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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)

# SIX

## whose sense?

In this final chapter, by way of conclusion, I discuss in turn the place of knowledge, understanding and method in comparative criminal justice and the role of researchers in constructing discourses about other peoples' systems of criminal justice. After describing some of the traps lying in wait for those who blindly rely on local 'experts', I consider how far these can be avoided using the three research methods I call 'virtual comparison', 'researching there', and 'living there'.

### On knowledge

We have seen in the previous chapters that criminal justice is not just a set of actions to be described, but is part of broader cultural ways of thinking, as found in a variety of locations or sites of interpretation. To appreciate other ways of defining and delivering official sanctions cannot just be a matter of identifying different units (states, organisations, professional work groups or whatever) which exhibit varying practices and procedures. We also need to deal with the different logics that structure what is known (and what it is thought possible and desirable to know). For example, does the criminological distinction between 'white-collar' and 'organised' crime correspond to an ontological reality? Or does it reflect a Protestant conception of the ethics of wealth production that presupposes the inherent respectability of moneymaking and the ethnic composition of organised crime (Ruggiero, 1996)?

There are important contrasts in national criminological literatures regarding what crimes are thought most worthy of attention, and which actors in the system are authorised to deal with them. There may also be telling differences in the availability and use of empirical descriptions of the work of police or other criminal justice actors. On the other hand, both mainstream and critical discourses (Van Swaaningen, 1997) also cross-cut national boundaries. While discourses such as rehabilitation or just deserts may have origins in particular places, their adoption hardly ever stops at the boundaries of national jurisdictions. The same applies to current attempts to introduce, monitor or regulate international standards. Ways of thinking are shared by various intellectual and policy networks (Edwards and Hughes, 2005) or 'transnational epistemic communities' (Karstedt, 2002). Scholarly criminological discourse in turn is part of (and has varying influence on) a larger series of purported knowledges, ranging from that found in official documents, through media and internet journalism, to popular culture and even advertisements, all of which help mould ideas about crime and its control.

Both explanatory and interpretative approaches can be brought to bear on the question how knowledge is produced and used. We can ask, for example, about the causes and effects of such 'knowledge'. Can American ideas about crime spread without necessarily leading to a rise in incarceration rates? What consequences are produced by classifications of levels of judicial integrity or rates of incarceration? How far does the publication of the results of public opinion surveys about fear of crime or attitudes to the criminal justice system make them self-fulfilling? Vagaries in what is considered 'knowledge', or who is considered an expert, can itself be a factor in accounting for changes in criminal justice, as seen in the growth of prestige of economists, accountants and experts in risk evaluation in the USA and the UK. But these developments may take a different form in different places, depending (as between the USA, Germany and Poland) on the classes whose ideas are hegemonic, the role of bureaucracies and competition between media outlets (Savelsberg, 1994, 1999; Savelsberg, King and Cleveland, 2002).

On the other hand, making sense of what passes for knowledge also involves questions of meaning. The scientific literature is often less culturally universal than it purports to be. Much influential criminal justice literature is American and carries entrenched culturally-specific assumptions about the nature of crime and the role of criminal justice. It

takes for granted the modern Anglo-American 'pragmatic instrumental' approach with its supposed aim of reducing recidivism. While insisting on getting beyond myths, it fails to see why, in some places, and at some times in all places, words speak louder than actions. Understanding criminal justice in an interpretative vein involves attempting to grasp the meaning of what other people are actually trying to do. But we also have to take into account the possibility that actors are not fully aware of what they are doing – and, still less, of its consequences.

The complexities of interpreting can be made clearer by taking as an example some remarks by Massimo Pavarini, a leading Italian criminologist. In an English-language article, he set out to explain what he saw as the implications of the ordinary Italian's rejection of the state, and of the absence of Protestant structures of responsibility. 'Its raining ... damn the government', he says, 'very aptly sums up how an abstract, impersonal entity is blamed for everything that is seen as socially evil, unjust, undesirable and frightening. The Italian political lexicon is a complex weave of two historic traditions: the catholic matrix with its providential conception of history in which universal judgement has always outweighed individual judgement, and the Marxist matrix with its belief in the rebirth of society through revolution. Both these cultural traditions have encouraged the process whereby social expectations do not entail individual responsibility for society's ills' (Pavarini, 1997: 95).

