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Learning from Elsewhere? Some comparative reflections on youth justice and the penal responsibility of children¹

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Introduction

The Children's Bill currently being drafted seeks to reform the law and practice of youth justice in Mauritius. One question that may arise in the process is whether, and if so how, Mauritius might learn from the practice of other jurisdictions. In this article I seek to reflect upon some of the challenges of deriving policy lessons from comparative studies of youth justice by reflecting upon the implications of an empirical project comparing the practice of youth justice in Italy and England and Wales. The study was conducted in collaboration with Professor David Nelken² and was based partly on comparing a matched sample of case-files and partly on matched interviews with practitioners from each jurisdiction. Interviewees were asked not just to reflect on their practice in general but also to consider how they would deal with particular fact-circumstances set out in vignettes adapted from real cases).³ I will draw from the study a picture of the contrasting outcomes in youth justice that emerged, offer some explanations for those contrasting outcomes, before examining the implications for our capacity to borrow legal solutions from other jurisdictions.

Contrasting systems

The decision to compare these two jurisdictions was prompted by the fact that they seemed in the 1990s and 2000s to be heading off in diametrically opposed policy directions. In particular, attitudes to the desirability of active and early intervention in response to youth offending through the criminal justice system were very different. In England and Wales, the Crime and Disorder Act 1998 had introduced what became

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³ For details of the study see S Field and D Nelken (2007) 'Early Intervention and the Cultures of Youth Justice: A Comparison of Italy and Wales' in V Gessner and D Nelken (eds) *European Ways of Law* (Oxford: Hart) and S Field and D Nelken 'Reading and writing youth justice in Italy and (England and) Wales' (2010) 12 (3) *Punishment and Society* 287

known as the 'new' youth justice overtly based on a strategy of early and progressive state intervention through the criminal justice system. Yet in 1988 a Presidential decree (448/1988) had explicitly entrenched into the Italian Youth Justice Code assumptions about the need to limit as much as possible the use of punishment through criminal process. So there seemed to be striking differences in policy direction that were worth examining.

This contrast in approach was clearly reflected in very different outcomes. Compared with England and Wales, young people in Italy in the 1990s and 2000s who came to the notice of authorities for committing criminal acts were much less likely to be convicted and sentenced. In Italy, of every 100 such youths, less than 20 would leave the system with a criminal conviction. In England and Wales, the comparable figure was 55-60. Italian youths were also much less likely to find themselves in custody: of youths aged between 12 and 17, around 50 per 100,000 were in custody in England and Wales while in Italy the figure was around 15. Even more strikingly, in England and Wales around a third of young people convicted would be subject to a sentence involving some kind of compulsory intervention in the community. In Italy this hardly ever happened.

These contrasting results flowed most obviously and immediately from a different rule and policy framework. In England and Wales, the Crime and Disorder Act 1998 not only reduced the age of criminal responsibility to 10 but introduced a new reprimand and final warning scheme which meant that offenders would usually be reprimanded for a first offence, but some kind of formal intervention was required for a second offence followed by charge and conviction for a third. From then on, in practice each time the offender re-offended, the penal intervention in the community would normally become more intense and/or prolonged. Interventions in the community generally involved control and support delivered by newly-created multi-disciplinary Youth Offending Teams with a primary statutory duty of reducing offending (rather than the broader welfare of the young person). Many offenders followed an almost conventional step-by-step path through increasing levels of social intervention in the community (even for relatively low-level offending). If the most intensive of these failed – the offender came back to court again – a custodial sentence became the likely outcome.

