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Citation for final published version:

Colson, Renaud and Field, Stewart 2019. Learning from elsewhere: from cross-cultural explanations to transnational prescriptions in criminal justice. An introduction. *Journal of Law and Society* 46 (S1) , S1-S11. 10.1111/jols.12180 file

Publishers page: <http://dx.doi.org/10.1111/jols.12180> <<http://dx.doi.org/10.1111/jols.12180>>

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Learning from Elsewhere: from cross-cultural explanations to transnational prescription in criminal justice?

Dr Renaud Colson (University of Nantes) and Professor Stewart Field (University of Cardiff)

Acknowledgements: This Special Supplement emerged from a workshop jointly organised by the Centre for Crime, Law and Justice and the Centre of Law and Society at Cardiff Law School in May 2017. The project benefited from the financial support of the Centre of Law and Society, the Cardiff University International Visiting Fellow scheme and the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg.

1. Comparing criminal justice systems in a transnational era

We are living at a time in which increasingly concerns about crime and security are shared across national borders and our responses are becoming transnational: this is evident in intensifying international efforts at crime-control co-operation and the dissemination of particular approaches to crime prevention, criminal justice and the rule of law. These developments are being implemented partly through international law (especially international criminal law and international human rights law) and partly through wider and more diverse forms of supranational influence and intergovernmental cooperation. There is now a substantial grey literature emerging from international institutions such as the United Nations, the European Union and the Council of Europe producing comparative data and research and seeking to promote particular views of good practice in relation to a variety of issues around crime, security and justice.¹

In this context, it is hardly surprising that the comparative study of criminal justice practice and policy and its transfer across national boundaries is beginning to emerge as a new field of research both in criminology and criminal justice.² One can distinguish two linked research questions within this field. The first is the more descriptive or analytical. How are concepts of good or best practice in security and criminal justice being constructed and circulated transnationally? How do transfers take place, through what channels and with what effects (good and bad)? Here the task is to chart what is actually happening in the development of transnational prescription in criminal justice practice and policy. The second research question is more directly normative with clear

¹ The UN Office on Drugs and Crime, the European Union Agency for Fundamental Rights or the European Monitoring Centre for Drugs and Drug Addiction are obvious examples.

² See esp. T Newburn, R Sparks (eds.), *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control* (2004), and D Melossi, M Sozzo, R Sparks, (eds.) *Travels of the Criminal Question: Cultural Embeddedness and Diffusion* (2011).

prescriptive implications. To what extent is it desirable to seek to identify transnational good or best practice? What are the difficulties and challenges in doing so validly? If transfers of policy and practice can sometimes be desirable, how should they be carried out in order to promote the exchange of good practice (as opposed to bad)?

What both descriptive and prescriptive research questions have in common is that they require an engagement with the underlying challenge of cross-cultural diversity in social and legal norms. If the definition and operation of concepts and practices in security and justice varies according to cultural contexts, then this raises questions both about the feasibility of effective transfer and its desirability. In turn, this then raises questions about the role of comparative researchers and cross-cultural research in informing good learning practices and criticizing bad ones. We may anticipate that, in so far as it is governments that are shaping transfers, they are likely to be driven by the immediacy of their own instrumental and political goals. Established in particular legal jurisdictions and shaped by the cultures of particular nations, they may struggle to come to terms with the significance of cross-cultural diversity. What part can or should cross-cultural research play in defining good transnational practice and assessing the consequences, both good and bad, of transfer? What kinds of comparative research might be appropriate to the task?

There are several distinct strands to the published academic research that relates to these questions. First there is a substantial body of conceptually sophisticated and methodologically reflective research in politics and international relations on policy transfer studies. It even has its own acronym (PTS). But as yet, very little of this has been applied in the criminal justice and criminological field.³ Secondly there is a burgeoning literature in comparative law which uses the concepts of legal transplant and legal adaptation to examine the transfer of legal rules and practices. But again, there has been only a limited focus on criminal justice.⁴ There is a more substantial literature on broader questions of comparative criminal justice; but policy transfer is often not a direct focus and such work is often seen as in need of greater conceptual and methodological

³ See for a notable exception, T Jones and T Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (2007). See Jones and Newburn, this volume for the authors' reflections on the significance of policy transfer studies to comparative criminal justice.