A number of issues arise. How is this account likely to be understood by those with no first-hand experience of Italy? What does it mean to say that social expectations do not entail individual responsibility? In my experience of everyday life I see a rich texture of intertwined social and individual demands and expectations. So is this account to be read more as a critical 'intervention' by an engaged participant, and less as an effort at disinterested description? (Is it relevant that this statement is being made by a leading (ex)-Marxist criminologist in a book edited by a (once?) Marxist scholar? And what of the fact that Pavarini is himself personally one of the most responsible people one could ever hope to meet?) Even the most well informed of Italian criminologists, then, provides us with an interpretation of his society in the form of a riddle. Whatever else they show, these remarks also offer, albeit unwittingly, further proof of the extent to which Italians are unusually inclined to speak badly of their own society. During 2008 there was a news report of

a German offender who managed to get himself smuggled home from prison by using the post office to mail himself there in a large package. The Italian media commented that in Italy he might have made it out of prison but he would never have arrived home!

## On understanding

If even experts need to be interpreted, this makes it all the more important to consider *which* informants we treat as experts and why we think they can be trusted. Yet most researchers are reluctant to recognise the implications of the fact that, in all cultures, descriptions and criticisms of social and legal ideas and practices carry, and are intended to carry, political implications. When we think of experts in own culture we will often, without much difficulty, be able to associate them with 'standing' for given political or policy positions. But it is no less essential, if more difficult, to be aware of this factor when we rely on informants from abroad. Think of the problem of deciding how far Italian judges involved in fierce battles with government proposals are mainly concerned with defending themselves as a corporation. Some politicians, practitioners and academics are notoriously pro-judges, while others are virulently against them. The same applies to Italian criminologists writing about immigration and crime. There are bitter disputes over the question whether illegal and unregulated immigrants are over-represented in criminal activity because they commit more crime, or are victims of selective criminalisation and the social constructions of (only certain) aspects of the crime problem. Whom do outsiders decide to believe and how do they decide? If there is any type of criminology in which 'reflexivity' (Nelken, 1994a) is of the essence, it is surely comparative criminology. But it is unusual for researchers to include discussions of the way they are themselves *part* of the context they are describing (Nelken, 2007c).

The issue 'whom can you trust?' is therefore as relevant to the process of doing research as it is to understanding criminal behaviour and responses to it (Nelken, 1994b). Who is 'authorised' to speak for a given legal system or specific practice? How do their roles, as politicians or

policy-makers, members of the system, judges or other regulators of the system, employees of NGOs or pressure groups, journalists, academics or whatever, influence their knowledge and accounts of the systems they are describing. In the UK, police spokespersons provide influential accounts of the crime problem and individual criminals; this is much less true in Italy. On the other hand, in Italy, judges and prosecutors are perhaps the major sources of information about organised crime. Their 'motivations' of judicial sentences sometime run to thousands of circumstantially documented pages and few people worry about the dangers of using evidence crafted for legal purposes as if it were a sociological treatise.

Why should informants tell us what they know? Each criminal justice organisation is likely to have an 'official line' that it wishes to promote and secrets that it wants to conceal. Some informants may tell us openly that the position they are taking is an unconventional or personal one that is not shared by others. But, more often, they will want us to credit their view as the only one possible. 'Correct' answers by police in Japan, Johnson tells us, reflect *tatamae*, or socially approved image management (Johnson, 2003: 141). But is this not also true for Japanese prosecutors? And is this problem only relevant in Japan? Can we be more certain of our findings if informants coming from different groups provide the same accounts? Take the question of similarities and differences between what academics and practitioners have to say. If academics and practitioners agree, could this be only because the academics are relying uncritically on information from the practitioners? If they disagree, could this be because academics are too cut off from what actually goes on?

