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COMPARING CRIMINAL JUSTICE

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In the few years since the last edition of this *Handbook* was published the literature relevant to this chapter has developed significantly. A number of valuable textbooks and collections have been published as well as a host of important books and articles examining specific systems in a comparative perspective (see the note on selected further reading).

In addition, there is also a growing literature on the crucial question of the globalization of crime and criminal justice and the way this affects how ideas and practices of criminal justice are shaped internationally or 'transferred' from one place to another. Comparative research now figures in some of the most debated issues on the criminological mainstream. Information from international comparative victim surveys has helped demonstrate how little changes in crime levels could explain patterns of punishment over time and space. David Garland's famous thesis about the rising culture of control set out to describe the trends in growing punitiveness in the USA and the UK (Garland 2000). But in implying that these countries could be seen as exemplars of widely shared late-modern conditions he prompted many other authors to see whether (and how) his claims applied elsewhere (see, e.g., Cavadino and Dignan 2006; Lacey 2008). Comparison is also central for those who seek to explain why the death penalty is retained in some places rather than others (Zimring and Johnson 2008)—and even Garland now seeks to explain what makes the USA specific in this respect rather than what makes it an illustration of wider trends (Garland 2010).

Given the space constraints it is not possible to do justice to all the new work that has been published. I have added something about the challenge that globalization poses to comparative criminal justice and the ways that global trends affect the nation state or other more locally-based justice practices. But the chapter continues to concentrate on general issues concerning the rationales, methods, and approaches to comparative research on criminal justice. Why do we do such research? What types of theoretical approaches should we draw on in comparing criminal justice systems? What methods can we use to gather our data? Even if comparative research is increasingly seen as offering a contribution to answering criminology's basic questions about the causes of crime and the way it is sanctioned, it still faces special problems in its search to find ways to understand difference—and make the familiar unfamiliar.

WHY STUDY CRIMINAL JUSTICE COMPARATIVELY?

Interest in learning more about different systems of criminal justice can be shaped by a variety of goals of explanation, understanding, and reform. For many scholars the major contribution of comparative work lies in the way it could advance the agenda of a scientific criminology aimed at identifying the correlates of crime as antisocial behaviour. These writers use cross-national data so as to test claims about the link between crime and age, crime and social structure, crime and modernization, and so on. Much the same could be done in constructing arguments about variations between types of crime and social reaction (Black 1997).

By contrast, evidence of differences in the relationship between crime and criminal justice may be sought in order to excavate the positivist worm at the core of criminology. When 'crime' is treated as a social construct, a product of contrasting social and political censures, criminology is obliged to open out to larger debates in moral philosophy and the humanities as well as in the social sciences themselves. By posing fundamental problems of understanding the 'other' it challenges scholars to overcome ethnocentrism without denying difference or resorting to stereotypes. Engaging in comparative criminology thus has the potential to make criminologists become more reflexive (Nelken 1994a), for example learning to avoid the common error of treating the modern Anglo-American type of 'pragmatic instrumental' approach to law as if it were universal. Setting out to describe other countries' systems of criminal justice in fact often leads to rival accounts proposed by criminologists of the countries concerned (see, e.g., Downes 1988, 1990; Franke 1990; Clinard 1978; Balvig 1988; Killias 1989). The debates that follow, painful and replete with misunderstanding as they sometimes tend to be, are fundamentally healthy for limiting the pretensions of a discipline that too often studies the powerless.

One result of studying the way crime is defined and handled in different jurisdictions by legislatures, criminal justice agencies, and the media (and others) is to discover—yet again—the crucial need to relate the study of crime to that of criminal justice. But it also demonstrates the difficulty of distinguishing criminal justice from social control more broadly. The proportionally low crime rates in Switzerland and Japan, for example, can only be understood in terms of such interrelationships. Likewise, if Italian courts send to prison only one-fifth of the youngsters who end up there, in England and Wales this may in part be explained by differences in the type and level of offences carried out by young people. But it will also have to do with the way Italian juvenile court judges and social workers feel they can (and should) defer to family social controls—given that children generally live at home at least until their late twenties, and often rely on family help to find work. On the other hand, cross-national data may on occasion also show that criminal behaviour is relatively uninfluenced by legal and social responses. There is evidence that even when different nation states change their drug laws at different times and in different directions, the patterns of national drug use (and drug overdose) seem to be less affected by this than by international developments in supply and demand.

But we should not limit our interest in comparative criminal justice only to its effects on levels of crime. We can also study it in its own right. This sort of comparative

enquiry has as one of its chief concerns the effort to identify the way a country's types of crime control resonate with other aspects of its culture. Why is it that countries like the UK and Denmark, who complain most about the imposition of European Union law, also maintain the best records of implementation? What does this tell us about the centrality of enforcement as an aspect of law in different societies? Why, in the United States and the UK, does it often take a sex scandal to create official interest in doing something about corruption, whereas in Latin countries it takes a major corruption scandal to excite interest in marital unfaithfulness? What does this suggest about the way culture conditions the boundaries of law and the way criminal law helps shape those self-same boundaries (Nelken 2002a)?