⁴ For a sample of studies, see D Nelken and J Feest (eds), *Adapting legal cultures* (2001). For a notable exception to the neglect of criminal justice, see M Langer (2004) 'From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanization Thesis in Criminal Process' 45 *Harvard International Law Journal* 1

reflection.⁵ In recent years we have seen the rise of a diverse academic and policy literature stretching across criminology, politics and international relations which treats a very wide range of transnational issues of public safety and social order as questions of 'security.' This includes a concern to define 'legitimate security' and to address normative questions about the 'good' in security.⁶ Yet the approach has traditionally been based more on notions of security as a general human need with a dominant universal logic rather than something differently experienced, felt and managed by different groups.⁷ The examination of the influence of cultural differences on the lived experience of security is as yet underdeveloped.⁸ Finally, there are substantial specialist legal literatures on international and European criminal law and the development of European criminal justice. But the general drive of much of the research is towards developing coherent general normative principles to organise these different fields rather than examining their effects and implications for diverse legal cultures.⁹

2. Functionalism and its critiques

In order to develop conceptual reflection on the terms and conditions of sound comparison and its implications for policy transfer in the specific contexts of criminology and criminal justice, an obvious starting point is mainstream comparative law. In the last thirty years, the rise of

⁵ David Nelken's work involves a continuing concern that those working in comparative criminal justice should be more reflexive in the development and use of concepts. See among others: *Contrasting Criminal Justice : Getting From Here to There* (2000) and *Comparative Criminal Justice : Making Sense of Difference* (2010).

⁶ A Crawford and S Hutchinson (2016) 'The Future(s) of Security Studies' 56(6) *BJ Crim* 1049, 1053. For a particular attempt to develop the concept of legitimate security see S Virta and M Branders (2016) 'Legitimate Security? Understanding the Contingencies of Security and Deliberation' 56(6) *BJ Crim* 1146

⁷ A Crawford and S Hutchinson (2016) 'The Future(s) of Security Studies' *op.cit.*, 1053.

⁸ But see for an agenda: A Crawford and S Hutchinson (2016) 'Mapping the Contours of 'Everyday Security: Time, Space and Emotion' 56(6) *BJ Crim* 1184. There are important exceptions to this generalisation that offer pointers for future development. On urban security in Europe, see A Edwards and G Hughes (2013) 'Comparative European Criminology and the Question of Urban Security', 10(3) *European Journal of Criminology* 257 and the special issue that this introduces. On policing, see the Special Issue of *European Journal of Policing Studies* 2(1) *Policing European Metropolises* edited by A Edwards, P Ponsaers, A Recasens, I Brunet, A Verhage (2014), and E Devroe, A Edwards and P Ponsaers (eds), *Policing European Metropolises: The Politics of Security in City-Regions* (2017).

⁹ See nonetheless R. Colson and S. Field (eds), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (2016)

globalization and the harmonization of legal fields as diverse as commercial law, company law, constitutional law or human rights law have stimulated academic research on the methods of legal comparison. The dominant approach relies on the idea that only laws which fulfil the same function can be compared. According to the so-called functional method, the goal of comparison is to understand how different societies solve similar problems in diverse ways. This in turn opens the door to legal progress because the contrast between various solutions helps to identify best practices and to circulate them.

