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## ARTICLES

# Comparative Criminal Justice

## Beyond Ethnocentrism and Relativism

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### ABSTRACT

How can the study of comparative criminal justice avoid the opposite dangers of ethnocentrism and relativism? The problem is examined taking as an example Cavadino and Dignan's recent analysis of differences in prison rates. The case is made that more attention needs to be given to understanding how different criminal justice systems actually produce prison rates as well as to interpreting the ideas and values that animate those inside and outside the system.

### KEY WORDS

Comparative Criminal Justice / Comparative Criminal Procedure / Ethnocentrism and Relativism / Processes of Attrition / *Garantismo* / *Gedogen* / Tolerance.

## Comparative criminal justice: Making sense of difference

The task of comparative criminal justice, most scholars would agree, is to compare and contrast our ways of responding to crime with those practised elsewhere. It also often involves, even if it does not necessarily have to do so, borrowing from, or at least trying to learn from, what is done in other places. It would seem obvious therefore that, if it is to be at all helpful, comparison requires understanding and interpreting what those in other places are *actually* trying to do. What I want to show in this paper is that the implications of this apparently banal point are not always straightforward. The reason for this is that it can be difficult not to fall foul of two opposing dangers. On the one hand, there is the risk of being ethnocentric – assuming 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. On the

other hand, there is the temptation of relativism, the view that we will never really be able to grasp what others are doing and that we can have no basis for evaluating whether what they do is right. To get beyond these alternatives requires a careful mix of explanatory and interpretative strategies (Nelken 1994).<sup>1</sup> We need to recognize that, although criminal justice practices gain their sense from the setting that shapes them and the conditions with which they have to deal, they can also be understood by outsiders and need to be evaluated according to cosmopolitan and not only local criteria.

But this is easier said than done. It is inevitable that our perception of others will be coloured to some extent by our own cultural starting points – even when we say that what we are doing is trying to learn from *them*. And criminologists do also have their own shared cultural common-sense. We tend to argue that the rise in crime rates is exaggerated by the media and the politicians, that we should avoid creating even more deviance by over-reacting to offending, that the availability of work and decent housing are more effective ways of reducing crime than whatever can be delivered by criminal justice. In the face of the changes brought about by neo-liberalism, we plead instead for policies based on inclusion, solidarity, tolerance and respect for difference. Not least, we recommend that politicians listen to professionals rather than seeking easy popularity. There may be little to quarrel with in these claims as aspirations. But when our study of other places merely confirms what we already thought was true and right, we need to be aware that we may not have given sufficient care to analysing the similarities and differences that may lie behind the practices we are studying.

The same applies to the more specific biases that come from our local cultural backgrounds. Policy makers in the Netherlands, for example, tend to look for pragmatic, practically workable solutions to crime – as they do when seeking to resolve other types of problem. In Dutch cultural common-sense, being pragmatic means *not being dogmatic*, but elsewhere these terms may have a different relationship. In Italy, the term ‘pragmatic’ suggests behaviour that is not guided by principles and that therefore borders on being *unprincipled*. Which is not to say the Italians in everyday life are not often pragmatic, and the Dutch never principled. Far from it. The point is rather how difficult it can be for us to see the limits of our ways of seeing things. As the American philosopher Morgenbesser reportedly used to say, ‘pragmatism is all right in theory’! But if the question is when it would be appropriate *not* to be pragmatic, a pragmatic approach itself may not be

<sup>1</sup> Francis Pakes (2004: 13ff) suggests that those who favour an exclusively interpretative approach to social life (I am not in fact one of them) must necessarily be relativists. Whether or not this is true is doubtful, but those who rely only on a positivistic strategy certainly do run a high risk of ethnocentrism.

able to provide the answer we need. Likewise, it is impossible to specify, in principle, all the contingencies that may play a role in shaping the everyday application of principles.

If we are to come close to grasping successfully what other systems of criminal justice are actually trying to do, we must avoid attributing to them intentions on the basis of what we imagine they *should* be doing – even if these are the best of intentions. Likewise – but this can be even more tricky – we should be careful not to deduce intentions from the outcomes being achieved. But it is often tempting – especially for the purposes of advancing a given agenda in local debates – to try to do just that. A good current example in my view can be found in some of the arguments being used as part of the important debate concerning the problem of growing punitiveness in responding to crime both in the USA and elsewhere. In briefly reviewing this debate I shall suggest that criminologists from Anglo-American backgrounds engaged in cross-cultural research need to devote more attention to what they and others mean by punitiveness and tolerance.

I shall first say something about the so-called ‘punitive turn’ and then describe some recent attempts to link punishment to differences in political economy. In seeking to show the dangers of ethnocentrism, and the way more attention to interpretative questions might help to avoid them, I shall illustrate my argument with accounts of what may be some relatively unfamiliar features of penal justice in Italy. The choice of Italy is not only a reflection of the fact that this is the country whose criminal justice system I now know best. Italy is also, surprisingly, the major European country with one of the lowest levels of offenders in prison in proportion to its population (Proband 2008).

