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## Comparative Criminal Justice: Beyond ethnocentricism and relativism<sup>1</sup>

The task of comparative criminal justice, most scholars would agree, is to compare and contrast our ways of responding to crime with those practiced 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 opposite 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 ever 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

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<sup>1</sup> Earlier versions of this paper have been given as a Keynote speech to the 'First conference on Assessing Crime, Deviance and Prevention in Europe, (European Commission funded) CRIMPREV network of excellence, Brussels, Belgium, February 8 2007; as a plenary presentation at the European Society of Criminology conference at Bologna, Italy on September 26, 2007; and as the Visiting Wiarda Chair inaugural lecture on June 13th 2008 at the University of Utrecht, the Netherlands.

strategies (Nelken 1994)<sup>2</sup>. We need to recognise that, while criminal justice practices gain their sense from the setting which 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 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, that the availability of work and decent housing are more important for reducing crime than whatever can be delivered by criminal justice. In the face of the changes being brought about by neo-liberalism we plead instead for policies based on inclusion, solidarity, tolerance, and respect for difference, and, not least, we recommend listening to the 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

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<sup>2</sup>Francis Pakes (2004: 13ff) suggests that those who favour an interpretative approach must necessarily be relativistic. This seems to me to be a mistake. On the other hand, whilst I would not go to the other extreme and argue that a strategy of relying only on a positivistic approach automatically leads to ethnocentrism it certainly does carry this risk.

resolve other problems. In Dutch cultural common -sense being pragmatic means not being dogmatic. But elsewhere these terms may have a different relationship. In Italy, on the other hand, pragmatic is often taken to suggest 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 that it can be difficult to see the limits of a given way of seeing. As the American philosopher Morgenbesser used to say, 'pragmatism is alright in theory!' But if the question is when it is appropriate not to be pragmatic, a pragmatic approach may not be able to provide the answer we need. Likewise, it is probably impossible to specify in principle all the contingencies which 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 and 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 give 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 interpretative enquiry may 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 that currently has the smallest number of people in prison in proportion to its population.

### 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'. 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 mobilisation of punitiveness - especially, but not only, in the United States- that is described in books with titles like 'Crime Control as Industry' (Christie 1993) , 'Making Crime Pay' (Beckett 1997), and, most recently, 'Governing through Crime' (Simon 2007).

In the current period it seems that ever more resort to punishment, and, in particular, the increasing use of prison, is widely felt to be necessary and appropriate. Even though all the evidence suggests that crime levels are 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' (Garland 2001) David Garland offers a pessimistic account that describes the way 'penal welfarism' has been displaced by the politicisation 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 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 eventually come into line.

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 American bloated penal system that now embraces more than 2 million prisoners. They insist that we need to recognise 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 whom it was proposed to learn how to be less punitive. But things have changed, and it has been calculated that the Dutch prison population increased from the 1980's at a faster rate even than that in the United States!<sup>3</sup> Now it is the Scandinavian countries that are seen as beacons of tolerance.

### Punitiveness and Political Economy

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<sup>3</sup> Its official level of imprisonment, however - like that of the other European countries - is still nowhere near the American level, and it has recently again begun to decline.

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 recent book about comparative penal systems (Cavadino and Dignan 2008). Their analysis has been much praised<sup>4</sup> and has been put to work by other leading writers<sup>5</sup> in Great Britain 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. Cavadino and Dignan argue that differences in the numbers of people in prison- which they take as a rough proxy for differences in punitiveness- are related to different kinds of political economy. As seen in Table 1, which is the linchpin of their thesis, rates of imprisonment in twelve modern industrial societies vary considerably between what they call neo- liberal, conservative- corporatist, social- democratic, and oriental- corporatist types of political economy.

Table 1 here

They argue that the neo-liberal societies have the highest prison rates because they follow social and economic policies which lead to what they describe as 'exclusionary cultural attitudes towards our deviant and marginalised fellow citizens'. On the other hand, Continental European corporatist societies (which have also been described as 'coordinated-market economies') and, even more, Scandinavia social democratic

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<sup>4</sup> There is much to admire in Cavadino and Dignan's work, and I cannot attempt to do justice to it here. For example, they successfully link punitiveness attitudes also to levels of prison privatization and the age at which young people are held to be criminally liable. And they also offer country by country reports of developments in punishment in the countries surveyed. Theoretically speaking, they are fully committed to explanations which aim to embrace both structure and culture and to show their interconnections.