Even when we are sure that our sources are not 'partial' to one side or another – or we try to make allowance for this – there still remains the problem that experts and practitioners are undoubtedly part of their own culture. This is, after all, why we consult them. But this means that it is easy to fall into a comedy of errors in which we look for what is of interest to us, and they tell us what they think we want to know even if it is not what we should want to know. If we set out to understand why in the USA or UK criminal justice is relatively harsh we are less likely to find informants working in the system who share this preoccupation than people worried that not enough is being done to protect the public from crime – and this explains, in part, why the system is relatively severe. If we are interested in explaining why Italian juvenile justice is so tolerant

(Nelken, 2006b, 2006c), our informants are more likely to be on the look out for signs of harshness – indeed it is precisely that vigilance which helps explain the leniency of the system. In England and Wales, a system highly influenced by managerial considerations will be criticised for its inefficiencies. In Italy, a principled but inefficient system will regularly be attacked by local commentators on grounds of principle.

Cavadino and Dignan (2006b) make use of a series of academic informants so as to fill in the details of what they call the 'idiosyncrasies' of the societies they are comparing. But they tell us very little about how they chose their collaborators, nor seem to be aware that each will have his or her own disciplinary biases and local political allegiances. As far as Italy is concerned they rely mainly on a legal scholar who is a well known expert on juvenile justice, whilst also making extensive reference to the now somewhat dated writings of the early 1990s by Pavarini, a very different kind of criminologist, whose larger claims – as we have seen – can also sometimes be challenging to interpret. And *mutanda mutandis* the same applies to the other countries they discuss.

## On method

From what has been said so far about the difficulties of interpreting another society's practices, it should be clear that the method we adopt to overcome such obstacles will have crucial effects on the substance of our findings. Whether we are doing, reading or using comparative research, we must be aware that claims about why things take the form they do can never be separated from the issue of *how* sense is made of them – and *whose* sense that is. The three possible strategies I have elsewhere described as 'virtually there', 'researching there', and 'living there' (Nelken, 2000a) may help to clarify what is involved in cooperating with foreign experts in other places, in interviewing legal officials and others in their own contexts, and in drawing on direct experience of living and working in the country concerned.

The approach called 'virtually there' uses cross-cultural collaboration as its means of arriving at reliable accounts of relevant differences between systems of criminal justice. Instead of going to learn about a

foreign culture at first hand, the researcher is content to be 'virtually there', by relying on an inside expert from the society or societies. At its worst, this can be a fig leaf for the worst sort of 'comparison by juxtaposition'. But, at its best, experts in the distinctive traditions of the societies in which they live and work take on the task of educating experts in the other system. Each therefore tries to familiarise the other with salient aspects of their own system in terms that can be related back to aspects of the other society. Such collaboration requires a high degree of mutual trust and often involves 'negotiating' mutually acceptable descriptions of legal practice in each of their home countries.

An excellent example of what can be achieved in this way is found in Brants and Field's comparison of controversial aspects of police practice in England and Wales as compared to the Netherlands (Brants and Field, 2000). Among other insights, they noted that in England and Wales, diversion was seen as a somewhat 'guilty secret', which compromised the ideals of adversarial justice in the interests of making the criminal process more expeditious. Diversion in the Netherlands, by contrast, was understood as an aspect of the wider 'politics of accommodation', which encouraged an ample use of prosecution and other official discretion. They also contrasted the changing 'demons' that were used to justify undercover police practices in the countries compared.