## The ‘punitive turn’: America as dystopia – Europe as utopia?

Criminal justice systems today face many common problems and increasingly seem to be responding in similar ways to ‘risk society’ (Beck 1992). As Hans Boutellier puts it, people are now seeking a ‘safety utopia’ (Boutellier 2004). Like all utopias, the attempt to impose this one can be dangerous for those who get in the way. But perhaps it is also dangerous for the rest of us! Hence the concern amongst many criminologists about growing punitiveness. Most of these writers do not argue that prison should be abolished. Still less do they claim that punishment is never necessary or justified, or that tolerance is always the better option – the decreased social tolerance of some forms of criminal or deviant behaviour may even be welcomed. Their concern is about what Willem De Haan has described as the ‘bad conscience

of punishment' (De Haan 1990); the economic and political mobilization of punitiveness – especially, but not only, in the United States – that is described in books with titles such as *Crime Control as Industry* (Christie 1993), 'Making Crime Pay' (Beckett 1997), and, most recently, *Governing through Crime* (Simon 2007).

Why is increasing resort to punishment and, in particular, greater use of prison widely felt to be necessary and appropriate? Even though all the evidence suggests that crime levels have been decreasing, trends in punishment, to a large extent, follow their own timing and have their own logic. In his recent influential thesis about what he calls the 'culture of control', David Garland (2001) offers a pessimistic account of this development, arguing that 'penal welfarism' has been displaced by the politicization of crime and the growth of popular punitiveness. He notes the privileging of public protection and the claim that 'prison works', and describes the changes in the emotional tone of crime policy from decency and humanity to insecurity, anger and resentment. What remains controversial, however, is how far what others have called 'the penal turn' should be seen as a result of widespread late-modern changes in social and economic conditions, or rather treated as something tied more closely to the political and legal culture of the USA. What some observers see as an essential aspect of late modernity others see as ethnocentric projection – an Anglo-American tendency to assume that what others do in foreign places and foreign languages is less important, and that they too are bound to come into line eventually.

Such critics tell us that we can and must avoid the dystopia (Zedner 2002) of assuming that Europe is also bound to end up with something like the bloated US penal system, which now embraces more than 2 million prisoners. They insist that we need to recognize and explore the differences between the USA and Europe and even within Europe, differences which suggest that there are *multiple cultures* of control rather than just one culture of control. Some European countries are seen as exemplifying the possibility of maintaining a less punitive climate. Until some years ago, for example, the Netherlands was very much in the group of those countries from which it was proposed to learn how to be less punitive. But things have changed, and it has been calculated that for a period recently the Dutch prison population increased at a faster rate even than that in the United States.<sup>2</sup> Now it is the Scandinavian countries that are seen as beacons of tolerance.

<sup>2</sup> Its official level of imprisonment, however – like that of other European countries – is still nowhere near the US level, and it has recently again begun to decline.

## Punitiveness and political economy

What explains the existence of contrasts in cultures of control? A valuable and innovative contribution to answering this question has been provided by Cavadino and Dignan in their book about comparative penal systems (Cavadino and Dignan 2006a). Their analysis has rightly been much praised,<sup>3</sup> and has been put to work by other leading writers who are trying to illustrate what they call ‘differences in penal tolerance’ so as to stop the dangerous slide in England and Wales towards an ever-expanding prison system (see e.g. Lacey 2008; Reiner 2007). Ruling out any direct correlation with cross-national differences in public support for prison sentences, Cavadino and Dignan argue that variations in incarceration rates – which they take as a rough proxy for levels of punitiveness – are related to contrasting kinds of political economy.

**Table 1** Imprisonment rates per 100,000 in 12 countries, 2002/3 and 2008

	2002/3	2008
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
Netherlands	100	100
France	93	96
Social democracies		
Sweden	73	74
Finland	70	64
Oriental-corporatist countries		
Japan	53	63

Sources: 2002/3 – Cavadino and Dignan (2006a: 22); 2008 – King’s College London, International Centre for Prison Studies, World Prison Brief, URL (accessed 3 March 2009): [http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_stats.php](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php).

<sup>3</sup> There is much to admire in Cavadino and Dignan’s pioneering work, and I cannot attempt to do justice to it here. For example, they also link punitive attitudes to levels of prison privatization and the age at which young people are held to be criminally liable – though here too some caution is needed. For example, Scotland has an advanced welfare system for juveniles despite criminal liability beginning at 8.