<sup>5</sup> See e.g. Lacey, 2008; Reiner, 2007.

societies, are said to 'pursue more inclusive economic and social policies that give citizens more protection from unfettered market forces'. These societies, according to them, 'see offenders as needing resocialisation which is the responsibility of the community as a whole'. 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 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.

#### Problems in comparing prison rates

Cavadino and Dignan's thesis is certainly plausible. Neo-liberalism in the US and Europe does 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 they actually define neo-liberalism as including punitive attitudes. On the other hand, there are countries (such as China) which make great use of prison without being neo-liberal, and others, such as Russia or South Africa, where neo-liberalism has actually gone together with a reduction in the use of prison. This suggests that a wider variety of variables than those connected to political economy may lead to high or lower punitiveness.

More specifically, a number of other awkward questions need to be raised about relying on prison rates as an index of punitiveness (even though Cavadino and Dignan are far from the only writers to do so). 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? I shall do no more than briefly consider some aspects of these problems, my main concern here being how far comparing incarceration rates can help us re- think our approaches to the possible sources of punitiveness and leniency rather than only reinforcing what we already think and value. Could there be something ethnocentric about a thesis so well suited to telling policy- makers in countries affected by neo-liberalism that only more welfare provision and government regulation of the economy could provide a prophylactic against punitiveness? Put differently, tables such as that presented by Cavadino and Dignan should be seen as more than just a resource for explaining differences in prison rates. They are also social artifacts whose function lies in their utility for local struggles about penal practices.

Take first the problem of crime levels. For the table 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 threats 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), whilst 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? What lies behind overall prison rates also needs to be disentangled. 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.

The empirical basis for the argument is also rather fragile. This table offers a snapshot from 2002 - 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 (but there are many others) Finland 's rate has gone down sharply over the last 30 years from a level of 200, whilst the Netherlands, as already mentioned, shot up over a short period so as to make it one of the highest in the list<sup>6</sup>. Even the USA had a moderate level of the use of prison until the 1970's. If we turn to current - 2006 - figures we find that Italy, with a rate of only 62.9 now has the lowest prison population amongst major European countries. But the explanation for this does not lie with the generosity of its welfare or work training systems (welfare payments mainly go to pay pensions). Its current low rate owes a lot to the recent *indulto*- or collective pardon, which freed over a third of its prison inmates- just before the Council of Europe collected its data. <sup>7</sup>

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<sup>6</sup> The Netherlands rate arrived at 134 by the late 1990's - and occasioned an extensive academic commentary seeking to ' explain' this new punitiveness. But, according to the Council of Europe's 2005 survey, it has now gone down again to 87.

<sup>7</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 which has seen a recent 36% decline in its prison population. (Its prison population is now again rising and is predicted to shortly reach pre- *indulto* levels). 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- as will be argued in the text. It is difficult, perhaps even fruitless, to try to purify comparative figures of such interventions.

Such volatility is not easy to reconcile with claims about the dependence of such rates on underlying basic differences in political economy<sup>8</sup>. Apart from anything else, countries' prison rates are not just a reflection of other aspects of their own social, economic and political structures and policies. They are also a product of reflexive responses by politicians and policy-makers to their perceptions of where their countries stand in relation to other places. Thus the reduction in Finnish prison sentences and the increase in the Dutch level was in part a response to an earlier publication by the council of Europe in the 1980's of comparative figures of prison rates that showed Finland at the top and the Netherlands as having the lowest number of inmates. Roy Walmsley, an advisor to the United Nations (whose figures were the source of Cavadino and Dignan's table<sup>9</sup>) urges all countries to shape their criminal justice practices so as to aim at a rate of no more than a hundred prisoners per hundred thousand of the population<sup>10</sup> (and he obviously assumes that this can be brought about irrespective of more fundamental changes in a country's political economy.) Tables like these- in addition to their role as explanatory aids- are therefore capable of changing policy - and are often intended to do so.