'Researching there', by contrast, is an approach in which the researcher is in direct contact with informants in their own society. This method can be illustrated by David Johnson's interviewing a large number of prosecutors in Japan so as to explain differences in 'role expectations' there as compared to the USA (Johnson, 2000). Johnson's main interest was in understanding why prosecutors in Japan so often go out of their way not to charge suspects. Prosecution aims that are at home in Anglo-American legal cultures, such as that of 'disposing efficiently of as many cases as possible', came low down the list for the Japanese. The most important goals to which they subscribed turned out to be that of 'discovering the truth' and 'making the correct decision whether to charge with an offence'. Interestingly, low priority was also given to the objective of 'invoking public condemnation of the crime', considered important by less than a third of his sample. Many of those interviewed did not even understand what this meant. Rather than seeking to clarify cultural assumptions through collaboration with other experts, or by

attempting to move backwards and forward between his own culture and that under observation, Johnson's interview schedule was carefully designed to produce the same stimulus for all respondents so as to be able to standardise their answers. However, he admits that his approach has limits that need to be set against its strengths. For example, the questions Johnson planned to ask about whether prosecutors *actually achieved* their objectives were ruled off-limits.

The third approach, which I have dubbed 'living there', involves wider participation in the general life of the country and may even include an active consulting/critical role in relation to the criminal justice system itself. The scholars who use this approach can be described as 'observing participants' (rather than participant observers) who come to enjoy the status of 'insider-outsiders' (Nelken, 2004b). Maureen Cain, for example, spent a total of eight years in the West Indies before returning to Britain, and she was able to draw directly on her own experience of teaching and action rather than limiting herself to retelling what professionals or experts had to say (Cain, 2000a, 2000b). She tells us, for example, that the students she taught wanted what they considered to be accredited 'universal' knowledge but that she felt ill at ease:

Teaching about youth cultures in society which is not rigidly age stratified; of teaching community policing and democratic accountability while lacking a language to describe a post-colonial service lacking a sense of direction, having lost its *raison d'être*, of talking ethnic minorities where historically – and arguably today as well – it is the culture and identity of the black former *majority* which is under threat. (Cain, 2000a: 265)

Different research strategies have different merits and there are the usual trade-offs, such as being able to cover more cases with questionnaires or interviews as opposed to in-depth observation, and so on. Methods can only be judged in terms of the objectives being pursued and it is important to appreciate that each operate under their own constraints. The choice to follow any particular approach to data gathering in comparative research will be linked to the many considerations which influence the feasibility of a given research project, including the time available, and whether one is able to visit the country concerned. But the three methods distinguished here can be placed on a continuum running from least to greatest engagement with another society, and this has

a number of implications. Virtual research and short research visits, by their nature, can require too much reliance on local experts and practitioners. Long-term involvement in a culture, by contrast, makes it more possible to discover the intellectual and political affiliations of our informants and gain direct experience of the relationship between criminal justice and wider aspects of the same society.

Actually living in a place for a long period is the best – perhaps the only reliable – way to get a sense of what is salient. Seeing the difficulties of keeping to the many over rigid legal rules in Italy gives you more idea of why some people avoid them, and of what the judges are up against in their attempts to enforce them. Seeing how social control is exercised in Italian family life is indispensable for understanding what is and is not asked of its juvenile justice system. Having a social and occupation role in Italian life was also helpful for finding out more about the practices that I have been using as running examples. I gained a deeper understanding of the actual effects of the rule of obligatory prosecution when a family friend explained that she would have liked to reserve her energies for pollution cases rather than low-level infractions without social consequences, but that her boss had threatened her with disciplinary proceedings if she risked allowing unimportant cases to fall into prescription. Participating in a national law professors' project on legal delay made it easier to appreciate how far lengthy trials were the desired or undesired outcomes of procedural complexities.

A further advantage of actually living in a country comes from being better placed to convey in a convincing way the experience of what Geertz calls 'being there' (Geertz, 1988). Whether this be seen as some sort of reaction to the otherwise paralysing postmodern 'crisis of representation', or, more straightforwardly, as a way of dealing with the suspicion that one has not really got to grips with the culture being (re)presented, there is no doubt that the descriptions that most influence an audience often take the form of vignettes drawn from life. The more opportunities to do this, the more convincing the argument as the story of the research comes to join the stories *in* the research.