As seen in Table 1 (a slightly simplified version of the table that is the linchpin of their thesis), rates of imprisonment in 12 modern industrial societies vary considerably between what they call neo-liberal, conservative-corporatist, social democratic, and oriental-corporatist types of political economy.<sup>4</sup>

They argue that the 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; 2006b: 447). On the other hand, Continental European corporatist societies (which have also been described as 'coordinated market economies') and, even more, Scandinavian social democratic societies, are said to 'pursue more *inclusive* economic and social policies that give citizens more protection from unfettered market forces' and to 'see offenders as needing resocialisation which is the responsibility of the community as a whole' (Cavadino and Dignan 2006a: 24; 2006b: 448). Other authors have since followed up their approach. Lacey (2008), for example, seeks to explain why what she calls 'coordinated market economies' have the opposite effects to neo-liberal developments, and argues that multi-party political systems are less likely to lead to appeals to populism than two-party systems. She also makes, though does not develop, the telling point that the corporatist countries (and also the social democratic ones) that are so good, relatively speaking, at offering an 'inclusive' approach to their own citizens are perhaps less equipped than neo-liberal ones for dealing with the challenge of 'outsider' crimes by (illegal) immigrants (see Solivetti 2004, 2007).

## Problems in comparing prison rates

Cavadino and Dignan's thesis is certainly very convincing, even if it is not the only way of using differences in rates of incarceration as indicators of comparative punitiveness.<sup>5</sup> Neo-liberalism in the USA and Europe does

<sup>4</sup> In addition to quoting most of the 2002/3 figures that they drew on in their 2006 book and article, I have added, for comparison, the current 2008 figures. These are not out of line with their argument.

<sup>5</sup> Marcelo Aebi, when offering his annual interpretations of Council of Europe penal statistics, simply uses geographical criteria to contrast groups of countries with different levels of incarceration, distinguishing, from high to low, Eastern Europe, the Caucasian area, Central Europe, Western Europe, South Eastern Europe, Southern Europe, and the Scandinavian countries. Although certainly less ambitious and less illuminating than Cavadino and Dignan's approach, the similarities in prison rates within each area are striking and are likely explained by wider socio-economic-political similarities and (or?) by which countries are treated locally as exemplars to conform to. It is unclear if such differences always coincide with contrasts in

seem to be associated with factors that lead to less concern with ‘including’ potential offenders, and its rise coincides in many of these countries with greater use of the prison. But, insofar as it claims to be an *explanation* of punitiveness, it should be noted that the authors actually *define* neo-liberalism as including punitive attitudes. In addition, their explanation may be limited in its range. Countries such as China make very heavy use of prison without being neo-liberal. Others, such as Russia (as well as South Africa, which is one of the countries they seek to explain), have seen a rise in neo-liberalism together with a reduction in the use of prison. This suggests that a wider variety of variables than those connected to neo-liberalism can lead to higher or lower punitiveness.

Even if we take the argument on its own terms, however, there are a number of questions that need to be raised about relying on prison rates as an index of punitiveness. A concept as intricate as punitiveness is poorly represented by a single indicator such as the detention rate. Are crime levels the same in each of the countries being compared? What do prison rates refer to? Why is there so much volatility over time? Do prison rates only reflect factors internal to the countries concerned? How large a part of the explanation of prison rates is to be attributed to differences in criminal procedure?

Consider first the problem of crime levels. For Table 1 to make sense we must assume that levels are roughly similar in each of the countries being compared. Higher prison rates in countries dealing with higher levels of crime would not make news, and we could not easily say we were comparing levels of punitiveness if the crime threat being faced was different. There are reasons to think, for example, that England and Wales does have higher levels of some crimes (e.g. burglary), while Japan certainly has overall lower levels of crime. Perhaps more important, it is strange that the good things about belonging to more inclusive welfare-oriented or social democratic societies do not also reduce the level or severity of crimes being committed (and not only shape the response to them). But in that case can we still say that a country is, relatively, less ‘punitive’ if it faces less crime? Above all, we need to know how to get to grips with the variety of factors within

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degrees of neo-liberalism. In complete contrast, Jan Van Dijk, a leading Dutch criminologist, has compiled a worldwide ‘punitiveness scale’ that pays scant attention to geography but subtracts the relative rank of countries in annual homicide rates from their rank in levels of incarceration (i.e. greater punitiveness means having more people in prison than would be expected from the number of murders in the country). On this criterion, Finland, Sweden and Norway turn out to be lenient but so does Australia, whereas Germany and Italy turn out to be relatively punitive (see Van Dijk 2007: 270 and 370–4). This intriguing if somewhat crude strategy begs the question of whether relative punitiveness is in fact correlated with crime levels, and in any case places too much reliance on only one crime measure.



the penal process itself that actually produce its prison rates. Many of the countries that have lower overall 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.<sup>6</sup>