It can be important to investigate how far particular methods of crime control are conditioned by these sorts of cultural factors. Much British writing on the police, for example, takes it for granted that nothing could be more ill-advised than for the police to risk losing touch with the public by relying too much on military, technological, or other impersonal methods of crime control. The results of this, it is claimed, could only be a spiral of alienation that would spell the end of 'policing by consent'. In Italy, however, two of the main police forces are still part of the military, and this insulation from the pressures of local people is actually what inspires public confidence. Britain, like most English-speaking countries, adopts a preventive style of responding to many white-collar offences which is sufficiently different to be characterized as a system of 'compliance' as compared to 'punishment' (Nelken, this volume). This is often justified as the only logical way of proceeding given the nature of the crimes and offenders involved. But in Italy such a contrast is much less noticeable. Enforcement is guided by the judiciary, who do their best to combat pollution, the neglect of safety at work, etc. using the normal techniques of criminal law and punishment.

As these examples illustrate, the interest in how criminal justice is organized elsewhere is often (some would say predominantly) guided by practical and policy goals. Perceived differences, such as the continued use of the death penalty in the United States, as well as its relatively high rate of imprisonment, may be used to reassure us about the superiority of our own institutions. But, more commonly, scholars cite evidence from abroad in an attempt to challenge and improve the way we do things at home. The concern for reform is manifest for example in the long-standing search by Anglo-American authors to see whether anything can be learned from Continental European countries about better ways of controlling police discretion (Frase 1990; Hodgson 2005). Many descriptive or explanatory cross-cultural exercises are often shaped by a more or less hidden normative agenda, or finish by making policy recommendations. Even cross-national victim surveys can be deployed as much as a tool for change as in a search for understanding variability (Van Dijk 2000).

The search for patterned differences in law and practice also raises the question of what it could mean to affirm (either as a sociological or a normative claim) that a country has the system it 'requires'. What price might a society have to pay to introduce 'reintegrative shaming'? What are the costs of pursuing 'zero tolerance'? If the Italian criminal process can effectively decriminalize most cases involving juvenile delinquency (with the important exceptions of cases involving young immigrants or Gypsies), could we and should we do the same (Nelken 2006a)? If prosecutors in Japan succeed in keeping down the level of cases sent to court, could we and should we

follow their example (Johnson 2000)? Policy-led research can itself produce interesting descriptive and explanatory findings. But cultural variability in ideas and values means that it can also be tricky. Is it safe, for example, to assume that 'all criminal justice systems have to handle the "built-in-conflict" of how to maximise convictions of the guilty at the same time as maximising the acquittal of the innocent' (Feest and Murayama 2000)? What would it mean to shift our focus from 'taking or leaving' single elements of other systems in favour of a broader effort to re-think practices as a whole in the light of how things are done elsewhere (Hodgson 2000)?

The search to find convincing, plausible interpretations of systems of criminal justice at the level of the nation state, as in accounts of 'Japanese criminal justice' or descriptions of 'French criminal procedure', continues to be an ambition of comparative researchers. But, in an era of globalization, there is increasing recognition of the difficulties of drawing boundaries between systems of criminal justice. Attempts to deal with a host of perceived international or transnational threats such as (amongst others) organized crime, terrorism, human trafficking, corruption, illegal dumping of waste, computer crime, money-laundering, and tax evasion raise the problem of how far it is possible or advisable to harmonize different systems of criminal justice (Nelken 1997b).

As noted in the previous edition, however, globalization is a name for complex and contradictory developments. At a minimum, however, we could think of itas referring to the consequence of the greater mobility of capital (sometimes, but not always, willingly embraced by states as a political neo-liberal choice) and new forms of international interconnections that have grown at the expense of national ones as nation states are incorporated into the global economy and informational cyberspace. State sovereignty is challenged by international courts, human rights conventions, multinational private security enterprises, cross-border policing, policy networks and flows, and technologies of global surveillance. Key crime initiatives now link regional or local centres of power (Edwards and Hughes 2005) or are delegated to the private sector. War making, peacekeeping, and criminal justice come to overlap and even war is privatized. At the same time the use of cyberspace requires and generates a variety of forms of control and resistance, as it points to unprecedented (not necessarily utopian) forms of social ordering.

On the other hand, nation state boundaries still often coincide with language and cultural differences, and represent the source of criminal law and criminal statistics. The imposition of a common legal code and the common training of legal officials form part of attempts to achieve and consolidate national identity and 'borders' continue to play important instrumental and symbolic roles, not least in responding to immigration. Nation states use neo-liberal strategies to (re)assert national boundaries and priorities and the criminal law continues to be a powerful icon of sovereign statehood. And the nation state remains a key site where the insecurities and uncertainties brought about by (economic) globalization are expected to be 'resolved'. These tensions need to be born in mind when studying the work of international bodies such as non-governmental organizations and intergovernmental organizations and the influential think tanks who formulate and spread what have been called 'global prescriptions'—including ideas about what to do about crime.

According to Savelsberg, globalization occurs along three paths: norms and practices, including those on punishment, change as a consequence of global shifts in

social structure, and culture, there is a nation-specific processing of global scripts and nation-specific responses to the arrival of (late) modernity, and a new type of international criminal law has been gaining strength at the global level (Savelsberg 2011). For him, as for many other commentators, globalization should be seen as a *process*—one in which the role of agents is crucial. As Muncie puts it:

> the argument that criminal justice is becoming a standardised global product can be sustained only at the very highest level of generality. Economic forces are not uncontrollable, do meet resistance and have effects that are neither uniform nor consistent. Nor should we expect that policy transfer be direct or complete or exact or successful. Rather, it is mediated through national and local cultures, which are themselves changing at the same time (Muncie 2011: 100).