But we should not exaggerate the differences between adopting one or other of these methodologies. The insider-outsider's direct 'experience' is always and necessarily marked by expectations based on previous socialisation – and the difficult trick is that of losing one type

of ethnocentrism without taking on another. Because the observing participant can experience directly only a small slice of life she, like those who use the other methodological approaches, is still largely reliant on other people for ideas and information which lie beyond her direct experience. A person who lives in a place can also no longer pretend to the same useful naiveté of a visitor. Once they have a recognized internal identity those with other loyalties will also be less willing to trust them (and they will compete for the same scarce resources.)

The insider-outsider too must learn from and contribute to a wider 'scientific' literature. But, on the other hand, direct experience can help in grasping the meaning of concepts such as 'clientalism' in a way that a mere literature search can never do. It is quite different, for example, actually encountering (and perhaps suffering) one version of this intricate combination of instrumental friendship and sponsored co-optation and then going back to the scientific literature to learn more about the wider varieties of this form of social and political ordering. The insider-outsider is also often in a good position to appreciate how given literatures which present themselves as standing above partial perspectives are in fact shaped by scholars with specific roles and standpoints.

Frances Heidensohn, an insightful writer on comparative issues, has recently proposed a richer classification than the three methods described above. She argues that it can be helpful to distinguish among accounts coming from strangers, refugees, explorers, reformers, bureaucrats, armchair travellers and global theorists (Heidensohn, 2006, 2007). These categories can be especially helpful, she suggests, in showing how different roles can contribute to a division of labour of comparative work. Data, she argues, is typically provided by bureaucrats and explorers, concepts come from strangers (but also from armchair and global theorists), whereas frameworks come from travellers of both types who gain overviews from their real or virtual journeys.

The three approaches I set out were not intended to cover all aspects of conceiving and executing comparative research projects. But it is hard to see how or why the division of labour Heidensohn describes would actually come about between actors with such different reasons for seeking to understand criminal justice practices. On the other hand, often the same researchers switch between, or combine, the various roles that she outlines. For example, academics

are currently collaborating with the NGO Transparency International under a Seventh Framework programme of the European Commission with the aim of designing better anti-corruption tools under the title of 'Promotion of Participation and Citizenship in Europe through the Advocacy and Legal Advice Centres of Transparency International: Analysis and Enhancement of an Anti-corruption Tool to Enable Better Informed and Effective Citizen Participation in Europe'.

Another, not untypical collaborative project under the auspices of JUSTIS calls on the talents of a number of European criminologists in a pioneering cross-national study of prosecution. This, we are told, 'is a project designed to provide EU institutions and Member States with new evidence-based indicators of public trust in justice'. The aim of the project is to develop and pilot survey-based indicators with the stated intention being not only to understand common features and important differences, but also to view these in the context of the planned common legal space within the EU and the tentative plans for a supra-national prosecution service. The project's interim findings supply lots of useful information about the systems being compared, often with the help of flow charts, special attention being given to what happens at each stage of the process in different jurisdictions. On the other hand, the goal of achieving more through disposals of high-volume crime is simply taken for granted. No mention is made, for example, in reference to Italy, of the role of obligatory prosecution and other specific features of the Italian legal system, nothing is said about the context of ongoing struggles between prosecutors and politicians, nor is any thought given to the political implications that proposals for standardisation with other places might have for this or similar issues in Italy or elsewhere. The issues that matter are taken to be legal, technical and managerial ones. This is not to say, however that there is any necessary contradiction between practical engagement and valid research. The European Committee on Torture, for example, is one of the few sources of essential data on the international treatment of vulnerable people by different police forces and prison authorities (Morgan, 2000).