The empirical basis for the argument may be less solid than it seems. Table 1 offers snapshots from 2002/3 and 2008, but prison rates in different countries in earlier periods have not always varied in ways that confirm the argument. And they have again diverged from it more recently. For example, after the Second World War Finland's rate went down sharply from one far higher than its Scandinavian neighbours (187 per 100,000, Lappi-Seppälä 2001),<sup>7</sup> whereas the Netherlands, as already mentioned, went in the opposite direction so as to give it, for a while, one of the highest rates in Europe.<sup>8</sup> Even the USA had a moderate level of use of prison until the 1970s. According to 2006 figures, Italy, with a rate of only 65.2 per 100,000 had the lowest prison population amongst Continental European countries (Proband 2008). 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). Its current low rate owes a lot to the recent *indulto* (or collective pardon), which freed over a third of its prison inmates.<sup>9</sup> Although this is a particularly striking example, the importance of the *indulto* underlines the centrality of the criminal justice process to understanding the significance of prison rates. It is impossible to understand the figures for France, for example, without taking its amnesties and pardons into account. Aside from the difficult task of trying to 'purify' comparative figures of such interventions, it could also be argued that it is fruitless, since the willingness to use amnesties could itself be taken as an illustration of tolerance.

Such volatility is not always easy to reconcile with claims about the dependence of such rates on underlying basic differences in political

<sup>6</sup> Commentators on prison rates such as Aebi distinguish between 'stock' (how many are held in prison), 'flow' (how many see the inside of a prison) and the average sentence lengths in prison (for how long prisoners are held in custody). Punitiveness rankings vary considerably depending on which of these criteria is selected.

<sup>7</sup> Finland's rate of imprisonment declined to 154 per 100,000 in 1960, 113 in 1970, 106 in 1980, 69 in 1990 and 55 in 2000.

<sup>8</sup> The Netherlands' rate was only 84 in every 100,000 in 1999 but then increased in a few years to higher than 130 – occasioning an extensive academic commentary seeking to 'explain' this new punitiveness. The rate has again declined more recently. See Aebi and Stadnic (2007).

<sup>9</sup> Although the *indulto* postdates the Council of Europe's 2005 annual survey, the small print indicates that it was somehow taken into account, and Italy is indicated as a country that has seen a recent 36 percent decline in its prison population. Its prison population is now again rising and is predicted to shortly reach pre-*indulto* levels.

economy. But, apart from anything else, countries' prison rates are not just a reflection of their attitudes to offenders or potential offenders. They are also a product of reflexive responses by politicians and policy makers to their perceptions of where their country stands in relation to other places. Thus the reduction in Finnish prison sentences and the increase in the Dutch level were in part responses to the prison rates in countries to which they thought they could and would be compared. Roy Walmsley, an adviser to the United Nations, whose figures were the source of Cavadino and Dignan's table (see Walmsley 1999), urges all countries to shape their criminal justice practices so as to aim at a rate of no more than 100 prisoners per 100,000 of the population,<sup>10</sup> and so obviously assumes that this can be brought about irrespective of more fundamental changes in a country's political economy. Tables such as theirs, in addition to their role as explanatory aids, are therefore capable of changing policy – and are often intended to do so. They should be treated not just as a resource for explaining differences in prison rates but also as social artefacts whose function lies in their utility for local struggles about penal practices.

But my main concern here is not to point to the difficulties or advantages of using international statistics as such, but rather to ask how research on comparative incarceration rates can help us rethink our approaches to the possible sources of punitiveness and leniency rather than only reinforce what we already think and value. Criminologists who attempt to explain which states in the USA have the highest prison rates typically single out correlations with factors such as lower welfare levels, a lack of effort to ensure economic equality, and low public participation. These are all matters that they tend to consider negative factors in their own right. But the so-called 'evil causes evil' fallacy may artificially restrict explanations of punishment as much as it does those of crime (see Cohen 1970)<sup>11</sup> – all the more so in cross-cultural contexts. Applied to Cavadino and Dignan's argument, there does seem to be something ethnocentric about a thesis so well suited to telling policy makers in countries affected by neo-liberalism that evidence from other countries shows us that only more welfare provision and government regulation of the economy can provide a prophylactic against punitiveness.

More may be going on than the adoption of a more or a less inclusive approach to (potential) offenders. A cultural propensity to inclusion may

<sup>10</sup> Interestingly, Walmsley's (2003) recommendations of how to reach this goal include avoiding short prison sentences even though the countries with the lowest rates include ones that make most use of such sentences.

<sup>11</sup> I do not of course want to argue that 'evil' factors are never responsible for 'evil' outcomes only to suggest that such cultural bias can prevent us seeing other possibilities.

be, in some sense, a relevant cross-cultural factor. The Dutch did pioneer a sharp reduction in the use of prison (Downes 1988), and the Italians too were leaders in the de-carceration movement, which aimed to have mental patients and others treated in the community rather than in total institutions. But the sense we give to inclusion can be fully appreciated only by learning much more about the countries concerned. It is controversial how far the rate of immigration affects prison rates. But it is certainly important to bear in mind that some of the Scandinavian countries with low prison rates have experienced relatively small flows of immigration, or have even done their best to limit 'economic migration'.

