008).

The Italian examples that I have been using in this book also illustrate the need for interpretation, as well as the challenges of invoking culture (and legal culture) in understanding systems of criminal justice. Take the measure which means that young people (in a sense) 'get away with murder'. The ministerial website proudly speaks of near 80 per cent success of the *messa alla prova* pre-trial probation disposal used for these and other crimes, and urges all juvenile courts to make more use of it. But it is not referring to the internationally standardised criterion of a two-year period of non-offending following a disposal, but only to the number of cases that are held to have been a success by the judges at the end of the measure itself. In practice it is only in the most serious

cases of non-compliance with this measure that a judge will decide on holding a trial, the outcome of which could only be, if conviction follows, prison or, more likely, suspended prison. Whatever positive good the juvenile justice system has to provide is only on offer in pre-trial probation. So judges are reluctant to find that youngsters have failed. By contrast, the only published attempt in Italy to measure young offender's recidivism after this disposal, albeit only in one court district in northern Italy, came up with a rate of over 40 per cent. Perhaps still acceptable, but a somewhat different outcome.

Culture is relevant to all three of the running examples I have been discussing. The principles adopted in the Italian juvenile justice system have to do with the wider culture of the late 1980s, but they also reflect more basic features of social structure that help explain why political pressure for change has not been able to overcome the resistance of those in favour of the current system. The attachment to obligatory prosecution, apart from being enshrined in the constitution, also reflects a cultural preoccupation, this time with the risks of personal or politicised decision-making. But its survival is now in doubt as recent Italian governments of the centre-right try to change the status of prosecutors by distinguishing them more sharply from judges and, more subtly, by detaching the loyalties of the police that prosecutors need to use in their tasks. Court delays, finally, parallel other cultural patterns which privilege procedure over substance. But they also ensure that – at least in the short and medium term – it is usually more rational for an individual to rely on existing forms of clientalist dependence rather than turn to legal remedies.

FOUR

explaining too much?

The major current debate in comparative criminal justice has to do with how best to explain the current growth in so-called 'punitiveness' – or willingness to punish – as evidenced especially in the rise in imprisonment rates. It has generated a considerable literature, to which I shall only be able to make limited reference here. But this chapter is in any case intended less to contribute to this debate than to comment on it. I seek to throw further light on some of the central questions in comparative criminal justice that I have been discussing so far – the differences between the tasks of description, explanation and interpretation, the part played by criminal procedure in explaining penal outcomes, the problems of comparing like with like and, not least, the dangers of ethnocentrism.

The debate over punitiveness

The puzzle at the heart of this chapter is well captured by leading penologist Michael Tonry when he writes that: 'punishment and crime have little to do with each other. That observation is a commonplace for most European criminologists, some North American criminologists, and very few politicians' (Tonry, 2005). In their search for comparable data, scholars of comparative criminal justice have been among the pioneers of those seeking to obtain a more faithful picture about crime

levels through asking samples of potential victims in different countries to report their experiences, rather than relying on the cases that happen to get recorded in official statistics (Van Dijk et al., 2007). Their findings show that punishment has continued to rise even when crime levels are decreasing and that, cross-nationally, the levels of crime and punishment do not correlate well.

Apart from victim surveys, other methods also show that, recently, punishment has been rising while crime has remained stable. For example, Felipe Estrada ingeniously demonstrated that the nature of injuries in crime incidents reported in hospital casualty rooms in Stockholm stayed the same even as police definition of such injuries became more serious, hence leading to greater punishment (Estrada, 2006). Though less stressed at the present time, the opposite is also true. Punishment levels do not always follow rising crime. As late as 1990, scholars of comparative criminal justice described the dominant trend as one towards more lenient punishment and the 'defining-down' of deviance (Haferkampf and Ellis, 1992). Before taking Tonry's words literally (or out of context), however, more would need to be said about the opposite question of possible effects of changes in punishment on crime levels. Few criminologists would deny that there is some relationship, even if it is far from linear. Nonetheless, almost all criminologists agree that – even in the USA – only a small part of the recent reduction in crime can be attributed to the increasing use of prison.