In contrast, decision-making in Italy was much less structured by policy guidelines: youth justice magistrates made decisions mainly on the basis of individualized and discretionary assessment of the risk of continuing criminality. In most cases magistrates concluded that routine crime was not serious enough to warrant intervention or that a judicial pardon was appropriate because the defendant showed no signs of entrenched patterns of offending. This led to diversion without any social intervention through the criminal process. But in a minority of cases (around 6-8%), where offending was more serious or there was a significant previous record, if social services identified a prospect of rehabilitation, *messa alla prova* was the usual response. This involved the judge suspending the criminal prosecution - usually at a preliminary hearing but sometimes at trial - where the young person admitted his or her involvement in an offence. This suspension allowed a period of supervision by social workers. During this, the young person might be required to undergo education or training, follow voluntary or activity programmes, accept restrictions such as staying in at night or avoiding certain places and perhaps make some reparative act. If the magistrate concluded at the end of the period of suspension that prosecution was not necessary - they did so in over 70% of cases - it would be terminated. This response, although it involves no conviction, could be imposed for virtually any crime: some magistrates interviewed suggested that certain offences such as homicide and rape were too serious for *messa alla prova* but many did not accept any limit by crime seriousness. There are many instances of its imposition for certain forms of homicide, rape and robbery. But certain kinds of offenders tended to be seen as beyond hope: immigrants, gypsies and those from criminal families or with organized crime connections. The authorities explained this in terms of the inability to organise intervention programmes without a (law-abiding) home base. For these categories conviction and custody were common disposals.

Explaining difference

How to explain these profound differences? We can see that, at the heart of differences between the systems are different views written both into underlying policy and particular decision-making as to the value of social intervention through the criminal process. In England and Wales, there was structurally inscribed presumption that most young persons required a graded application of increasing levels of such intervention. A failure to punish contributed to youth crime because, without early intervention, vulnerable young people would not develop a sense of personal responsibility. For this, the criminal process, with its moral accent on

blame and shame, was essential. In Italy, the central aim of youth justice was also to responsabilize young people. But, there was a much clearer sorting process between offenders: for the vast majority such intervention was unnecessary or damaging, a few needed the social intervention of *messa alla prove*, and for some it would be a waste of time. Educative measures might sometimes be necessary, but the emphasis was on not interrupting or interfering with the normal processes of education and psychological and social development taken to be already in place. In particular, incarceration and the resulting separation from the socializing and educative effect of the family and community were taken to have especially negative effects.

Thus, at one level one can explain difference between the two jurisdictions simply in terms of the applicable legal and administrative rules and underpinning policy choices. Yet we discovered that the explanations were also to be found in established institutional elements and cultural contexts in the two jurisdictions which seemed to support those contrasting rules and policies. In short there seemed to be a logical 'fit' between rule and policy and surrounding criminal justice institutions and broader social contexts. This, I will argue later, has important implications for 'learning from elsewhere' in youth justice.

The first key institutional difference was in the relationship between pre-trial and trial phases which was in turn the consequence of differences in the 'pace' of throughput in youth justice. In Italy, delay is an established element of legal culture. Judges cited 2-3 years as the normal time period between offence and public hearing. A young person arrested at 14 may be very different in their personality, aspirations and family contexts when finally sentenced at 16 or 17. It is hardly surprising that, if a youth justice system with these levels of delays sees a need for intervention, it should prefer action before rather than after conviction. Thus, delay becomes part of the institutional context in Italy that promotes pre-trial rather than post-conviction intervention. This is not just the use of *messa alla prove* from the preliminary hearing. It also entailed the use of restrictive pre-trial measures that were used as interventions in the sense of responses intended to reduce further offending. In the case of very serious crime, especially that which involved the Mafia or foreign youths, this might well involve remand in custody. But for most youths and for more routine offences, this will involve the use of a range of pre-trial measures involving increasing degrees of control in the community: young people might be required to study or work for a period, to stay at

home or in another specified place or to live in a special residential community. In part, these might be used for the same reasons as bail conditions in other jurisdictions: preventing flight, further offending or interference with witnesses or evidence. But the terms in which such pre-trial measures were discussed by magistrates was more often couched in terms of responses to established or presumed offending. Such measures were frequently presented as rehabilitative or re-educative or responsabilizing in their aim.