In examining the spread of such blueprints we need to study *what* it is that is being spread—scripts, norms, institutions, technologies, fears, ways of seeing, problems, solutions—new forms of policing, punitiveness, or conceptual legal innovations such as 'the law of the enemy', mediation, restitutive or therapeutic justice? We can also ask *where* it is being spread, e.g. from or to national, sub-national and supranational levels in Europe, or more widely? How is agreement achieved amongst signatories to conventions or those subject to regulatory networks? We also need to take quite a broad view of *who* is involved. The key actors include politicians, inter-governmental and non-governmental organizations or pressure groups, regulatory bodies, journalists, and even academics themselves and not only judges, lawyers, police, probation officers, or prison officers. They may also be representatives of businesses such as security providers or those who build and run private prisons. Attention needs to be given to the role of institutions, singly, collectively, or in competition. In Europe—but also beyond—European Union institutions, the Council of Europe, and the Human Rights Court system are important players. The same crime threat may call forth responses from a variety of inter-Governmental and non-Governmental organizations, such as the UN commissioner for rights etc., the international labour organization, or the international organization for migration, Human Rights Watch, Amnesty etc. (Nelken 2011).

The questions of 'success' and its implications for diversity are complex ones. When assessing the effects of globalizing, authors sometimes confuse explaining whether a certain model has spread successfully and whether this is a good thing. On the one hand, we may be told that 'zero tolerance' ideas have not changed practices on the ground and are merely 'symbolic' (Jones and Newburn 2006). On the other, if human rights ideas do begin to change the local discourse, as in the case of conventions dealing with violence against women, this may be counted as success even if they do not change (other) practice on the ground (Merry 2006). Globalization itself also blurs the line between the normative and the descriptive. As pressures for global conformity rise there is often confusion between what is 'normal' in the sense of not falling below a standard and the somewhat different meaning of what is normal or average.

Comparative criminal justice involves not only comparing objects of inquiry but also differences in the ways of constructing such objects. Hence the discourses of national and globalizing criminologies must also be brought within the frame of comparison (Nelken 2010a). 'Second order comparison' (comparing how others

compare) is called for as increasing interaction at the transnational level affects the ideas that people have about criminal justice elsewhere and the desire to be similar to or be different from them. Prison rates (or decisions about keeping the death penalty) for example, need to be understood not only as measures describing the operations of local criminal justice systems but as results of choices to come into line with what others are doing (Von Hofer 2003). They not (only) reflect policy differences in the way states choose to deal with marginal citizens but differential ways of responding to a similar transnational trend, or even the results of the marketing and imitation of an American model of penalty (Waquant 2009). This does not mean of course that those doing the comparison have got it 'right'. Typically, places or groups construct other societies in terms that reflect their own concerns and assumptions—even when they are seeking to collaborate with them. Ross, for example has shown the considerable difficulties faced by those working in the US criminal justice system when seeking to bring their own working practices into alignment with those belonging to other systems of criminal justice (see, e.g., Ross 2004).

Although there is nothing new about the borrowing and imposition of law from elsewhere (Nelken and Feest 2001) in the many ways it blurs the differences between 'units', globalization is changing the meaning of place and the location and significance of boundaries. And students of comparative criminal justice are still uncertain about how best to integrate its effects into their traditional classificatory and descriptive schemes. Material that fits awkwardly into the normal comparative paradigm is relegated to a separate book (Reichel 2007), to an early chapter (Reichel 2008), or a closing one (Dammer, Fairchild, and Albanese 2005). Sheptycki and Wardak in their edited collection distinguish 'area studies', 'transnational crime issues', and 'transnational control responses' (Sheptycki and Wardak 2005). But they admit that more needs to be said about when an account of a country's criminal justice system should focus more on internal factors or on external influences. Larsen and Smandych argue that 'the effects of rapid globalisation have changed social, political, and legal realities in such a way that comparative and international approaches to crime and justice are inadequate to capture the full complexity of these issues on a global scale' (Larsen and Smandych 2008: xi). Aas insists 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). And Pakes too worries that 'diffuse interrelations and complications brought about by globalisation are ignored or understated' (Pakes 2010b: 17). He suggests that the comparative approach could be seen as just a matter of methodology whereas globalization is an 'object of study' (Pakes 2010b: 18–19). But he also recognizes the need to move away from 'methodological nationalism'.

APPROACHES TO COMPARISON

Within the social sciences, some argue that *all* sociological research is inherently comparative: the aim is always the same: the explanation of 'variation' (Feeley 1997). But

explicitly comparative work does have to face special difficulties. These range from the technical, conceptual, and linguistic problems posed by the unreliability of statistics, lack of appropriate data, meaning of foreign terms, etc., to the complications of understanding the differences in other languages, practices, and world views which make it difficult to know whether we are comparing like with like. Indeed often it is that which becomes the research task. Others claim that for these and other reasons comparative work is near impossible. Legrand, for example, argues that what he calls 'legal epistemes' are incommensurable and certainly never the same matter for those who have been socialized in the culture being studied and those who are merely researching into it (Legrand 2001; but see Nelken 2002a). Cain, who prefers a form of active collaboration with the subjects of her research, insists that comparison faces the allegedly unavoidable dangers of 'Occidentalism'—thinking that other societies are necessarily like ours—or 'Orientalism'—assuming that they are inherently different from us. Her advice is to 'avoid comparison, for it implies a lurking occidentalist standard and user, and focuses on static and dyadic rather than dynamic and complex relations' (Cain 2000: 258).