Comparison of the willingness to punish between states within the USA, as well as between nation-states, has a long pedigree. Paradoxically, however, the recent stimulus to comparative work came about in large part because of the influential analysis offered by David Garland of the connections between the rise of punishment and widespread late-modern changes in social and economic conditions, including exposure of the middle classes to 'high crime' rates (Garland, 2001). Garland offered a rich, but pessimistic, account of the way 'penal welfarism' had been displaced by the politicisation of crime and the growth of popular punitiveness. He noted, for example, the privileging of public protection and the claim that 'prison works', and described the changes in the emotional tone of crime policy from decency and humanity to insecurity, anger and resentment. But he gave little attention to differences between countries. Thus the question arose: did his analysis hold

generally? There is some evidence that the thesis is widely applicable, or at least (what is not exactly the same thing) that 'the culture of control' is spreading like a firestorm (Waquant, 2009a). For example, the Netherlands, once a 'beacon of tolerance', is seen as going in this direction (Downes and Van Swaaningen, 2007; Downes, 2010). And even Japan is now changing its criminal justice system to respond to political and popular calls for more severity (Fenwick, 2005; Miyazawa, 2008).

But others deny that there has been any such general turn to punitiveness and argue that we can and must avoid assuming that Europe is also bound to end up with something like the American dystopia, with its bloated penal system that now embraces more than two million prisoners (Zedner, 2002). In Ireland, to take only one example, the use of prison was eight times higher in the 1950s than fifty years later (O'Sullivan and O'Donnell, 2007). Nor is there any earlier golden age to set against the present once we take into account that 'welfare' in the context of criminal justice is also a form of social control (Mathews, 2005) and that it still forms a central part of current 'volatile and contradictory' practices (O'Malley, 1999). Tonry himself insists that '(m)any of the generalizations bandied about in discussions of penal policy in Western countries are not true'. Populism or populist punitiveness, if it exists at all, he says, 'is mostly as reifications in academics' minds of other academics' ideas'. Imprisonment rates have not risen substantially everywhere in the last fifteen years. Some penal policies in some places have become harsher, but in most places this is offset by changes in practice that moderate and sometimes nullify the policy changes, and by other policy changes that move in the opposite direction (Tonry, 2007a: 1).

From this perspective, what Garland and others are describing is something principally tied to the political and legal culture of the USA. What we need to explore are the differences between the USA and Europe, and even within Europe, differences that suggest that there are multiple *cultures of control* rather than just one 'culture of control' (Pratt et al., 2005). Certainly the numbers in prison in the US are out of all proportion to other Western countries, even if the rise of the prison archipelago is fundamentally a phenomenon of the last thirty years and there are enormous differences even now between some of its constituent states and others (Hinds, 2005; Newburn, 2006). Explanatory factors

that are particularly relevant to the USA range from the importance of racial divisions, the history of the frontier, attitudes to gun ownership, the role of elected judges and prosecutors, the need for politicians such as state governors to take a hard line against crime so as to have a chance of getting into power, and the influence of single-issue pressure groups at the federal level. The absence of such factors helps explain why other places have less people in prison. In addition, in explaining why other countries have lower prison rates, we must consider their 'shields' against punitiveness. There seems to be a strong link between the level of social inequality and (other) negative social consequences (Wilkinson, 1996). Savelsberg offers a triangular comparison of the USA, West Germany and Poland that highlights the role of strong state bureaucracies, centralised and decentralised administration of justice, and institutions of knowledge production and diffusion (Savelsberg, 1994, 1999).

The political economy of punitiveness

But the debate on which factors are the key to explaining punitiveness is far from settled. In the rest of this chapter I offer a critical discussion of just one recent contribution to this debate. In their innovative work, Cavadino and Dignan try to straddle generalising and particularising approaches so as to explain both why punitiveness has been growing and why it is by no means a uniform development (Cavadino and Dignan, 2006a, 2006b). Their argument has been much praised by other leading writers in Great Britain, who, like them, are also concerned to stop the dangerous slide in England and Wales towards an ever-expanding prison system. In the rest of this chapter I first summarise their claims, then consider what their comparison holds 'constant', and the plausibility of the independent and dependent variables that make up the structure of their explanation. I then go on to argue for the need for a more interpretative approach to notions such as punitiveness and tolerance.