At first sight, the identification of functional equivalents in different legal systems seems to provide an appropriate tool to overcome the descriptive and normative challenges facing comparatists in the field of criminal justice. Not only does it provide a framework to identify what is worth comparing (different legal rules and normative practices deployed to solve similar criminal problems and analogous security issues), but it also allows us to assess these norms and possibly promote or criticise their diffusion depending on how they fulfil their goal. A good example is provided by the way the development of negotiated justice and plea-bargaining in different states is described as a response to a common problem, namely an increasing burden on criminal procedures due to an increasing crime rate.¹⁰ In the light of such a diagnosis, it then becomes possible to compare the various national manifestations of plea-bargaining in order to determine how each of them meet this goal, what overall impact it has on the functioning of the criminal justice system, and evaluate whether it should be extended further or applied in other contexts.¹¹

Although dominant in comparative scholarship, the functional approach has been under fierce attack. The critique is manifold and bears both on the method itself (criticised as relying on a simplistic and instrumental view of legal technique) and its goals (said to be practice-oriented, lacking neutrality and blind to cultural diversity). Some critiques claim that the mainstream approach precludes a sophisticated understanding of the relationship between norms and their functions and is heavily tilted towards hegemonic harmonization, not to say unification, of laws. Ultimately, its most radical opponents reject the quest for similarities at the core of the functionalist approach and claim that the legal comparisons should essentially focus on differences instead of pseudo-convergences.¹²

¹⁰ M. Langer, "From Legal Transplants to Legal Translations", *op. cit.*, 37.

¹¹ M. Wade, "Why some old dogs must learn new tricks: Recognising the new in EU criminal justice?" in Colson and Field (2016), *op.cit. n.000*

¹² P. Legrand, 'The Same and the Different', in *Comparative Legal Studies: Traditions and Transitions*, eds. P. Legrand & R. Munday (2003), 240.

This critique seems all the more powerful in the field of criminal justice, a domain where distinctive legal characteristics are deeply entrenched. Rooted in history and tradition, criminal law - especially in its procedural dimension - should not be viewed as a mere set of technical arrangements. It emerges within a historical context and it articulates local political and cultural constructs which seem to determine its development as much as its explicit function. As a result, the quest for functional equivalence to explain the circulation of criminal models may prove problematic as it overlooks other fundamental determinants in the transfer of norms and institutions. Thus, in understanding a practice like negotiated justice, we may need to think more about the effects of legal and political cultures to explain the ways in which the apparent homogenization of legal practices may conceal continued differences or even the development of unpredictable consequences.¹³ This in turn may lead us to be very cautious with, or even to abstain from, any normative statement on the desirability of legal transfer.

Should comparatists resign themselves to oversimplification in order to shape the increasing normative exchanges which characterize criminal justice systems? Or should they sacrifice policy prescription on the altar of cultural complexity? At first sight, the fierceness of the ongoing methodological dispute and the depth of the epistemological discrepancy between the functionalist and the hermeneutic perspectives seem to rule out any reconciliation of the two points of view. Yet compromise should not be seen as precluded. Although functional and interpretive approaches are based on very different epistemological starting points, both stress the need for a contextual analysis of law.

3. Comparison as Translation

Translation studies can provide a useful guide to the researcher involved in the comparison and the circulation of norms and practices between criminal justice systems. Language and law are analogous in many ways. Both are systems of rules (linguistic or legal) which evolve in particular social, economic and political contexts. Both are the result of historical processes shaped by interaction with other linguistic and legal systems, and these interactions often reflect hegemonic power relationships. Moreover, comparative law and translation studies have much in common.¹⁴ Comparative lawyers are often obviously confronted with the

¹³ E Grande, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe* (2016) *American Journal of Comparative Law* 64, M Langer, *op.cit.* n000

¹⁴ See, among others, V. Grosswald Curran, "Comparative Law and Language", in *Oxford Handbook of Comparative Law*, eds. M. Reimann & R. Zimmerman, (2006), chap. 20; C. Laske, "Translators and Legal Comparatists as Objective

issue of translation when working on foreign laws. But beyond this visible connection, which simply flows from different legal systems being in different languages, there are other similarities between the two disciplines. Indeed, both provide methods to mediate meanings and identify correspondence between distinct semiotic universes, and both engage in debates on the value of these methods and their results.