It is also hard to learn much from a table that suggests that such different places as the Netherlands and Italy are equally punitive – and implies that this is for similar reasons of political economy. Compared with the Netherlands, for example, Italy's inclusiveness 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 (Nelken 2000). Importantly, neither of Italy's two leading belief systems allows individual victims of crime to occupy the moral high ground. In terms of socioeconomic factors, rather than pointing to political economy as such (even though in fact Italian criminologists have been pioneers in this style of explanation), it is important to recognize the continuing centrality in Italy not only of the family and the 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. Nor is this necessarily evidence of Continental European 'corporatist' collaboration between business and government. Many of those helping to maintain 'order' in the southern regions of Italy are actually organized criminals!

## The importance of courts and criminal procedure in Italy

To show why it is unwise to look for causes of high and low punitiveness only in the factors that are highlighted in Cavadino and Dignan's thesis, I shall now examine, using Italy as an illustration, the question of the place that needs to be given in any explanation of punitiveness to the role of the criminal justice system itself. It is easy to see that political economy can shape punitiveness only through mediating variables.<sup>12</sup> Yet the role of the

<sup>12</sup> Cavadino and Dignan, who are continuing to develop their ideas, now call for more exploration of the intermediate factors that connect political economy to punishment – including crime levels, general culture, media culture, political culture and political institutions (Cavadino and Dignan 2008).

criminal process itself remains somewhat ambiguous. Even if what happens inside the criminal justice complex ultimately makes all the difference, is this part of the 'why' or only the 'how' of punitiveness? How can we decide whether the criminal process is the dependent variable in our explanation or (also) an independent one? Consideration of the Italian case gives us reason to see criminal procedure as an independent or at least semi-autonomous variable in its own right – and not merely as a conduit for wider economic and political factors or changes.

But – and this constitutes a further challenge for Cavadino and Dignan's argument – the degree of such autonomy is itself a sociocultural variable. There are significant differences between countries such as Italy and Anglo-American countries with regard to how far it is thought constitutionally appropriate for criminal justice to be responsive to political direction or to social expectations. This has obvious implications for the extent to which, at the level of everyday decision-making by judges and prosecutors, the criminal justice system seeks to defend its 'relative' autonomy from both political and public pressures. Drawing on her knowledge of German arrangements, Lacey (2008) suggests that it is collaboration between politicians, policy makers and courts that is likely to keep prison rates down. But the Italian experience suggests that it can also be the refusal of such collaboration that can lead to this result. The main resistance in Italy to the latest efforts by politicians to encourage the mass criminalization of illegal immigrants comes from a uniquely strong corps of self-governing and independent judges and prosecutors,<sup>13</sup> whose priorities are often different from those of both the politicians and the public.

It is only by looking at criminal procedure that we can make sense of the paradox of why, despite many reasons that could lead us to expect the opposite, Italy can occupy an average and sometimes low rung in prison rates amongst major European countries. This is a country with an enormous number of criminal laws, many of which are regularly – even routinely – breached at all levels of society. Penal rules and judicial interventions are often relied on as a substitute for political and policy-led decision-making, given that other forms of civil or administrative regulation work (even more) poorly. In four regions of the country, powerful organized crime groups control or subject to their 'taxes' large parts of the economy and often condition what goes on in regional and local politics. Newspapers are full of

<sup>13</sup> Even after the reform of criminal procedure was supposed to have moved Italy towards the accusatorial model, prosecutors and judges form part of the same category, with similar constitutional guarantees of independence and immovability, and are entitled to shift (subject to conditions) from one task to another. There are increasing pressures to introduce the so-called 'separation of careers', but this is politically highly controversial because many see it as the route to reducing prosecutors' independence from political influence.

crime news, and criminal prosecution can be a potent weapon for assigning stigma. In the so-called *Tangentopoli* anti-corruption investigations of the 1990s, all the established parties of government were swept from power through the enforcement of laws concerning election finance and corruption of public works contracts, even if few of these individuals stayed in prison for long. Over the recent years in which prison rates have fallen, illegal immigration has continued to increase, as has the tendency for the police to concentrate their attention on the crimes of immigrants as easy targets. What is more, prosecution in Italy is constitutionally obligatory; so there is no easy way out by using formally mandated types of diversion. So how is it possible that prison rates have sunk so low?

In Italy's case – though I would claim that some of the same mechanisms are also often significant elsewhere – the answer is that this has little to do with levels of welfare or a state project aimed at the inclusion of marginal individuals, but has everything to do with the operations of its system of justice. *Prison rates are low because of processes of attrition*; although many cases start out, few arrive at a conclusion. All systems of criminal justice are to some degree intended to be selective (as seen in the now famous distinction in Anglo-American literature between the requirements of 'due process' and the objectives of 'crime control'). But systems differ between themselves (and over time) in the way they construct and operate such selectivity. In Italy, the typical procedural guarantees of the accusatorial system (centring on the forensic contest of the trial) that were introduced in the 1989 reform of criminal procedure were simply added to the ones that belong to the inquisitorial tradition. This means that 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/her 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.