Cavadino and Dignan reject common-sense explanations such as differences in crime levels or in public attitudes towards sentences as

the reason for variations in prison rates. Instead, they build on prior neo-Marxist analyses of the role of the prison in relation to the labour force (for a recent example, see De Georgi, 2007), as well as classifications of welfare typologies in the social policy literature, claiming that political economy, and in particular the influence of neo-liberalism, offers the key to differences in punitiveness as measured by the numbers of people in prison. I have reproduced in Table 4.1 the data that they see as supporting their thesis. This shows us that the rates in twelve modern industrial societies vary considerably and consistently between what they call neo-liberal, conservative-corporatist, social-democratic and oriental-corporatist types of political economy. The updating of their figures (the numbers in brackets) also indicates that these striking differences have remained pretty stable over the past few years.

Table 4.1 Imprisonment rates per 100,000 in 12 countries (2002/03[1] and 2008[2])

Neo-liberal countries	
USA	701 (756)
South Africa	402 (334)
New Zealand	155 (185)
England and Wales	141 (152)
Australia	115 (129)
Conservative-corporatist countries	
Italy	100 (92)
Germany	98 (89)
The Netherlands	100 (100)
France	93 (96)
Social-democratic countries	
Sweden	73 (74)
Finland	70 (64)
Oriental-corporatist countries	
Japan	53 (63)

[1] Source: Cavadino and Dignan, 2006a: 22.
[2] The figures in brackets are updated from those in their book. Source: www.kcl.ac.UK/depsta/law/research/icps/worldbrief/wpb_stats.php (accessed 12/01/2010). See the latest figures at the site of the International Centre for Prison Studies.

At the risk of over-simplification, their claim can be summarised as follows. Neo-liberal societies have the highest prison rates because they follow social and economic policies that lead to what they describe as '*exclusionary* cultural attitudes towards our deviant and marginalised fellow citizens' (Cavadino and Dignan, 2006a: 23. Emphasis added). On the other hand, Continental European corporatist societies and, even more, Scandinavia social-democratic societies, 'pursue more *inclusive* economic and social policies that give citizens more protection from unfettered market forces'. These societies 'see offenders as needing resocialisation which is the responsibility of the community as a whole' (Cavadino and Dignan, 2006a: 24 Emphasis added). Stated like this, Cavadino and Dignan's thesis fits well into the mainstream style of explanatory work in comparative criminal justice that tries to tie together explanatory variables and punishment outcomes. Their book, however, also draws on the views of selected locally-based experts so as fill in what they call missing 'idiosyncratic' detail. But they conclude that this does not require them to modify their overall thesis.

Cavadino and Dignan, like most of those comparing a large range of incarceration rates, spend little time on persuading us that crime rates are really the same in all the countries they are comparing. But it is this, the assumption that crime levels are 'constant' in the places being compared, that sets the puzzle they are trying to solve. How can some societies live with high crime rates without concomitant expansion of the prison realm? If countries with higher prison rates were actually dealing with higher threats from crime, this would not be news, and we could hardly say that we were fairly comparing levels of *punitiveness*. (Rather, we would be showing how neo-liberalism increases both crime and punishment.) On the other hand, it is strange that the good things about more inclusive welfare-oriented or egalitarian social-democratic societies do not also reduce the level, or severity, of crimes being committed, rather than only shaping the response to them. And since our ideal is presumably to live in places that have both low levels of punishment and low crime it is a pity that this inconvenient point is passed over so quickly.

In fact, there are reasons to think that some of the places in their table with higher prison rates do have higher levels of crime. The USA certainly has more lethal violence than any of the other countries in

their list and South Africa too suffers exceptional levels of homicide, violence and rape. Victim surveys show that England and Wales has higher rates of burglary. One comparison of overall victimisation rates for ten crimes places England and Wales top, with the Scandinavian countries and Japan the lowest (Van Dijk, 2007: 158). As with all official statistics, what lies behind and produces overall prison rates needs to be studied empirically and carefully disentangled. It is important to see who is in prison, for what crimes, and how they arrived there. Many of the countries that have lower rates, Sweden for example, or Switzerland, or the Netherlands in its glorious period, use shorter prison terms but actually send relatively *more* people to prison than those with higher overall rates. Does this show less punitiveness than sending fewer people for longer periods? It certainly complicates any argument we may want to make about punitiveness and inclusiveness.