The first lesson that researchers involved in the comparison of criminal laws can learn from translation studies is that mediating the exact same information from one language into another is impossible. While the translator should strive to say 'almost the same thing',¹⁵ it can never achieve an 'ultimate' translation in the target language without a loss. Because languages do not signify identically, all translation necessarily implies some sort of distortion. In an influential essay,¹⁶ Walter Benjamin illustrated this phenomenon using a simple example: while the word German *Brot* and the French word *pain* refer to essentially the same *bread*, these two words are not interchangeable as they mean something different to a German, who will probably have in mind *Vollkornbrot*, and to Frenchman, who will most likely be thinking of a *baguette*. Similarly, the comparatist lawyer willing to describe foreign rules and legal concepts can hardly claim to fully render their meaning to its audience.¹⁷ American plea bargaining, German *Absprachen*, French *comparution immédiate sur reconnaissance préalable de culpabilité*, and Italian *patteggiamento* may well all be referred to as *guilty pleas*, but they are not interchangeable. On the contrary, it could be argued that each of these concepts excludes the others. They have different meanings. Each of them refers to a distinct set of rules and practices, all deeply culturally bound and reflecting particular legal mentalities which are incommensurable.

The second lesson that translations studies can provide to comparatist is that since there is no "true" translation, the translator is bound to betray somehow the original text and the host language,¹⁸ and he should accordingly choose an interpretative strategy. Does he want to convey the strangeness of the original text and communicate its cultural and linguistic particularities to a foreign readership at the risk of being cryptic and elusive? Or does he aim at a more transparent discourse in the host language at the risk of assimilation of the cultural other? Depending on its choice, the translator will stick to the word or to the spirit of the original

Mediators between Cultures?", in *Objectivity in Law and Legal Reasoning*, eds. J. Husa & M. van Hoecke (2013) 213.

¹⁵ U. Ecco, *Dire quasi la stessa cosa. Esperienze di traduzione*, 2003.

¹⁶ W. Benjamin, 'Die Aufgabe des Übersetzers' (1923), at: <https://www.textlog.de/benjamin-aufgabe-uebersetzers.html>

¹⁷ S. Glanert, "Translation Matters", in *Comparative Law: Engaging Translation*, ed. S. Glanert (2014) 1.

¹⁸ F. Ost, "Law as Translation", in *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke*, eds. M. Adams & D. Heirbaut (2014) 69.

text, to the letter or to the genius of the host language. This decision is sometimes framed in ethical terms, as a choice between “authenticity” and “ethnocentrism”.¹⁹ Yet, Julian Barnes has rightly pointed out that the translation that works best may sometimes be the one least faithful to the original.²⁰ This “politics of translation” in relation to the work of translators mirrors the “politics of comparison” which is also at play, although usually implicitly, in the work of legal comparatists.²¹ Indeed, similar issues arise in the comparative description and appreciation of foreign criminal justice systems.

In order to describe foreign rules and foreign institutions, the comparatist can try to do justice to their originality, to emphasize their otherness to the point of incomprehension, or he can choose to emphasize sameness over difference in order to make the foreign model understandable and possibly transferable. The choice between these two approaches has political consequences. The study of law, including comparative law, is not only a contemplative activity: part of its value derives from its ability to transform legal representations and legal practices.²² These political stakes are especially high as comparative arguments are frequently used in the framing of national and transnational criminal policies. When involved in such enterprise, the comparatist cannot always take refuge in the ethereal debate on cultural appropriation and the authenticity of the comparative process. He necessarily has to take a stance, if only because the knowledge he produces is likely to have a governance effect, because cross-cultural comparisons play a crucial role in accelerating the circulation of policy ideas and legal models.

Like the translator, the comparatist should reflect on the purpose of his research to determine what comparative strategy to adopt. This is all the more necessary if he is engaged in a process of law reform, whether it be new procedural guarantees for individuals, increased crime control efficacy or the administrative modernisation of criminal justice. In that case, he should remember that any legal transfer from one setting to another is fraught with uncertainty.²³ All jurisdictions have an established framework for thinking and doing criminal justice (a criminal justice language) that imposes particular constraints but also offers specific opportunities. As a result, the most faithful transfer from one jurisdiction

¹⁹ F. Schleiermacher, “On the Different Methods of Translating” (1813), in Glanert, *op. cit.*, 9.