All this has obvious repercussions in terms of the time cases take to reach final disposal in Italy. Crucially, the so-called 'prescription', or statute of limitations, period after which criminal proceedings become null and void continues to run until the Cassation court has given its final verdict. And this can sometimes take over 10 years.<sup>14</sup> Partly under the shock of the *Tangentopoli* investigations, in which politicians were the main targets, laws

<sup>14</sup> This period after which 'prescription' sets in varies with the severity of the offence. Prime Minister Berlusconi is among those who have benefited from this procedural nullification of criminal charges.

were passed that allowed those sentenced to less than three years in prison to apply to be put instead under what is often little more than nominal social work tutelage outside prison. Likewise, resources are stretched when it comes to supervising those let out on parole. This formed the larger background against which a full-scale *indulto* – or collective pardon – was passed by the centre-left government in 2006 (after a long period in which the events of *Tangentopoli* had made the use of ‘amnesties’ politically unacceptable).

Many of the procedural benefits of the Italian criminal justice system are not available to illegal immigrants ‘caught in the act’ of committing crimes, and it is these offenders (and low-level drug dealers) who now tend to fill the prisons. ‘Security’ has also become an ever more important political issue, as shown with the return of a centre-right government in 2008 whose campaign played on linked concerns over immigration and crime.<sup>15</sup> Although the Northern League and the ex-fascist National Alliance parties, junior members/allies of Berlusconi’s Liberty Party, had strongly emphasized crime issues even before, it is only recently that the issue of ‘street crime’ has become such an important part of both national and local politics.<sup>16</sup> Overlooking the considerable cross-party support at the time it was passed,<sup>17</sup> the new government was also able to exploit the unpopularity of the latest *indulto*. This measure is likely to have increased crime levels, not least because those let out of prison were not provided with any incentive to reform themselves. But it is still not clear how far the new government will really tighten up on the kind of medium-level crimes typically committed by Italian offenders. Whether this happens again seems less dependent on shifts towards neo-liberalism than on the extent to which politicians can be satisfied that they will not be in the firing line of any expedited proceedings.<sup>18</sup>

But is Italy just a special case? (As Mrs Thatcher liked to say, when characterizing various countries in the European Union – ‘and then there’s Italy’.) Its politics may be somewhat unusual, but I would argue that

<sup>15</sup> Until very recently the Italian expression that encompassed conventional crimes including burglary, rape and robbery was ‘micro-criminality’, used as a broad contrast to corruption, terrorism and organized crime, which threaten the state itself.

<sup>16</sup> Directly elected local mayors, as much on the left as on the right, have been vocal about the measures they are taking to maintain local order using local municipal police agents, even if they do not officially have responsibility for the enforcement of criminal justice.

<sup>17</sup> The *indulto* was widely seen as having been motivated by politicians of the right and the left (then in power) looking after their friends. But it was justified at the time in terms of prison overcrowding and carried the express approval of Pope Jean Paul II.

<sup>18</sup> One of the first acts of the Berlusconi government elected in 2008 was to pass a law that sought to block for a year all proceedings in which the possible prison sentence was less than 10 years. This ‘happened’ to have the effect of interrupting one court case in which the Premier was himself involved.

criminal procedure and case-attrition are 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. The Netherlands and Switzerland used to send offenders home to wait until a place was ready for them in prison. At a minimum therefore we will have to add differences in criminal procedure to the range of explanatory factors canvassed by Cavadino and Dignan.<sup>19</sup> But the more we emphasize the role of this factor as an explanation in its own right, the more it becomes difficult to draw a line between, on the one hand, the broader political and economic factors that they treat as their independent variables and, on the other, the dependent variable – prison rates – that their independent variables are intended to explain.

## The cultural meanings of punitiveness and tolerance

A second set of issues concerns the cross-cultural meaning of Cavadino and Dignan's dependent variable. The observer may choose to define 'punitiveness' and 'tolerance' *by fiat* in terms of prison rates. But in some societies these responses may not even be thought to lie on the same continuum (Nelken 2006). First, we need to pose a number of questions. Is tolerance to be seen as the outcome of deliberate choice – for example, the willingness to organize welfare interventions – or does it extend to deliberate (or even negligent) non-enforcement of available sanctions? Who is being said to be punitive or tolerant – politicians, legal professionals or the public? With respect to what sort of behaviour are these terms being applied? Are we talking of neutral 'facts' or of value judgements (and whose judgements count)? In sum, it is moot how far we can compare punitiveness and tolerance in different cultures without specifying what (various) actors in each of the societies concerned mean by these terms. Those who compare prison rates seek to avoid this problem by deducing intentions from outcomes. But if we ignore intentions it becomes difficult to be sure that we are comparing like with like. For example, is the effort to 'change' individuals, an aim that formed a central part of the ideology of the welfare-rehabilitative approach to offenders, a more or a less punitive intervention than the use of prison? Or is it really irrelevant that what I call tolerance you may call permissiveness, indulgence, favouritism, neglect, indifference, impunity, denial or collusion?