Another key institutional distinction between Italy and England and Wales is in the way relations between civil and criminal state intervention are constructed. In Wales, Family courts and Youth (criminal justice) courts are formally separated. Youth social services work with Family courts and have the primary statutory aim of addressing the interests and welfare needs of children and young persons. Youth Offending Teams (YOTs) work with the youth courts with the primary statutory of preventing offending. But the distribution of intervention between civil and criminal jurisdictions was shaped by the fact that YOTs were widely perceived to have superior resourcing and to be more effective institutions than youth social services. Thus, unless there was an accommodation or child protection issue, social services, faced with limited resources, often sought to pass the provision of welfare services onto the YOTs for any YPs involved in offending even where the link between need and offending was not obvious. So the availability of resources and the demands of national standards meant services that might have been delivered by non-criminal agencies were delivered by YOTs so that they became primary deliverers of welfare needs. This is completely the reverse of the situation in Italy where local social services when responding to what are essentially problems of offending have to define those problems as welfare problems because the local state does not have jurisdiction over crime. Thus, in the delivery of services, there is a logic to 'talking down' crime in Italy and 'talking up' crime in Britain. Furthermore, Italian prosecutors and juvenile judges have co-ordinate civil and criminal jurisdiction. Prosecutors can define an event as non-criminal but ensure state intervention takes place through social work intervention through the civil courts. Indeed, often civil intervention is quicker than waiting to put a *messa alla prove* in place. Italian pre-trial judges can ensure civil interventions are taking place alongside preliminary criminal investigations. Now there are very real resource constraints as to what can be done: Italy is by no means a country with wide-ranging state welfare interventions. But there was none of the feeling in our interviews

in Wales that the criminal side is so much better resourced and organized that effective social intervention is better done through the criminal process.

The empirical data also revealed clear differences in established occupational cultures and relationships. In Italy, youth justice is primarily controlled by professional specialist youth justice magistrates. These magistrates had chosen to work with children in a jurisdiction that embraces both civil and penal intervention and their self-image is constructed in terms of welfare and education. They have clear legal powers to direct social workers and police officers in pre-trial investigation and wide-ranging constitutional judicial independence to resist any punitive pressures from politicians and public opinion. Roles and relationships were very differently constructed in England and Wales. First, youth justice magistrates are not the dominant actors that they are in Italy. Furthermore, youth justice magistrates in England and Wales are lay magistrates. In our interviews, many magistrates were quite clear that their function was in part to reflect the opinions of the communities that they in some sense 'represented'. And for those magistrates, that local public opinion would not allow them to pursue a less punitive or more diversionary policy.

Even beyond the youth justice system there were key differences in the cultural contexts, in family and community. Levels of supervision and informal social controls through the extended family and school were seen in Italy as sufficient for most families to be trusted by the system with responding to most troubling youths. Admittedly this thinking was not applied to particular social categories (essentially immigrants, gypsies and organised crime families). But magistrates in Wales were forceful and more general in their view that the 'collapse of the family' meant the solution of problems could not be left to parents.

Implications for learning from elsewhere

What can we learn from bilateral comparisons like this about policy choices in youth justice? One approach to reform is to seek to frame the question in a way that removes (or perhaps disguises) the underlying value judgements, as being about efficiently and effectively reducing youth crime? What works? What works elsewhere? Can it be applied here? But typically, it will be difficult to provide convincing empirical evidence that one system works better than another in reducing youth

crime. Not least of the problems is that the two systems under examination do not measure youth crime in the same way: Italy records the number of offences by youths reported to the prosecutor whereas England and Wales uses central data on pre-court disposals and convictions. We can guess that youth crime in Italy was probably lower over the relevant period because the numbers for relevant crime are so different. But we do not know how far that is a product of the superior response of the youth justice system or in differences in broader social factors affecting levels of youth crime. And we cannot compare reconviction rates for various social interventions to see which 'reduce' offending the most because they are not systematically recorded in Italy.

A broader way of looking at youth justice policy-making is to see it as choosing the priority accorded to, and the relationship between, two linked but separable social objectives. The first, promoting the social integration (or limiting the social exclusion) of troubled children and young people, defines the problem in broad social terms. The second, preventing or reducing youth crime through criminal justice sanctions defines it much more narrowly. Do we see young people as children first and offenders second or do we choose to govern troubled youth through criminal justice? Now these are fundamental moral and then political choices which turn on much broader questions than youth justice. What kind of society do we want? They also reflect matters of national or social identity: what kind of people are we? Comparative research may have a value in illustrating the range of possible blends between these two objectives but making these choices may be as much about national identity and overarching visions of society as evidence-based policy construction.