²⁰ ‘Translating Madame Bovary’ in J Barnes *Through the Window* (2012).

²¹ D. Kennedy, ‘The Methods and the Politics’, in Legrand & Munday, *op. cit.*, 345. See also ‘New Approaches to Comparative Law: Comparativism and International Governance’ (1997) *Utah Law Review*, 545.

²² H. Muir-Watt, ‘La fonction subversive du droit comparé’ (2000) *Revue internationale de droit comparé* 52, 503.

²³ D. Nelken, ‘Comparatists and Transferability’, in Legrand & Munday, *op. cit.*, n ..., 437.

to the other may not be the most effective. Yet there may be occasions where showing one's fidelity to the original model may be a matter of important political symbolism and effectiveness in practice on the ground a lesser concern.²⁴

4. Article summaries

With this volume, we hope to place reflection on comparative methodology at the centre of scholarly debate on transnational harmonisation of criminal law. This Special Issue seeks to do this by asking notable cross-cultural researchers to reflect on their own experiences, positive and negative, in attempting in particular studies to define good transnational practice or to negotiate cross-cultural difference. In so doing, it seeks to develop insights into both of the research challenges with which we started: the descriptive analysis of mechanisms of international transfer of policy and practice and the prescriptive evaluation of the characteristics of good and bad transfers. All contributors engage with comparative practices and methodologies in the specific contexts of transnational criminal policy, and all discuss studies or initiatives that represent good practice as well as counter examples where good practice has been defined invalidly and/or unhelpfully.

The first article of the special issue provides a general perspective "on transnational policy flows in security and justice". It offers an overview of cross-national comparative research in relation to crime control and penal policy. Trevor Jones and Tim Newburn's state-of-the-art account of policy transfer studies shows that there is now a sufficient body of work on the subject to make some general observations on the increasing circulation of criminal policy models and criminological ideas around the globe. The article addresses empirical questions relating to how far and in what ways crime, security and justice policies are actually transferred across national boundaries, what happens to them in the process, and what factors might explain such phenomena. These include 'rational' attempts at policy learning from other jurisdictions, but also 'coercion' orchestrated by powerful 'hegemon' states and 'mimicry' whereby norms and policies are emulated for symbolic reasons rather than likely effectiveness. Jones and Newburn then proceed to reflect on the desirability of such cross-national exchange. Observing that much research in relation to policy transfer in crime control adopts a pessimistic position in the light of the 'punitive turn' that has emerged in many western countries, the authors discuss the normative principles that might be used to explore the possibilities for progressive policy transfer.

The identification of such progressive policy in order to promote their diffusion across borders is central to the construction of global social

²⁴ See both Nelken and Jones and Newburn for examples in this Special Supplement

indicators. David Nelken's article "on the significance of context in and for transnational criminal justice indicators" notes the growing interest of criminologists and comparative law scholars in such data. Drawing upon the example of the recent global targets set by the United Nations in the field of criminal justice, Nelken questions the way ideas that count as good practice are selected and how they are used to frame transnational comparisons. Global indicators which are used to evaluate local conditions in terms of overarching standards are neither purely descriptive nor politically neutral: they have knowledge and governance 'effects'. Those engaged in exercises of transnational ranking and target setting may often be tempted to disregard contexts. But applying similar (criminal) standards to dissimilar places may have adverse consequences when pursuing projects of social improvement, such as the fight against corruption or gender violence. While Nelken does not rule out the possibility that, with proper design, global indicators might have the potential to make effective contributions, he warns against the dangers of simplistic comparison. Calling for more empirical studies on how global indicators accomplish commensuration between diverse settings, Nelken's article highlights the methodological difficulties attached to governance by numbers in transnational criminal policy, especially in the diffusion of best practices and ideal standards.