According to the 2006 figures, Italy had the lowest prison population among the larger European countries. But the explanation for this does not lie with the generosity of its welfare or work training systems (welfare payments mainly go to pay pensions). It owed everything to an *indulto* or collective pardon, which freed over a third of its prison inmates just before the Council of Europe collected its data. Its prison population is now again rising and is predicted to reach pre-*indulto* levels shortly. This may be a particularly striking example, but it can be difficult, perhaps even fruitless, to try to purify comparative figures of such external interventions. Finland, which, post-Second World War, had one of the highest prison rates, deliberately brought its figures down so as to be more in line with its Scandinavian neighbours (Von Hofer, 2003). Such volatility is not easy to reconcile with claims about the dependence of prison rates on underlying basic differences in political economy.

Cavadino and Dignan's thesis about neo-liberalism is certainly a plausible candidate to be part of the explanation for the recent increase in prison rates, as well as a factor in explaining differences between places. But their argument may not apply so well outside the range of countries they compare. There are countries (such as China) which make a high use of prison without being neo-liberal, and others, such as Russia or South Africa, where moves towards neo-liberalism have actually gone together with some reduction in the use of prison. This suggests that

a wider variety of variables than those connected to political economy may also lead to high or lower punitiveness. More interesting, perhaps, in relation to the countries they selected, it could also be argued that their explanation risks being tautological, showing that it may not always be easy to draw a line between classification, description and the allegedly more powerful strategy of explanation. It is hardly surprising to find that neo-liberalism in the USA and Europe correlates with exclusionary attitudes towards offenders, given that Cavadino and Dignan themselves *actually define neo-liberalism as including such attitudes*, as well as justifying the diversion of spending from welfare to the criminal justice system (Cavadino and Dignan, 2006b: 15, Table 1). They explain that there are differences between the countries they compare in terms of two other dependent variables: the degree to which they have private prisons and the age of onset of criminal responsibility. But again, it could be objected that the former factor is just another expression of neo-liberalism and even the latter has to do with the individualism that is an ingredient of all forms of liberalism.

For some commentators, other independent variables need to be added to those identified by Cavadino and Dignan. Lacey (2008), for example, fully accepts that what she calls 'societies with coordinated market economies' are indeed less punitive. But she argues that we should also consider the way multi-party political systems with proportional voting see less resort to populist politics than two-party systems, and rightly recommends that we take into account the influence of the long-established constitutional and legal frameworks in which criminal justice systems are embedded. Lacey admits, however, that the specificities of different societies can cause problems for her thesis. New Zealand has one of the harshest penal dispensations despite its multi-party system. And once we recognise that different variables may be relevant in different societies, a table comparing prison rates can easily obscure as much as it reveals. Some of the Scandinavian countries with low prison rates have experienced little immigration; others even have long-standing blocks on economic migration. Can this be ignored?

Are the Netherlands and Italy really similarly punitive – and for similar reasons of political economy? What of social control outside criminal justice? Not for nothing, Cavadino and Dignan entitle their chapter on Japan 'Iron fist in a velvet glove'. As far as the Italian case is concerned,

Cavadino and Dignan are right to stress the importance of corporatist rather than market structures. But it could be just as important to think about religion. Likewise there is the continuing centrality in Italy not only of the family and extended family, especially important with respect to the handling of juvenile delinquency, but also of family-like groups in maintaining social order in many sectors of public and private life. Some of those helping to maintain 'order' in the southern regions (and hence keeping prison rates low) are actually criminal groups.