These reservations about comparison are given added point by the current processes of globalization. In a globalized world there is no Archimedean point of comparison from which to understand distinct nations or traditions. Within anthropology the process of producing accounts of other cultures has become increasingly contested (Clifford and Marcus 1986). The very idea of 'culture' becomes highly problematic, no more than a label to be manipulated by elements within the culture concerned or by outside observers (Kuper 1999). Cultures are influenced by global flows and trends; the purported uniformity, coherence, or stability of given national cultures will often be no more than ideological projection or rhetorical device. The links between societies and individuals have been so extended and transformed that it makes little sense to look for independent legal cultures. Hence 'all totalising accounts of society, tradition and culture are exclusionary and enact a social violence by suppressing contingent and continually emergent differences' (Coombe 2000). For all this, however, at any given time there continue to be important and systematic differences in criminal justice, whether this be regarding the relationship between law and politics, the role of legal and lay actors, levels of leniency, degrees of delay, and so on (Nelken 2002a).

In exploring such differences some studies set out:

1. to test and validate explanatory theories of crime or social control (which we may, at some risk of oversimplification, call the approach of 'behavioural science' or 'positivist sociology');
2. to show how the meaning of crime and criminal justice is embedded within changing, local and international, historical and cultural contexts (an approach which we will call 'interpretivist');
3. to classify and learn from the rules, ideals, and practice of criminal justice in other jurisdictions (which we can call the approach followed by 'legal comparativists' and 'policy researchers').

The behavioural science approach itself includes a wide range of different points of view about the role of comparative work. For some writers, taking the model of science

seriously means that comparative work must show that cultural variability is as *irrelevant* to social laws as it is to physical laws. Gottfredson and Hirschi argue that failure to recognize this has meant that up until now 'cross national research has literally not known what it was looking for and its contributions have rightfully been more or less ignored' (Gottfredson and Hirschi 1990: 179). Some of the most influential American explanations of crime, such as Merton's anomie theory and Cohen's subcultural theory of delinquency, on the other hand, seem almost deliberately ethnocentric in the sense that the explanation is designed to fit variables found in American society. Yet anomie theory was first developed in France, and only afterwards was it reworked in the United States with particular reference to the American dream of egalitarianism and the cultural emphasis on success as measured in money. It has since been applied with advantage in very different cultural contexts; for example, in Italy to explain the growth of political corruption in the 1980s (Magatti 1996), and in Japan to account for the relative lack of crime there (Miyazawa 1997). Is the same theory being employed? How and why does this matter?

Gottfredson and Hirschi argue that Cohen's account of the frustrations of American lower-class children is hardly likely to be applicable to the genesis of delinquency in an African or Indian slum, and this spells its doom. Rather than assume that every culture will have its own crime with its own unique causes, which need to be sought in all their specificity, the object of criminological theorizing must be to transcend cultural diversity in order to arrive at genuine scientific statements (Gottfredson and Hirschi 1990: 172–3). In this search for a universal criminology Gottfredson and Hirschi define crimes as 'acts of force or fraud undertaken in pursuit of self interest'. For them, different cultural settings cannot influence the causes of crime except by affecting the opportunities and the ease with which crimes can occur. They are therefore comforted by apparent cross-cultural consistency in correlations between crime involvement and age and sex differences, urban–rural differences, and indices of family stability. A similar approach is—or could be—followed by those scholars who seek to establish general laws about judicial institutions. Shapiro's classic study of appeal courts sets out to demonstrate that higher courts always function primarily as agents of social control, whatever other political and legal differences may characterize the systems in which they are found, and whatever other legitimating ideologies they may themselves employ (Shapiro 1981). Gottfredson and Hirschi, however, just *assume* that the agencies that apply the criminal law have the universal task of reminding people both of their own long-term interests and of those of other people.

Most behavioural scientists are less concerned than Gottfredson and Hirschi with finding cultural universals. What matters is the *implicit* generalizability of the variables, not whether they actually do apply universally. For theories which link crime and industrialization, for example, it is strategically important to investigate apparent counter-instances such as Switzerland (Clinard 1978) or Japan (Miyazawa 1997), both so as to test existing hypotheses and so as to uncover new ones. Similarly, we can ask about variations in the patterns of policing, courts, or prisons in terms of the patterns found in different cultures or historical periods. If the Dutch prison rate could, at least until recently, be kept so much lower than that of other countries in Europe, this is important not only because it shows that there is no inevitable connection between

crime rates and prison rates but also because it challenges us to look for the particular variables that explain the Dutch case (Downes 1988).

On the other hand, many scholars of comparative criminal justice are more fascinated by difference than by similarity. Yet the point of compiling differences, apart from its value as description or in correcting ethnocentrism, is not always made as clear as it might be. Certainly, the assumption that all economically advanced countries would be expected to have exactly similar ideas and practices for dealing with crime seems far-fetched. Why study difference? The interpretivist approach seeks to uncover the inner meaning of the facts that positivist social scientists take as the starting or finishing points of their comparisons. Even the technical definition of crime varies between legal systems, so that in Japan, for example, assaults that result in death are classified as assault, not murder; and in Greece the definition of 'rape' includes lewdness, sodomy, seduction of a child, incest, prostitution, and procuring (Kalish 1988). Less obviously, there is considerable variation in the importance that legislatures, justice agencies, or the media put on responding to different sorts of behaviour as crime. Until very recently, in Germany or Italy the police and the mass media kept a remarkably low profile regarding most street crime or burglary, at least by British or American standards (Zedner 1995; Nelken 2000b).