We need to be careful not to confuse ways of getting data with the use that will be made of it. In particular, the time spent in a place tells you little about what conclusions are likely to be drawn. For example, Clinard's short visit to Switzerland led him to a positive assessment of

the country's way with crime (Clinard, 1978), but Balvig's even shorter visit there led him to more critical conclusions (Balvig, 1988). On the other hand, Downes (1988) needed only a short period to be impressed with prison policy in the Netherlands whereas his Dutch critics, actually living there, were much more cynical (Franke, 1990). On the basis of relatively short periods of research, Crawford criticises King, who lived for some years in France, for failing to see the downside of the French approach to crime prevention (Crawford, 2000b). What can be relevant to at least some of these disagreements is whether the study of foreign cultures is actually more about the home country than the setting being studied. It is reasonable to suppose that, as a very general rule, an insider-outsider who spends a long time in a foreign country is likely to become less interested in examining it for the lessons it supposedly has to teach those back home (except when writing for an audience in their country of origin) and as much, or more, in trying to understand it in relation to its own history and current challenges. They may also, by choice or otherwise, embrace a general world view closer to the new place where they are located (Bond, 1997).

The insider-outsider, whose work is not constrained by cross national policy-oriented projects or plans for harmonisation, may be asked or tempted to take part in the national or local debates and conflicts of her new society. In my own case, as an Anglo-American criminologist transplanted to Italy during the *Tangentopoli* anti-corruption investigations, it mattered to insiders whether I was 'for' or 'against' the judges. After writing some articles about *Tangentopoli* for English-speaking readers, I wrote a chapter in Italian, in a collection for a respected series of volumes on Italian history, that attempted to tell the story of what had happened (Nelken, 1997b). I thought the piece was favourable to what the judges had achieved, and some senior left-wing judges later recommended it to their readers. But because it did also contain some mild criticisms it was also seized on by writers sympathetic to the politicians under attack and praised in Parliament by a notoriously anti-judge deputy. I was then invited to act as an expert witness by lawyers defending a businessman facing extradition from the USA for what seemed then like a serious case of corruption. My task would have been to explain to the American courts that the crimes uncovered by *Tangentopoli* should have been considered political offences (Nelken, 2002). I declined this



invitation, the businessman was in fact extradited, but the court then found the facts he was accused of not to exist.

Political corruption in Italy is no longer at the centre of local criminal justice debates, though it never seems to disappear for long. The burning issue now concerns the relationship between immigration and crime and the way this has encouraged fear of street crime. Should this new concern about crime be understood (and opposed) as further evidence of the spread of American, hegemonic, neo-liberal-inspired ideas of punitiveness, as many left-leaning criminologists would have it? Or should it (also) be seen as a sign of a more democratic, bottom-up growth in individualist, consumer-based approach to politics and law that in Italy is accompanying the inevitable (?) decline of (solidaristic) ideologies. Insider-outsiders have to relate their opinions and observations on this and other questions to those of the native members of the culture with whom they interact. They may take themselves serving as a translator, commentator or counterpoint in respect to the views of their informants. Sometimes they will find the conformity of their colleagues or other informants judgements with their own views as evidence for the soundness of their observations, at other times they may see more value in the freshness of the outsider's perspective and see what natives say as data that itself needs interpretation.

Whatever choice is made, the methods we choose and the way we use them are not only a means to obtaining information but are also intimately linked to the substance of what we find or think we find. They are an essential part of the ethical and political reasons for doing comparative work (Roberts, 2002), involving as this does engaging with and 'representing' the other, and being open to being changed by such encounters. It may be true that keeping faith with others' meanings may not always be the only value in play. We may sometimes need to impose common meanings in order to get a collaborative project off the ground (Klockars, Ivkovich and Haberfeld, 2004). In some circumstances, depending on our approach to social science, we may even think that we know better than the people we are studying, the meaning of what they are doing – or its implications. Or our goal may simply be to try and change what they are doing. But in all such cases, at the least we should be mindful of what is involved in making sense of difference – and conscious of the dangers of our presumption.

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