As far as the theoretical argument goes, a table comparing prison rates can easily obscure as much as it reveals. It is controversial how the rate of immigration affects prison rates. But it is worth bearing in mind that some of the Scandinavian countries

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<sup>8</sup> On the latest figures England and Wales has a rate of 146 .1, the Netherlands 78, and Italy only 62.9. Source: Table 1.3a, Aebi and Stadnic, 2007. Though this could be said to confirm claims about the malign (background) influence of neo-liberalism in England and Wales, the other countries have seen equally large shifts which cannot be explained in these terms.

<sup>9</sup> See Roy Walmsley, 1999.

<sup>10</sup> Interestingly, Walmsley's recommendations of how to reach this goal include avoiding short prison sentences even though countries with lowest rates tend to be ones that make most use of these

with low prison rates have experienced little immigration, others even have long-standing blocks on economic migration. It is also hard to learn much from a table that suggests that such different places as the Netherlands and Italy are similarly punitive - and implies that this is for similar reasons of political economy. A cultural propensity to inclusion may be, in some sense, a relevant cross-cultural factor. But the sense may not be the same. As compared to the Netherlands, 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. Importantly, neither of these two belief systems gives the high moral ground to victims, especially not to individual crime victims. Italians were also leaders in the de-carceration movement which aimed to have mental patients and others treated in the community rather than in total institutions.

In terms of socio-economic 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 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. Some of those helping to maintain 'order' in the southern regions are actually criminal groups. Obviously, no search for common factors can do justice to all the differences between individual countries<sup>11</sup>. But we do need to ask how far it may be the ethnocentric

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<sup>11</sup> Cavadino and Dignan op. cit. include separate chapters on individual countries in an attempt to deal with this-but it not always clear how what they call 'idiosyncratic histories' relate to their major thesis.

chains on our imagination that prevent us from finding or wanting to find a place in our theories for these some kinds of variables<sup>12</sup>.

### The importance of courts and criminal procedure

A further and fundamental issue has to do with the importance any explanation must give to what goes on within the criminal justice system itself. This should not be considered only a matter of the 'how' of punitiveness. Certainly, factors that shape punitiveness can only make themselves felt through changes in the rules or practices of the criminal process. But there are also good reasons to consider criminal procedure as an independent or at least semi- autonomous-variable in its own right - and not merely as a reflex of wider economic and political factors or changes. What happens inside the criminal justice complex makes all the difference. It has been suggested, for example that it is collaboration between politicians, policy makers and courts that keeps prison rates down (Lacey 2008). But Italian experience suggests that it can also be the refusal of such collaboration that can leads to this result. The main resistance in Italy to the latest efforts by politicians to encourage the mass criminalisation of illegal immigrants comes from a uniquely strong corps of self - governing and independent judges and prosecutors, whose priorities are often different from those of the politicians or the public. There are also significant differences between countries such as Italy and Anglo- American legal cultures with

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<sup>12</sup> Criminologists who have attempted to explain which States in the US have the highest prison rates also single out factors such as lower welfare levels, less effort to ensure economic equality, and less public participation, that most criminologists would consider negative policies in their own right. I do not of course want to suggest that 'good ' factors are never responsible for ' good' outcomes- and vice versa- only to warn that the ' evil causes evil' fallacy ( all the more so in cross - cultural contexts) may artificially restrict explanations of punishment as much as those of crime (see Cohen, 1970).

regard to how far it is thought right constitutionally for criminal justice to be responsive to political direction or to social expectations. This has obvious implications for the extent to which the criminal justice system can defend its 'relative' autonomy.

It is only by looking at criminal procedure that we can make sense of the paradox of how, despite the many reasons that could lead us to expect the opposite, Italy can occupy the lowest 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 organised crime groups control or tax large parts of the economy and often condition regional and local politics. Newspapers are full of crime news, and criminal prosecution can be a potent weapon for assigning stigma. In the so called *Tangentopoli* anti - corruption investigations of the 1990's 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 stayed in prison for long. Public fear of crime and attitudes of punitiveness are higher than the European average. 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 their crimes 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 - but I would claim that the same will often be true elsewhere- the answer is that this has little to do with levels of welfare or state project aimed at the inclusion of marginal individuals, but everything to do with the operations of its

system of justice. Prison rates are low because of bauprocesses 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 amongst themselves (and over time) in the way they construct and operate such selectivity. In Italy the typical procedural guarantees of the accusatorial system (centering 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 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. 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>13</sup>. Partly under the shock of the *Tangentopoli* investigations, in which politicians were the main targets, laws were passed that allowed those sentenced to less than three years 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 large scale *indulto* -or collective pardon- was passed by the centre-left government in 2006 (after a long

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<sup>13</sup> This period after which 'prescription' sets in varies with the severity of the offence. Prime minister Berlusconi is amongst those who have benefited from this procedural nullification of criminal charges.