<sup>19</sup> Lacey (2008) seems to opt for this solution.

It is in pursuing this sort of interpretative enquiry that comparative research risks the opposite problem, that of relativism. We are told for example that in the Netherlands 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.'<sup>20</sup> *Gedogen* does not correspond, for example, 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. Comparison with Italy reveals even more significant differences. In the Netherlands, *gedogen* lies behind official willingness to accommodate exceptions to the law. But in Italy the State can 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.<sup>21</sup> Italian commentators speak less about being 'tolerant' than of the need to subject the criminal process to strict procedural requirements or *garanzie*.<sup>22</sup> But, in practice, '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). More generally, de facto toleration may be a way of currying popular favour through laxity in enforcing rules and a readiness to accept amends after the event.

But attention to these contrasts in the social meanings of tolerance does not have to lead us to a relativist approach. Such a theoretical position would rule out the possibility of even grasping the existence of these differences. And it would miss the point that penal approaches are often highly contested within the societies concerned, and that perceptions of their acceptability change over time – in part because of exposure to practices in other societies. Despite often 'ruling through leniency', Italy has also seen major investigations into political corruption and considerable successes in the fight against the Mafia. On the other hand, despite a tendency to distrust the State and to side with those who suffer its vexations, there is now increasing ambivalence (mobilized by much of the media)

<sup>20</sup> Taken from the website of the philosophy department of Erasmus University in Rotterdam. Of course, this term also gets its sense as part of a larger semantic field including, amongst others, the key term *beleid*; see Blankenburg and Bruinsma (1995).

<sup>21</sup> In the same way, the Italian term for 'discretionary' is used rarely in a positive sense but rather as the semantic equivalent of 'arbitrariness'.

<sup>22</sup> Ferrajoli (1989). A leading Dutch critical criminologist, René Van Swaaningen, argued strongly that *garantismo* represented a key idea for all critical criminologists to take up (Van Swaaningen 1997).



towards the continued 'tolerance' of everyday crime through attrition, or 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 re-thinking is seen in the increasing currency of terms such as *buonismo* (pretentious generosity at others' expense), *perdonismo* (being too ready to forgive everything) or *garanzie pelose* (so-called 'hairy' procedural guarantees, which are seen by some as measures pretending to protect the accused's rights 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).

There would also be more to be said about the changing relationship between tolerance of offending, on the one hand, and tolerance of sexual deviance, moral ambiguity and cultural difference, on the other. 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). This process clearly varies from place to place (and disapproval of offending may often be a covert way of refusing difference). 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. Such changes in what Cavadino and Dignan describe as 'attitudes towards inclusion' have indeed affected the possibility of keeping prison rates down. *Gedogen* no longer has the widespread support it had (Buruma 2007). But once again, even if such changes in the cultural climate are undoubtedly themselves also influenced by developments in economic and political conditions, they are not simply reducible to them.

## Conclusion

Just as it would be ethnocentric for Americans to assume that European criminal justice does or must work like that in the USA, for them, or English-speaking writers in general, to assume that European societies have fewer people in prison because they possess more regulated types of political economy may also be misleading (Nelken 2003). Ethnocentrism can be a problem not only where we think our practices are the best, but also where we assume too quickly that the others from whom we wish to learn are acting on the basis of what *we* think would be best practice (Cain 2000). Adopting an approach that attempts explicitly to get beyond ethnocentrism and relativism shows that simply calling for more of the solidarity and

inclusiveness that is assumed to characterize other societies with lower prison rates is the kind of short-cut that can easily miss the point. Learning from what others do is not so straightforward. On closer acquaintance we may well find that we like the outcome achieved by other systems of criminal justice, but not the means they use to get there – or vice versa.

But this message is not as negative as it might seem. Not only are there many things that *can* be learned from others, there are some matters that can *only* be learned from others. Reforms 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. Thus, in England and Wales – or the Netherlands – the answer to failures in the system is normally thought to be even more concern about efficiency. In Italy it is usually a re-thinking of ‘values’ or principles that is invoked as the way forward. Often the best practice for *us* to learn from may therefore not always be best practice as such, but 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 we need. And even learning what *not* to do can be useful, especially where this helps us to understand better why we make the sometimes hard choices we do.