Field's article, which focuses on the "comparative analysis of youth justice cultures", examines precisely some of the methodological challenges in using comparative research to inform policy transfer. It is rare to attempt the transposition of whole criminal justice systems from one jurisdiction to another: it is more common to seek to transfer particular elements of a system such as a penal measure or a legal role. But how can we predict the impact of a transferred element when it is placed within a different cultural context? Where criminal justice cultures are very different, their elements may not be directly comparable, or their significance may be conditioned by the system of which they are part. Drawing on a bilateral comparative study of youth justice in Italy and England and Wales conducted with Nelken, Field explains the difficulty of comparing particular pre-trial interventions in two jurisdictions where the relationship of pre-trial and trial phases and between civil and criminal intervention is very different. Arguing for the need to understand criminal justice practices in the light of the legal and political cultures within which they are imbedded, Field argues that learning from very different 'elsewheres' should be seen in terms of broadening the criminal justice imagination rather than furnishing particular solutions with predictable consequences.

Renaud Colson's paper on transnational drug policy demonstrates that comparative law has the potential to expand the agenda of "thinkable" possibilities. The article explores the insights that may be gained from the vast amount of comparative data produced to monitor the implementation of the international drug control regime. At a time of growing doubt about

the benefit of criminalisation of drug use, it provides a case study on the ways that epistemic communities may rely on comparative research to identify best practices and promote them as normative alternatives in the face of a long entrenched legal dogma. In order to explore these issues, the article looks at the UN drug control system from the perspective of comparative law. It shows how the concept of legal transplant provides a useful tool to understand the limits of transnational criminal law designed on a global scale to tackle the "drug problem". The article also identifies the various types of legal comparison that might contribute to addressing this failed transplant. It argues that while comparative analysis can certainly make substantial contributions to legal and policy knowledge, its ability to provide universal solutions applicable on a transnational basis should not be overrated. Even when grounded in sophisticated design, legal comparisons are always open to interpretation and can sometimes prove erroneous. In this respect, comparison of laws and regulatory measures on drugs is no substitute for rigorous policy evaluation.

The Special Issue concludes with two particular case-studies which consider the potential impact of comparative research on the building of transnational norms. In the first, Jackie Hodgson reflects on her recent experiences as a member of cross-cultural research teams. The teams were funded by the European Commission to do comparative empirical research aimed at informing the development of EU Directives on suspects' rights to legal advice in police custody. She notes that the legal form of transnational norms can make a significant difference to their effectiveness: the European Union's capacity for proactively legislating the particulars of suspects' rights has a potential to influence practice that goes beyond the more abstract and reactive interventions of the European Court of Human Rights. But in understanding the potential impact of Directives in different jurisdictions, what is essential is empirical research that goes beyond the comparison of formal legal texts to examine the variable ways that these may be translated into the everyday practices of law and the experiences of suspects in different jurisdictions. Comparative empirical research enables us to understand the different ways in which the professional organisation of criminal defence or the provision of legal aid may shape the real meaning of a right to custodial legal advice. It enables us to appreciate the impact of variable institutionalized relations between police, prosecutor, defence lawyer and judge. It provides us with a basis not just for advice on constructing legal norms but also on the training that may shape professional cultures. Critical to this is the kind of insight that can be generated by cross-cultural research teams.

The final article by John Jackson charts the transnational development of legal norms relating to security-cleared counsel (special advocates): these are lawyers acting in trials where evidential material is regarded as so sensitive to the interests of the state that their access to that material is

conditional on not disclosing it to their 'client'. Like Hodgson, Jackson emphasizes the limits of the European Court of Human Rights' capacity to define best practice through judicial decision-making. It struggles to compare widely enough across different jurisdictions, to look deeply enough into the variable practices discovered and to pay close enough attention to the local context. Like Hodgson, Jackson argues for the potential of comparative empirical research to provide better insights: in this case, the challenge is to define procedures that best balance the needs of state security against suspects' rights of participation. Drawing on his own interview-based study of practice in Canada, the United States and the UK as well as previous comparative research by Cole and Vladek, he too suggests that what is needed is 'interpretivist' research that engages with the professional cultures and procedural traditions that underpin domestic and transnational practice.