For Tonry himself, it is politics with all its contradictions, rather than political economy, that is the master variable, both for explaining America's exceptional prison rates and differences within Europe (Tonry, 2001, 2007a). Certainly, if we again consider the Italian case, politics seems a very significant variable. Few national politicians (other than those on the far right) sought in the past to exploit populist fear about crime for electoral advantage in the face of their own vulnerability to prosecution, the widespread popular distrust of the state, and reluctance to see it as too powerful. There is also, not least, the somewhat different status of victims in a Catholic country where they are expected to forgive more than to authorise revenge. But the independent variable that most directly explains Cavadino and Dignan's findings, in Italy and elsewhere, is to be found not at the level of the wider society and its politics but in the quotidian practices shaped by criminal procedure. All systems of criminal justice are to some degree intended to be selective in the cases that are taken on to trial and penalty, but they differ among themselves (and over time) in the way they construct and operate such selectivity. In Italy, for example, it is the attrition rate of cases as they go through the long and complex requirements of criminal procedure that is particularly striking.

As the three aspects of Italian penal procedure that I have been using as running examples well illustrate, many cases start out but few arrive at a conclusion. The 1989 innovations in juvenile justice procedure were brought in as a way of holding up trial. Obligatory prosecution too can end up contributing to court delays and cases becoming 'prescribed' and thus time-bound. And court delay speaks for itself. The typical procedural guarantees of the adversarial system (centring on the forensic contest of the trial) that were introduced in the principal 1989 reform of criminal procedure, were simply added to the ones that

belong to the inquisitorial tradition. Even quite minor cases go through a series of procedural hoops and are reviewed by a large number of judges, and there are two stages of appeal (the first stage being a retrial on the facts). There are complex rules about informing the accused and his lawyers of trial hearings at each stage of the proceedings and extensive periods are allowed for them to prepare their defence each time. It is not infrequent for such notifications to go astray, especially where there is more than one accused and lawyer involved. Uniquely, the so-called 'prescription', statute of limitations period, after which criminal proceedings become null and void, continues to run until the Cassation court has given its final verdict. On the other hand, illegal immigrants, especially those 'caught in the act' of committing crimes, are unable to take advantage of many of the routine procedural benefits of the system, and it is these, mainly property offenders, who, together with low-level drug dealers, now tend to fill the prisons.

But is Italy just a special case? (As Mrs Thatcher liked to say, when characterising various countries in the European Union, 'and then there's Italy'). Its politics may be somewhat unusual, but criminal procedure and case attrition is also a large part of the explanation of how other countries with low prison rates kept them low in the past, or still do so. Germany, for example, diverts around half of its prosecutions, and France in the 1980s and 1990s repeatedly resorted to amnesties as a response to prison overcrowding (Lévy, 2007; Roche, 2007). The Netherlands and Switzerland used to send offenders home to wait until places were ready for them in prison. Yet the more we emphasise the role of criminal procedure as an explanation in its own right, the more it becomes difficult to draw a line between independent variables and the dependent variable – prison rates – that independent variables are intended to explain. In fact, it has been argued that the whole basis of relying on incarceration rates as measures of punitiveness is simply mistaken and it only makes sense to compare prison rates per number of people actually prosecuted (Pease, 1994).

On the other hand, the importance of socio-political variables could be reaffirmed by arguing that criminal procedure merely represents the *means* used to express underlying leniency (and similar issues of 'why' versus 'how' could of course also be raised regarding other variables, for example the role of the media.) What happens within the criminal

justice system is certainly often linked to other aspects of political and social structure, even if this may not be easy to grasp without some inside knowledge. Lacey, for example, suggests that in Europe it is collaboration between politicians, policy-makers and courts that keeps prison rates down (Lacey, 2008). But Italian experience suggests that it can be refusal of such collaboration that leads to the same result, as many judges and prosecutors seek to resist efforts by politicians to encourage the mass criminalisation of illegal immigrants (Montana and Nelken, forthcoming). As this suggests, it is best to see criminal procedure as a semi-autonomous variable in its own right, constraining as well as being shaped by larger factors. There are crucial differences between common law and continental countries with regard to how far *it is thought right* for criminal justice to be insulated or responsive to political direction or to social expectations. And it is the breaking down of such ideas about autonomy that is bringing about change in Europe and Japan.