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 that, for the first time, unequivocally succeeded in obtaining national electoral advantage<sup>14</sup> by playing on linked concerns over immigration and crime<sup>15</sup>. Overlooking the considerable cross-party support at the time, the new government is also able to exploit the unpopularity of the latest *indulto*. This is widely seen as having been motivated by politicians looking after their friends (although justified at the time in terms of prison overcrowding and carrying the expressed approval of the last Pope) and is likely to have increased crime levels, also 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,

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<sup>14</sup> The Northern league parties and the ex-Fascist National Alliance party had strongly emphasised this issue even before. Directly-elected local mayors, as much on the Left as on the Right, have also 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 crime enforcement.

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

as on the extent to which politicians can be satisfied that they will not be in the firing line of any expedited proceedings<sup>16</sup>.

But is Italy just a special case? (As Mrs Thatcher liked to say, when characterising various countries in the European Union- 'and then there's Italy'). Its politics may be somewhat unusual, but I would argue that criminal procedure and case- attrition is also a large part of the explanation of how other countries with low prison rates kept them low in the past- or still do so. Germany for example diverts around half of its prosecutions, and France in the 1980's and 1990's repeatedly resorted to amnesties as a response to prison overcrowding. The Netherlands and Switzerland used to send offenders home to wait until places were ready for them in prison. At a minimum we will have to add differences in criminal procedure to our explanatory mix<sup>17</sup>. But the more we emphasise the role of this factor as an explanation its own right, however, the more it becomes difficult to draw a line between the broader political and economic factors that Cavadino and Dignan treat as their independent variables, and the dependent variable - prison rates- that their independent variables are intended to explain.

### The cultural meanings of punitiveness and tolerance

As this suggests, whatever problems there may be in identifying the independent variables that can explain variations in punitiveness and tolerance it is even more important to think more about the cross- national meaning of the dependent variables. These cannot merely be defined *by fiat* in terms of prison rates. Are punitiveness and

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<sup>16</sup> One of the first acts of the Berlusconi government has been to pass a law that seeks to block for a year all proceedings in which the possible prison sentence is less than ten years. This ' happens' to have the effect of interrupting one court case in which the Premier is himself involved.

<sup>17</sup> Lacey op.cit seems to opt for this solution.



tolerance on the same or on different continua? Is punitiveness -or tolerance- an outcome of deliberate choice - for example the willingness to organise welfare interventions. Or is it an alternative to such interventions - just the name we give to deliberate or even negligent non- enforcement of available sanctions? Who is being said to be punitive or tolerant- politicians, legal professionals, or the public?<sup>18</sup> 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, we cannot sensibly speak about punitiveness and tolerance in different cultures without specifying what (various) actors in each of the societies concerned mean by these terms. Comparing prison rates seek to get round this problem by deducing intentions from outcomes. But this can make it difficult to be sure that we are comparing like with like. 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? Is it irrelevant that what I call tolerance you may call permissiveness, indulgence, favouritism, neglect, indifference, impunity, denial, or collusion?

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

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<sup>18</sup> Cavadino and Dignan (op.cit.) also provide a useful table that relates punitiveness scores of the general public (measured by whether what they consider appropriate punishment for a crime coincides with that typically imposed by the courts) to the position of the country concerned in the rank order of those sending offenders to prison. This indicates a good correlation except for the case of Japan (public more punitive) and France (public less punitive). See Table 1:3 page 30.

term is Dutch. the concept is Dutch, and its application only works in Holland'<sup>19</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 also reveals 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 whilst targeting their opponents.<sup>20</sup> Italian commentators speak less about being 'tolerant' than of the need to subject the criminal process to strict procedural requirements or *garanzie*<sup>21</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 support through laxity in enforcing rules and readiness to accept amends after the event.