The prosecution or prison statistics that constitute the data of behavioural science explanations are here treated as cultural products. But it would be wrong to take too extreme a stand on the idea of crime as a cultural construction. This could lead to a relativism by which comparative criminology would become implausible (Beirne 1983), and this could be simply countered by the argument that if understanding 'the other' was really so difficult then even social science research into different social worlds at home would be impossible (Leavitt 1990). As noted, criminal justice cultures are in any case less and less sealed off from each other for them not to have some common language in which to express their concerns. Far from being either cognitively or morally relativist, the interpretivist approach in fact actually presupposes the possibility of producing and learning from cross-cultural comparisons, even if it does seek to display difference more than demonstrate similarity. It may be used, for example, to compare different societies in terms of their levels of 'punitiveness' (Nelken 2005) or 'tolerance' (Nelken 2006a), taking care to distinguish the external observers' judgement from the way such practices are experienced by members of the societies concerned. It is unfortunate that some scholars continue to insist that the interpretivist approach is necessarily relativist and non-evaluative (Pakes 2004: 13 ff.; cf Nelken 1994b).

The search for difference only really becomes interesting when the attempt is made to show how differences in the punitiveness or any other aspect of criminal justice are linked to other differences (e.g. in types of political culture). If the positivist approach operationalizes 'culture' (or deliberately simplified aspects of it) to explain variation in levels and types of crime and social control, this second approach tends more to use crime and criminal justice as themselves an 'index' of culture. Grasping the 'other' requires the willingness to put our assumptions in question: the more so the greater the cultural distance. Some of the most exciting work in comparative criminal justice sets out to interpret what is distinctive in the practice and discourse of a given system of criminal justice by drawing an explicit or implicit contrast with another system, usually that of the scholar's culture of origin (Zedner 1995). In an important study,

Whitman seeks to explain the relative harshness of the treatment of criminals in the USA in comparison to that reserved for them in the countries of Continental Europe. His argument is that whereas France and Germany 'levelled up' their treatment of criminals, on the basis of long-standing more respectful treatment for higher-status prisoners, in America criminals suffered from a general levelling-down process that presupposed status equality (Whitman 2003; Nelken 2006b).

This said, interpretative approaches do face their own problems (Nelken 1995). One difficulty is that of knowing who or what can speak for the culture (especially when matters are controversial). Very different results will be obtained by analysing texts and documents, testing public attitudes, or relying on selected informants such as criminologists or public officials: the drawbacks of exclusive reliance on these last sources have already been discussed. Because the interpretative approach is so labour intensive it does not allow for large-scale, cross-cultural comparison. Much therefore depends on which other system is taken as the yardstick of comparison—and how this is to be justified. Taking criminal justice discourse in England as our starting point may reveal that France works with one model of 'mediation' whereas we have several (Crawford 2000). If we compare England with Germany, on the other hand, we may find that Germany seems to have several ideas of 'community' where we have just one (Lacey and Zedner 1995, 1998). But what exactly is the significance of such findings?

Care also needs to be taken in assuming that a given feature of the practice or discourse of criminal justice necessarily indexes, or 'resonates' with, the rest of a culture. Specific ideals and values of criminal justice may not always be widely diffused in the culture. In many societies there is a wide gulf between legal and general culture, as where the criminal law purports to maintain principles of impersonal equality before the law in polities where clientilistic and other particularistic practices are widespread. It is also not easy to get the balance right between identifying relatively enduring features as compared to contingent aspects of other cultures. Relying on ideas of national character would make it difficult to reconcile the defiance of law in Weimar Germany as compared to the over-deference to law of the Fascist period. What are taken to be entrenched cultural practices in the sphere of criminal justice can be overturned with remarkable rapidity. The Dutch penal system was rightly celebrated for its 'tolerance', from the 1960s on, keeping its proportionate prison population well below that of its European neighbours (Downes 1988). But shortly after gaining such praise, the criminal justice elite who pioneered the 'Utrecht' approach was sidelined by the pressures of gaining popular political consensus in the face of Holland's growing drug problem (Downes 1996). Holland engaged in a massive programme of prison-building that took it back towards the levels of the 1950s, a period when its relative level of incarceration was comparable to the rest of Europe.

The third approach, followed by students of procedure and comparative lawyers, highlights the role of criminal procedure. This is important in order to see how criminal justice outcomes reflected in indicators of prison or other rates is actually produced. Understanding how and why different systems try to achieve 'autonomy' from pressures from government and the public provides a crucial key to understanding differences in punitiveness (Nelken 2009: Montana and Nelken 2011). Another advantage of this focus lies in the way its language and concerns connect directly to those used by many of the legal actors themselves whose behaviour is being interpreted. It

must be relevant to pay attention to rules and ideals to which actors are obliged at least to pay lip-service but which they may well take as guides for much of the time. The evolution of the discourse used by criminal justice actors may also be better understood, even for sociological purposes, when related to its own forms rather than simply translated into sociological language.