How far can this study assist in these judgements? What we have done is use empirical data to develop a complex detailed explanation of differences in practices in Wales and Italy. This explanation showed the many ways in which policy, institutional relationships and broader cultural contexts all supported early formal intervention through criminal justice system within the youth justice in England Wales and diversion into Italian youth justice in Italy. We were able to show how and why penal non-intervention fitted the 'youth justice culture' in Italy: we have set out a set of interrelationships which seem to make it not just possible, but indeed perhaps logical, to avoid intervention, which gives coherence to non-intervention as a response. Some British academics and pressure groups, concerned about the high rates of criminalization and incarceration of young people under the 'new youth justice' in England and Wales, have seen Italy as a preferable, more tolerant response to

youth crime that limits stigmatizing exclusion of criminal justice. They wanted to see a shift in balance away from targeted criminal justice interventions against troubling youth to more general support for troubled youth outside the criminal justice system. But this never went very far as an argument towards adopting an Italian model. Our research surely suggests why. Italian practice has a number of features that would require 'cultural revolution' in England and Wales in that they require a certain trust in an active judiciary: a professional specialist youth justice magistrate directing trial and pre-trial with a high degree of discretion in practice, a mixed civil and criminal jurisdiction and the use of controlling and supporting interventions in the pre-trial process before conviction. This 'fits' the political and social traditions and institutions of Italy but would be politically problematic because institutionally revolutionary in England and Wales. Attempting to reduce offending through the use of judicial pre-trial control and social interventions through the criminal justice system would be considered contrary to the presumption of innocence if directed at those not (yet) convicted of crime. A system that combined use of civil and criminal sanctions was abandoned in the 1960s in England and Wales because of the fear that welfare interventions might be used for controlling or coercive purposes. The use of control or coercion must be subject to the distinct safeguards of the criminal justice system. Both of these constraints express a certain distrust of the state and need for adversarial due process to contain the coercive power of the state. And we can argue that the absence of a dominant figure like the Italian pre-trial youth justice magistrate is not an accident in England and Wales. The coordinate structure of lay magistrate, police and social workers is characteristic of a tradition in criminal justice characteristic of Anglo-saxon liberal adversarial jurisdictions. The absence of clear hierarchical relationships reflects the historic desire to divide and contain power. These relationships do not just reflect what particular Governments think of as the most effective way of responding to youth crime, this is a form of organisation that reflects entrenched elements of political culture and history. Introducing a specialist professional pre-trial youth magistrate trained in law and in youth development with the power to direct police and social workers and to use civil and criminal powers to both promote welfare and maintain social order, might look to some like a way of combining a concern for welfare with one for due process. But to many in England and Wales, of left and of right, this might be seen as putting a lot of trust in a single judicial figure where the guarantees are written into the function and occupational culture of the officeholder rather than the constraints of procedure. Building such an occupational

culture from scratch within the context of English traditions would be a challenging and risky enterprise that few Governments would contemplate in the face of likely opposition seeking to protect the independent power of the police and the lay magistrate.

It is hard to see how 'learning' from Italy could be done in less radical mode. The systems are so different that transplanting a particular part taken from one system to the other poses obvious risks of rejection (just as an organ from one body may be rejected when transplanted into another). So one possible conclusion for Mauritius, is that if you are looking to make particular policy adjustments while maintaining the underlying political and cultural assumptions of a system, then appropriate comparators are likely to be places with similar fundamentals but particular differences so that you can better assess the utility of those particular elements.

What is the use then of more radical comparisons such as the one conducted in this bilateral study? What it may do is enable the creative challenging of deep rooted and apparently established wisdoms. For example, one can see the conflict between Italian youth justice and the 'new justice' of the 1990s and 2000s as a debate between radically different approaches to the concept of 'responsibilization.' In one, responsibilization is associated with a moment of public blaming, shaming and paining at criminal trial. In the other, responsibilization is a broader life-long process of socialisation principally carried out through the family and community but to which educative contact with the state may contribute. The Italian system provides an example of a system - a functioning system in the context of native Italian youth - that responsibilizes without primary emphasis on conviction and punishment. When asked how responsibilization occurs in a system where young people are often not convicted for even serious offences, Italian magistrates argued that it was the educative contact with the justice system (the message coming from social workers and magistrates) that was critical rather than a public ritual of shaming and paining. The precise way in which this is done in Italy could not be easily reproduced in England and Wales. But the fact that it can be done provides evidence that alternative organising concepts are possible involving different visions of the good society and the political relationship between state and individual.