In all this, interpreting what others are *actually* trying to do is essential even if – or especially if – the social actors we are studying do not have, nor could have, all the answers to our – or even to their – problems. If we are to intervene in a helpful way in public debates and policy-making, we must be able to engage with what actors think they are doing, and why it makes sense to them (insofar as it does so). I offer two examples to close with. I am currently engaged in comparative research into the handling of juvenile delinquency in England and Wales. This jurisdiction currently has one of the highest rates in Europe for the incarceration of juveniles and certainly much higher than that of Italy. If you ask the legal actors and others involved in the system why this is so, you will not usually hear them saying anything about trying to be punitive or intolerant. Rather, they claim to be doing their best to help children before they get into further trouble.<sup>23</sup> The number of youngsters ending up in prison is increasing as a result of government insistence on a quick through-put of cases. This is because persistent offenders run through the gamut of non-penal alternatives more quickly. But, again, this policy was ostensibly put in place in the interests of the offenders themselves. Different working assumptions lie behind the levels of tolerance or leniency in dealing with young people in different

<sup>23</sup> Even if, for some of those involved, it feels like a Faustian pact by which they have to agree to the risk of increasing criminalization in return for continuing access to welfare resources for deprived youths.

places. In England and Wales it is thought that children will not easily grow out of delinquency without official intervention. In Italy, on the other hand, there is a legally enshrined presupposition that in the majority of cases they will do so.

On the other hand, Italy has one of the highest rates in Europe for the proportion of illegal immigrants in prison, usually sent there for low-level property offences and drug-dealing. Why is it that these offenders do not benefit from the many procedural possibilities for delaying trial or avoiding prison? In part this is because they lack the legal competence and assistance to do so. But, in addition, official actors do not always interpret the procedural possibilities for leniency that do exist in their favour. Italian law says that first offenders sentenced to terms of less than two years should normally have their prison sentences suspended, on the legal assumption that they have not offended before and are unlikely to do so again. Should this provision also be applied to illegal immigrants? According to some magistrates, immigrants are entitled to the same protections as anyone else; it is not their job to take into account sociological considerations. What is at stake is a matter of basic fairness and formal equality of treatment. Other judges think that such offenders may well have already had a criminal record abroad before immigrating; they also argue that it is unrealistic to assume that a person without home or work will not be tempted to re-offend and that if measures are not taken to stop offenders now they will do their best to disappear. Although both views are held within the magistracy, the first, more lenient, approach is being steadily undermined by political and media pressure.

In both of these examples, labelling one view 'punitive' and the other 'tolerant' is not particularly helpful. The actors in each criminal justice system are up against the well-known difficulties of trying to find penal solutions to what are in fact larger social problems. Insofar as they have room for manoeuvre, their choices will reflect their conceptions of what courts can and should do in these situations (choices that may not be consistent across the range of different kinds of social problems). This said, when it comes to the evaluation of criminal justice practices, whether actors think they are being tolerant or punitive is not the end of the matter. We can, do and should make our own defeasible claims about other people's ideas and actions even where they would reject our interpretations. Not only self-confessed racists are racists! So it can make sense in some contexts to describe people as tolerant even if they do not intend to be (and vice-versa). It can be helpful to show actors that things could be done differently, and that they are already being done differently, elsewhere. Increasing their awareness of this can help unpack the self-fulfilling assumptions of the

criminal justice systems they belong to. But we should not overestimate their ignorance of matters elsewhere,<sup>24</sup> and we need to exercise great caution in substituting our accounts of what they are trying to do for their own.

In Italy, despite (or because of?) its low prison rate, ‘tolerance’ – or the local equivalents – has recently come to be seen by many as less and less something to be proud of but rather as evidence of the neglect of existing and potential victims. As one influential editorialist in a mainstream newspaper recently commented, in criticizing the latest *indulto*, ‘what right does the State have to pardon identified offenders at the expense of the unidentified victims who will suffer from the crimes that they will commit once released’. He ends by insisting that ‘public opinion is not bloodthirsty. It does not dream of taking revenge on Cain. Simply, it has eyes also for Abel and sees the solitude in which he has been left’ (Ricolfi 2007, my translation). To compete with this sort of rhetoric – aimed cleverly at reducing the religious and cultural aversion in Italy to what might otherwise be seen as putting law at the service of ‘vendetta’ – one possible strategy could be to insist that there can be more constructive ways of punishing than prison. But alternatives to prison do have their own costs and difficulties, and they are hard to apply in the case of offenders who have arrived in a country as irregular – and supposedly unwanted – immigrants. What seems undeniable is that, in the current penal climate, if we are to propose the adoption of different practices we will normally need to do more than merely show that they are – in their outcome – less punitive. Timing is everything.

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<sup>24</sup> It is not enough just to point out to English magistrates that things are done differently in Italy. Some then reply that this is possible there only because of the strength of Italian family life, whereas in England they are unable to count on such family support.

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