Research carried out by comparative lawyers is sufficiently different from comparative social science for both to have something to gain from the other's approach. Although comparative lawyers rely mainly on historical, philosophical, and juridical analyses they are well aware that legal and other rules are not always applied in practice, and that legal outcomes do not necessarily turn out as planned. But the sociological significance of such evidence is usually ignored in favour of processing it normatively, as an example of deviance or 'failure', to which the solution is typically a (further) change in the law. The weaknesses of this approach, which are the converse of its strengths, thus come from its tendency to share rather than understand or criticize the self-understanding of the legal perspective. Because the terms it uses are legal and normative it will not capture many of the organizational or personal sources of action which shape what actors are trying to do, still less the influences of which actors are not aware.

Social scientists, on the other hand, are more interested in what does happen than in what should happen, looking beyond written rules and documents to the structures which shape the repeated patterns of everyday action. Their approach has the opposite drawbacks. The determination to take practice more seriously than protestations of ideals can sometimes lead to an underestimation of the role law plays in many cultures as a representation of values, including 'counterfactual' values (Van Swaaningen 1998, 1999), which are all the more important for not being tied to existing practice. And the importance given to the present, rather than to the past or future of law, can block an appreciation of law's character as a bearer of tradition that makes 'the past live in the present'.

Each of these three approaches to comparison tends to be associated, in its pure form, with a distinctive epistemology, respectively (predictive) explanation, 'understanding by translation', and categorization-evaluation. The standard way of deciding which approach to choose is to ask: are we trying to contribute to the development of explanatory social science, or to improve existing penal practice? Combining such different enterprises, it is said, will only produce confusion (Feeley 1997). But, on the other hand, social scientists cannot afford to lose touch with those nuances of legal culture that bring the comparative exercise to life. Effective comparison is as much a matter of good translation as of successful explanation. We may need, for example, to understand how and why 'diversion' from criminal justice is treated as intrinsic to the criminal process in Holland, but as somehow extrinsic to it in the UK (Brants and Field 2000). And this will require considerable historical, juridical, and linguistic analysis.

In practice these three approaches are rarely found in their pure form. Sociologists—especially those interested in legal culture and ideology—need to know about law and legal procedures (and sometimes get it wrong); comparative lawyers often make sociologically questionable assumptions about what a system is trying to do and how it actually operates. Debates within, as well as between, comparative law and

sociological criminology turn on mixed questions of explanation and evaluation, so that it is not the choice of one or other of these aims which guarantees either insight or confusion. Within the field of comparative law, Goldstein and Marcus, who reported that there was little America could learn from Europe in order to reform its pre-trial procedures, used sociological-type arguments based on the attempt to see how the rules actually worked in practice (Goldstein and Marcus 1977). But those who claimed that this understanding of Continental procedure was superficial were able to show how the very desire for generalizable explanation reinforced American ethnocentrism (Langbein and Weinreb 1978). On the other hand, Downes's sociological study of the role of prosecutors in keeping down prison rates in Holland clearly had a practical purpose aimed at changing the situation in Britain, but it was not (or at least not for that reason) unsuccessful in illuminating the Dutch situation.

Key conceptual building blocks for comparing criminal justice, such as the term 'legal culture' (Nelken 1997a), figure in each of the three approaches even if they are often employed with competing meanings. Another heuristic idea, used both by social scientists and by comparative lawyers, is that of 'functional equivalence'. One comparative law textbook tells us to assume that other societies will often meet a given legal 'problem' by using unfamiliar types of law and legal techniques (Zweigert and Kotz 1987). Likewise, Feest and Murayama, in their study of criminal justice in Spain, Germany, and Japan, demonstrate that each jurisdiction has some (but not necessarily the same) crucial pre-trial and post-trial filters to distinguish the innocent from the guilty, while others are more formalistic and typically presuppose that the required critical attention has or will be given at another stage. They come close to suggesting that there are 'functional equivalents' in each system for legitimizing even unsound cases of police arrests, and that systems 'self-correct' to reach rather similar outcomes (Feest and Murayama 2000).

But assumptions of functional equivalence can also be misleading. At a minimum we shall also need to extend our analysis to the role of non-legal institutions, alternatives to law, and competing professional expertises as well as to other groupings within civil society such as the family or patron-client networks. Moreover, in some cultures, some problems may simply find no 'solution'—especially, but not only, if the 'problem' is not perceived as such. Cultures have the power to produce relatively circular definitions of what is worth fighting for and against, and their institutions and practices can express genuinely different histories and distinct priorities (Nelken 1996). Often matters are 'problematized' only when a society is exposed to the definition used elsewhere. In the 1980s, for example, the appearance of league tables of relative levels of incarceration induced Finland to move towards the norm by reducing its prison population—and were used in Holland to justify doing the opposite!