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<sup>19</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>20</sup> In the same way the Italian term for 'discretion' is rarely used in a positive sense but rather as the semantic equivalent of arbitrariness.

<sup>21</sup> René Van Swaaningen, (Van Swaaningedn, 1997) argued strongly that *garantismo* represented a key idea for critical criminologists to take up. The most extensive- even monumental- discussion of *garantismo* is Luigi Ferrajoli's book Diritto e Ragione, (Ferrajoli, 1989). Unlike Anglo- American thinking, *garanzie* are not defined in a way that leads to them to being balanced against the competing demands of 'crime control'. Indeed my attempt to discuss them in that framework was labelled 'bizarre' by Ferrajoli in his reply to my contribution to a symposium on his book.

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 'ruling through leniency' Italy has also seen major investigations against political corruption and considerable successes in the fight against the Mafia. On the other hand, despite a tendency to distrust the state and side with those who suffer its vexations, there is now increasing ambivalence (mobilised by much of the media) 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 whilst 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 like *buonismo* (pretentious generosity at others expense), *perdonismo* (being too ready to forgive everything), or *garanzie pelose* (so called 'hairy' procedural guarantees that are seen as measures pretending to protect the 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 the 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 many in the Netherlands used to consider praiseworthy, guided tolerance - or *gedogen*, has affected the possibility of keeping prison rates down (Buruma 2007). Once again, even if changes in the cultural climate are undoubtedly themselves influenced by developments in economic and political conditions they are not simply reducible to them.

### Some Implications

All this is of not merely (hopefully) of academic interest but also has practical relevance. We have argued that if it would be ethnocentric for Americans to assume that European criminal justice does or must work like that in the USA, pointing out that European societies possess more regulated types of political economy may not be the only explanation of why practices differ. Moreover, we have suggested that 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 which attempts explicitly to get beyond ethnocentrism and relativism shows that simply calling for more of the solidarity and inclusiveness that is assumed to characterise other societies with lower prison rates is the kind of short cut that easily lead to a dead end. Learning from what others do is not so straightforward. On closer acquaintance we may well find that we like the 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.

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). Two examples to close with. I am currently engaged in comparative research into the handling of juvenile delinquency in England and Wales. This country currently has the highest rate in Europe for the incarceration of juveniles. 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>22</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 places. In England and Wales it is thought that children will not easily grow out of delinquency

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<sup>22</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 criminalisation in return for continuing access to welfare resources for deprived youths.

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 also have already had a criminal record abroad, and that in any case it is unrealistic to assume that a person without home or work will not be tempted to re-offend. If measures are not taken to stop the offender now he will do his best to disappear. Although both views are held within the magistracy, the first is being steadily undermined by political and media pressure.

In both of these examples labelling one view tolerant and the other punitive is not particularly helpful. The actors in the criminal justice system in each case 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 which may not be consistent across the range of different kinds of social problems). This said, when it comes to evaluation of criminal justice practices,

whether actors think they are being tolerant or punitive is not the end of the matter. Not only self - confessed racists are racists! So perhaps it can make sense in some contexts to describe people as tolerant even if they do not intend to be? We can, do and should make our own defeasible claims about other people's ideas and actions. Studying the factors that correlate with lower prison rates can provide useful clues to the influences on policy makers and others of which they may not themselves even be aware - provided that we recognise that these factors may not always be ones we would want to copy. And it often helps to be able to show actors that things could be done differently, and 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, even if it is never easy to overcome these.<sup>23</sup>

Even in Italy, however, despite (or because of) its low prison rate, 'tolerance'- or the local equivalents- have recently come to be seen by many as less and less as something to be proud of than and rather as evidence of the neglect of existing and potential victims. As one influential editorialist in a mainstream newspaper recently commented, in criticising 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'<sup>24</sup>. To compete with this sort of rhetoric - aimed cleverly at reducing the religious and cultural aversion in Italy to what might otherwise might be seen as putting law at the service of 'vendetta' - one possible strategy could be to insist that there can be more

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<sup>23</sup> It is not enough just to point out to English magistrates that things are done differently in Italy. They reply that this is possible there only because of the strength of Italian family life, whereas in England, they have to fulfil the task of intervention/ protection.

<sup>24</sup> Luca Ricolfi, 'La sicurezza scotta' , La Stampa, 13 October 2007 (my translation).

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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