The meanings of tolerance

Whatever difficulties there may be in correctly identifying the relevant *independent* variables that can explain variations in punitiveness and tolerance, it can be even more important to think about the cross-national meaning of *dependent* variables such as punitiveness, leniency and tolerance. What turns punishment into punitiveness? Are we talking of neutral 'facts' or of value judgements, and whose judgements count or should count? Can there be too little punishment? Is tolerance always good? To what sort of behaviour are these terms being applied? It has been argued that, in late modernity, tolerance for some kinds of deviance (for example, sexual deviance) may have increased, but that there is now less willingness to reform and reintegrate those who engage in offending (Young, 1999). In the Netherlands the differences between the two kinds of tolerance and the way they have evolved recently is well evidenced by the late Pim Fortuyn's flamboyant display of an alternative sexual lifestyle combined with his insistence on the threat represented by Muslim immigration.

But there are important variations in this process from place to place, with Scandinavian countries currently tending to integrate offenders but moralise about deviance, and disapproval of offending may often be a covert way of refusing difference.

Are punishment and tolerance on the same or on different continua? Is tolerance the name we give to the outcome of intentional choices, for example the willingness to organise welfare interventions? Or is it an alternative to such interventions – just the name we give to deliberate or even negligent non-enforcement of available sanctions? If punitiveness and tolerance are deliberate strategies, who is it that is pursuing them – politicians, legal professionals, the public – or all of these? How do they influence each other? Can we speak sensibly about punitiveness and tolerance in different cultures without specifying what the actors in each of the societies concerned mean by these terms? Admittedly, this is not the only approach we can take. If we are imposing judgements from the outside, it could be acceptable to describe behaviour as more or less punitive – just as we can say behaviour is more or less racist – even if the actors would not necessarily recognise such a description of their behaviour. But Cavadino and Dignan offer their analysis as an attempt to grasp what those involved think they are trying to achieve. Can it be irrelevant that what I call tolerance you call permissiveness, indulgence, favouritism, neglect, indifference, impunity, denial or collusion (Nelken, 2006a, 2006b)? What if tolerance of others committing crime is a result of a lack of civicness and minding one's own business?

There is a very large literature on public attitudes to crime (see e.g. Beckett, 1997; Roberts and Hough, 2005). Cavadino and Dignan, however, rule out the obvious short-cut of arguing that it is simply differences in public attitudes to criminals that provides the explanation of differences in incarceration rates. They provide a table that relates the punitiveness scores of the general public (measured by whether the sentence they consider the appropriate punishment for a crime coincides with that typically imposed by the courts) to the position of the country concerned in the rank order of those sending offenders to prison (Cavadino and Dignan, 2006b: 30, Table 1.3). This throws up some problem cases. The public in Japan is more punitive than the typical sentences handed down, whereas people in New Zealand or France are

less so. But even if the correlation between public attitudes and the incarceration rate is not perfect, in most of the countries in their list public expectations and court sentences are in fact roughly in line with each other. Van Dijk, too, argues 'in the western world, the countries where the public clearly favours imprisonment, such as the USA and the UK, tend to have comparatively higher prisoners rates' (Van Dijk, 2007: 150–1; see also Solivetti, 2010).

The question remains where these attitudes come from. Do they produce harshness or result from it? At the level of elites there is some evidence that the creation of punitive outcomes can be more or less intentional. From their public pronouncements it would seem that many leaders in the USA are against 'forgiveness', and politicians there and in the UK are less concerned with keeping prison rates down than with finding ways of reducing crime and problematic behaviour. Italians, on the other hand, were leaders in the international decarceration movement (which aimed to have mental patients and others treated in the community rather than in total institutions). In general political discussions, Italian commentators do speak a great deal about 'solidarity' as a way of referring to inclusion. But, in the context of criminal justice, they tend to speak less about being 'tolerant' than of the need to subject the criminal process to strict procedural requirements or *garanzie*.