METHODS OF COMPARATIVE RESEARCH

With some exceptions, most texts about comparative criminal justice contain little about the actual process of doing cross-cultural research in criminal justice. At

best this question is addressed by the editors rather than by the contributors themselves (e.g. Cole *et al.* 1987; Fields and Moore 1996; Heiland, Shelley, and Katoh 1992). Admittedly, there is never only one ideal research method, and choice of method is inseparably linked to the objectives being pursued. But the questions posed in comparative work are often more ambitious than the methodologies which comparative lawyers usually adopt. For example, Fennell *et al.* ask, 'could there be a relationship between the mildness or severity of a penal climate and an inquisitorial or an accusatorial system of justice?' (Fennell *et al.* 1995: xvi). But they then add immediately afterwards, 'or is the question absurd?'. Methodological issues loom still larger when comparative enquiries seek to tackle fundamental problems such as, 'how do different societies conceive "disorder"?', how do 'differences in social, political, and legal culture inform perceptions of crime and the role of criminal agencies in responding to it?', or 'what factors underlie the salience of law and order as a political issue?' (Zedner 1996). Only long and intimate familiarity with a society could even begin to unravel such complex puzzles.

How, then, are we to acquire sufficient knowledge of another culture for such purposes? Either we can rely mainly on cooperation with foreign experts, or we can go abroad to interview legal officials and others, or we can draw on our direct experience of living and working in the country concerned. These three possible strategies I have elsewhere dubbed as 'virtually there', 'researching there', or 'living there' (see Nelken 2000a, 2010a; Heidensohn 2006).

The first of these methods allows for a variety of focused forms of international collaboration in comparative research. Feest and Murayama, for example, describe the result of a 'thought experiment' which starts from a careful description of the actual case of an American student arrested and tried in Spain on a false charge of participating in an illegal squatting demonstration. The authors then discuss what would have been the likely outcome given the same sequence of events in Germany and Japan, the countries whose criminal justice systems they know best (Feest and Murayama 2000). Other scholars set out to explain past and possible future trajectories in various aspects of the work of police, courts, or prisons. Thus Brants and Field ask how different jurisdictions have responded to the rise of covert and proactive policing—and why (Brants and Field 2000). These authors are constantly worried about the dangers of not comparing like with like, and they draw attention to the continuing difficulties of reaching shared meanings between experts in different legal cultures even after long experience of cooperation. Such collaboration, they say, requires a high degree of mutual trust and involves 'negotiating' mutually acceptable descriptions of legal practice in each of their home countries. The lesson they seek to drive home is that correct interpretation of even the smallest detail of criminal justice organization requires sensitivity to 'broader institutional and ideological contexts'.

Given these difficulties it is not surprising to find that many scholars advocate going to the research site in person. Immersion in another social context gives the researcher invaluable opportunities to become more directly involved in the experience of cultural translation. On the basis of his regular visits to France, Crawford, for example, offers a sophisticated reading of the contrasting meanings of mediation in two different settings (Crawford 2000). In France the move to introduce mediation can be seen as part of a project of 'bringing law to the people' both by making the criminal justice

response more immediate in time and also by subtly transforming its referent. But it is not about involving the 'community' in the actual delivery of criminal justice. For this conception of the 'community' has a meaning and appeal which is strongly tied to the Anglo-American type of political and social order. In France it has historically been the role of the state to represent the larger community, and its social institutions have it as their fundamental task to lead those who are not yet part of the *polis* into becoming bona fide French citizens. 'Researching there' also provides the chance for 'open-ended' enquiry that can lead to the discovery of new questions and new findings about the 'law in action'. Some things are never written down because they belong to 'craft rules of thumb'. Other matters are considered secrets that should not be written down, for example, because theory and practice do not coincide, and so on (Hodgson 2000).

Short research visits, however, usually involve considerable reliance on local experts and practitioners. Indeed obtaining their views is very often the whole point of the exercise. But care must be taken in drawing on such insiders as the direct or indirect source of claims about other cultures. Who count as experts, and how do *they* know? What are the similarities and differences between academics and practitioners? If experts and practitioners are in agreement, could this be because experts themselves get their information from practitioners? In all cultures descriptions of social and legal ideas carry political implications, in some cases even issuing directly from particular political or social philosophies. When we think of experts in our own culture we will normally, without much difficulty, be able to associate them with 'standing' for given political or policy positions. But what about this factor when we rely on experts from abroad? In much of the comparative criminal justice literature there seems to be little recognition, and less discussion, of the extent to which those describing the aims or results of local legal practices or reforms are themselves *part* of the context they are describing, in the sense of being partial to one position rather than another. In France some commentators are strongly against importing ideas from the common law world, others are less antagonistic; in Italy, some academics are notoriously pro-judges, others are anti-judges. It can be misleading to rely on the opinions or work of members of different camps without making allowance for this fact.

Moreover, cultural variability means that the problem faced here is not always the same. There are some cultures (Italy and Latin America, for example) where many consider it quite appropriate for academics—and even for judges and prosecutors—to identify and to be identified as members of a faction. In playing the role of what Gramsci called an 'organic intellectual', your prime duty is understood, both by your allies and by your opponents, to be the furtherance of a specific group ideal. In consequence, in such societies the question of social and political affiliation is one of the first questions raised (even if not always openly) in considering the point and validity of academic criticisms of current practices and of corresponding proposals for reform. In other cultures, however, the approved practice is to do one's best to avoid such identification. In some cases this just makes the process of establishing affiliation more elusive. Alternatively, the extent of political consensus, or of admiration for allegedly neutral criteria based on 'results' or 'efficiency', may be such that academics are indeed less pressed to take sides. Or intellectuals may simply count for less politically! The point again is that without knowledge about their affiliations, and an understanding of the responsibilities attached to different roles in the culture under investigation, it

can be hard to know what credit to give to the arguments of any expert about criminal justice.

Even if we assume that our sources are not 'partial' (or, better still, if we try to make proper 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 also means that they do not necessarily ask or answer questions based on where the researcher is 'coming from' (and may not even have the basis for understanding such questions). In a multitude of ways both their descriptions and their criticisms will also belong to their culture. In Italy, local commentators regularly attack a principled but inefficient system on grounds of principle; in England and Wales, a system highly influenced by managerial considerations, sometimes at the expense of principle, will tend to be criticized for its remaining inefficiencies.

Longer-term involvement in another culture offers, amongst other advantages, a better route to grasping the intellectual and political affiliations of insiders. Through everyday experience of another culture, 'observant participation' (Nelken 2000a), rather than merely 'participation observation' in a given research site, the researcher can begin to fill in the 'taken-for-granted' background to natives' views and actions. Direct experience and involvement with what is being studied can also help give the researcher's accounts the credibility that comes from 'being there' (Nelken 2004). But actually moving to a research site—for shorter or longer periods—does not mean that the researcher necessarily comes to see things as a native. Our 'starting points' (Nelken 2000b) play a vital role in what we set out to discover. Our own cultural assumptions continue to shape the questions we ask or the answers we find convincing. Much of the voluminous American research on the specificity of Japanese criminal justice, for example, can be criticized for seeking to explain what is distinctive about Japanese legal culture in contrast to familiar American models without recognizing how much it derived from the civil law systems of Continental Europe from which Japan borrowed.

Similarities and differences come to life for an observer when they are exemplified by 'significant absences' in relation to past experience. A good example is provided by Lacey and Zedner's discussion of the lack of any reference to 'community' in discourse about crime prevention in Germany (Lacey and Zedner 1995, 1998). But the vital question of starting points is often left begging, especially in research based on short visits, because of the implicit collusion between the writer and his or her audience which *privileges what the audience wants to know as if it is what it should want to know.* The long-stay researcher, by contrast, is engaged in a process of being slowly resocialized. He or she will increasingly want to reformulate the questions others back home wish to address to the foreign setting. As important, he or she may even begin to doubt whether they ever really understood their own culture of origin. Sometimes the researcher will try to see things like a native insider, at other times he or she will try to do 'better' than the natives. The ability to look at a culture with new eyes is, after all, the great strength of any outsider.

This said, the heavy investment required by 'observant participation', or by sustained ethnography, may not always be necessary or feasible. The choice to follow any particular approach to data gathering is linked to the many considerations

which influence the feasibility of a given research project; not least the time available, whether one is able to visit the country concerned, and with what sort of commitment. Depending on its purposes, collaboration with experts or a limited period of interviewing abroad may even have some advantages as compared with living and working in a country. There are the usual trade-offs amongst methodologies. It is possible to cover a large number of cases with questionnaires or interviews only by dispensing with in-depth observation. And the short-termer can also pretend to a useful naivety that the long-term researcher must abandon, since that is part of what it means to become an insider/outsider. In practice, even the insider/outsider or 'observant participant' cannot possibly experience everything at first hand. So all three approaches have to face, to some extent, similar problems in knowing who to trust, and then conveying credibility. However findings are (re)presented, they are always in large part the result of interviews and consultation of experts and practitioners, and the resident scholar may often obtain these in ways which are less systematic than those followed by the other approaches. The main advantage of 'full immersion' in another society for this purpose is that enquiry becomes more fruitful when you have enough cultural background to identify the right questions to ask. Beyond this, method is also more than a means to an end insofar as it poses the problem of how to engage with 'the other', and when and why it is justifiable to speak 'for them' rather than let them speak for themselves.

SELECTED FURTHER READING

For examples of recent textbooks, collections and readers see Crawford (ed.) (2011); Dammer, Fairchild, and Albanese (2006); Drake, Muncie, and Westmarland (eds) (2009); Larsen and Smandych (2008); Muncie, Talbot, and Walters (eds) (2009); Nelken (2010a); Pakes (2010a); Reichel (2008); Sheptycki and Wardak (eds) (2005); Tonry (ed.) (2007); Winterdyk, and Cao (eds.) (2004); and Winterdyk, Reichel, and Dammer (2009). For a recent bibliography see Winterdyk, Reichel, and Dammer (2009).

Illustrations of cross- national perspectives on crime and criminal justice may be found in Newman (ed.) (1999), Tonry (ed.) (2007), Van Dijk (2007), and Van Dijk, Van Kesteren, and Smit (2007). For discussions of blueprints, convergence, and cross-national borrowing see Melossi, Sozzo, and Sparks (eds). (2011); Newburn, and Sparks (2004); Jones and Newburn (2006), and Nolan (2009).

For good studies of specific societies see,for example, Downes (1988) or Johnson (2001). Works inspired by the comparative law or interpretative approaches to comparative criminal justice still do not usually communicate much with debates in the criminological mainstream (e.g. Vogler 2005, but see Whitman 2003). Depending on the topic in hand the student of comparative criminal will need to sample literatures that touch on a variety of disciplines. For example, a lot of the running in anything to do with judges is made by political scientists. On the other hand, information on governmental and official websites on criminal justice systems in specific countries should be treated more as presentational data in need of explanation rather than as a solid basis for cross-cultural comparison. Similar caution should be exercised when using the sites of inter-governmental and non-governmental organizations.

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