As elsewhere, however, there is now rising criticism (mobilised both by some politicians and parts of the media) of the 'tolerance' of everyday crime that is consequent on attrition in the penal process. Notice is drawn to the 'inexplicable' way in which even alleged serious criminals can find themselves still at large while awaiting trial, or benefit in other ways from what seem like excessive procedural formalities. Such rethinking is seen in the increasing currency of terms like *buonismo* (pretentious generosity at others' expense), *perdonismo* (being too ready to forgive everything), or *garanzie pelose* (so-called 'hairy' procedural guarantees that are seen as measures pretending to protect the rights of the accused, but really aiming to create a system whereby it will be possible, if needed, to get certain accused people off the hook at all costs).

As this reminds us, an investigation of local concepts can provide clues to differences in approaches to punitiveness. What the Dutch call *gedogen*, or guided tolerance, does not correspond to the English term 'tolerance' because that can also be passive whereas the Dutch concept

refers to an open-eyed tolerance – a matter of government policy. In Italy, on the other hand, the state could never explicitly approve such accommodation because of the fear that the law will then be bent to the interests of those who wish to achieve immunity for their own misdeeds while targeting their opponents. Italy's inclusiveness thus has less to do with the guiding role of the regulatory state than it does with attitudes of low respect for the legality mandated by the national state, combined with a cultural emphasis on forgiveness, solidarity and fraternalism deriving from current local interpretations of a strong Catholic heritage and left-wing ideologies. 'Tolerance' as non-enforcement comes about *de facto* because the legislative body tends to multiply offences at the same time as doing nothing about the considerable difficulties that exist when it comes to enforcing them. Sometimes government impotence may also merge into collusion with elite crime – what has been described as 'ruling through leniency' (Melossi, 1994). Sometimes, laxity in enforcing rules and readiness to accept amends after the event is used as a way of currying popular support.

Could such differences sustain the claims of cultural relativism? We are told, for example, that the term *gedogen* is not readily translatable into English or any other language. 'The term is Dutch, the concept is Dutch, and its application only works in Holland' (website of the philosophy department of Erasmus University in Rotterdam). But this misses the point that penal approaches are highly contested and changeable even within the societies concerned. Despite 'ruling through leniency', Italy has also seen major investigations against political corruption and considerable successes in the fight against the Mafia. And critical reassessment in the Netherlands of the virtues of *gedogen* has clearly affected the possibility of keeping prison rates down – and the desire to do so (Buruma, 2007).

To conclude: this chapter has illustrated some of the challenges in combining both explanatory and interpretative approaches to comparative criminal justice. We have seen that no search for common factors to explain differences in prison rates can do justice to all the differences between individual countries. More qualitative and interpretative approaches, relying on other methods and generating other kinds of data thus provide an essential supplement and corrective to the claims of mainstream work. We have also seen that, if we are to come close to

grasping successfully what other systems of criminal justice are actually trying to do, we need to see them 'warts and all'. We should be careful not to deduce intentions from the outcomes being achieved on the basis of what we imagine they *should* be doing – even if these are the best of intentions – and even if it is often tempting – especially for the purposes of advancing a given agenda in local debates – to do just that. As far as Italy is concerned, it can be questioned how far their ways of reducing numbers in prison can rightly be described as expressions of 'inclusion' or tolerance (with the partial exception of the treatment of youth offenders), especially as these 'shields' turn out to be of little help where immigrants are concerned.

FIVE

the challenge of the global

The 'units' that we seek to compare undergo change over time, often as a result of external influences. For some writers, the transformations currently being produced by globalisation go so far as to put into question the comparative project. Katja Aas, author of a superb recent introduction to 'crime and globalisation', argues that 'one can no longer study, for example, Italy by simply looking at what happens inside its territory, but rather need to acknowledge the effects that distant conflicts and developments have on national crime and security concerns and vice versa' (Aas, 2007: 286). Not surprisingly, therefore, she devotes little energy to problems of comparing individual countries, and instead seeks to show us the complex processes by which the 'global' and 'the local' are intertwined. In this chapter I argue that comparative criminal justice must indeed take global and other cross-national interconnections into account, but that it also offers an essential contribution to understanding such developments. I begin by saying more about globalisation and its implications and then focus on case studies of attempts to bring about greater similarities in systems of criminal justice (hence reducing the apparent need for comparison of differences).

Globalisation and comparative criminal justice

Even if we limit ourselves to the narrow question of the implications of globalisation for comparative criminal justice, the literature