

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

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# My academic profile

- Long-standing interest in comparative law (especially relations between common and civil law tradition)
  - Partly inspired by responsibility for LLB Law and French and academic exchange programmes with France
  - Partly research focus on comparative criminal justice
    - Dutch, French and Italian comparators
- Empirical studies (observation, interview, case-files)
  - French criminal justice: study of French defence lawyers
  - Youth justice in Italy and (England and) Wales

# Learning from Elsewhere? Story of a study in comparative youth justice

- An empirical project comparing practice of youth justice in Italy and (England and) Wales
  - Based on matched interviews with practitioners (including vignettes)
  - Comparison of case-files
- Draw from study
  - A picture of contrasting outcomes
  - Explanations for contrasting outcomes
  - Implications for 'learning from elsewhere'



# Origins of study: two jurisdictions heading off in different directions?

- England and Wales
  - Crime and Disorder Act 1998
  - The 'new' youth justice
  - Early and progressive social intervention through the criminal process
  - Responsibilization requires blaming and shaming through criminal process
- Italy
  - Presidential Decree 448/1988 reformulating Juvenile Penal Code
  - Education where necessary but emphasis on not impeding the normal process of growing up shaped by community and family
  - Concern to limit stigma caused by criminal justice punishment

# Route Map/Plan

- Youth justice in Italy and (England and) Wales
  - A picture of contrasting outcomes
  - Explaining contrasting outcomes
  - Implications for 'learning from elsewhere'

# Differences in published outcomes

- Compared with E&W, young people in Italy in 1990s and 2000s who came to notice of authorities for committing criminal acts were much less likely
  - to be convicted and sentenced
    - Italy less than 20%
    - E&W around 55-60%
  - be subject to social intervention in community by the state during criminal process
    - Italy, around 8% (almost always without conviction),
    - E&W, around 34% after conviction and nearly 20% without conviction
  - to be in prison
    - E&W 50 per 100,000 yps 12-17
    - Italy 15 per 100,00 yps 12-17

# Explaining differences in outcomes

- Multiple, mutually reinforcing layers of explanation for difference
  - Legal rules and official policy aims of system defined very differently
    - Age of criminal responsibility
    - Policy background: assumptions about intervention through criminal justice
  - But also supporting intervention in E&W and leading away from intervention in Italy
    - Institutional elements
    - Social contexts

# Legal Contexts: Criminal Responsibility of Young People

- In Italy, young people are not criminally responsible until 14 and are responsible as minors from 14-18
  - Italian magistrates (specialist professionals) justify age of criminal responsibility by stressing that YPs under 14 have limited understanding of consequences of acts;
- In England and Wales, young people are now criminally responsible from 10 and responsible as minors from 10-18
  - Welsh (lay) magistrates) more inclined to see social cues in court (body language) suggested guilty knowledge adequate to indicate responsibility even of children 10-14.



# Policy Background: England & Wales

- Assumptions of 'new youth justice':
  - Non-intervention undermines socialisation and responsabilisation;
  - Specifically criminal intervention needed to reinforce personal responsibility and links with community;
  - Criminal responsibility from 10:
    - 1st offence: reprimand (formal warning);
    - 2<sup>nd</sup> offence: final warning (+ intervention 'programme')
    - 3<sup>rd</sup> offence: charge and referral order
    - 4<sup>th</sup> and beyond: charge, conviction and increasing intervention
  - Multi-disciplinary Youth Offending Teams (YOTs) focus single statutory aim (reducing offending)

# Diverting and Intervening: England and Wales

- ‘Lock-step’ assumptions of increasing criminal intervention
  - Inscribed in reprimand and final warning schemes;
  - Evident in qualified form in lay magistrates’ assumptions
- Increasing intervention flows from accommodation between two institutional logics:
  - Lay magistrates: there **MUST** be an effective state response to offending (if not community, then custody);
  - YOTs: based on assumptions of effective intervention and desire to avoid custody: propose something new (more);
  - Climb the ladder to most intensive community interventions and then custody

# Underlying legal and policy assumptions underpinning Italian approach

- Italian decision-making mainly based on individualized and discretionary assessment by magistrates of risk of continuing criminality
- But *prima facie* assumption for Italian youth that offending a passing phase
- Punishment, and especially prison, interferes with normal processes of socialisation
- So usually magistrates sought to avoid intervention and punitive sanction;
- If significant problems but good prospects for change: *messa alla prova*
- But key social categories beyond help: immigrants, Gypsies, organised crime families

# Diverting and Intervening : Italy

- Dominant use of diversionary filters ending without conviction:
  - *Irrelevanza del fatto*: insufficient seriousness to justify conviction;
  - *Perdono giudiziale*: first offences of some (but limited) seriousness (up to 2yrs max pen)
  - *Messa alla prova*: serious offences which revealed significant social problems that could be addressed by education and training programmes
- And so convictions and sentences rare:
  - Standard sentence prison but rarely imposed and usually suspended;
  - Post conviction supervision orders exist but rarely used

# Beyond law and policy: institutional elements 'syncing' with policy aims

- How might one explain the different purchase on law and policy of ideas of early intervention through criminal justice?
- Institutional differences
  - Relations between pre-trial and trial phases: the consequences of the 'pace' of throughput in youth justice
  - Relations between criminal and civil state intervention
  - Role of magistrates in system and their relations with police and social workers
    - Beyond difference between lay or professional decision-making
    - Culture, independence and power of magistracy

# Pre-trial and trial phases of criminal process

- Relationship between pre-trial and trial phase very different
- The impact of extreme delay in the Italian system
  - 2-3 years between arrest and final public hearing
- Effective intervention must be pre-trial: not just *messa alla prova* but..
- Control and supervision as pre-trial measures (*misura cautelare*)
  - Requirements to study and work
  - To stay at home or in a specified place
  - To live in a special residential community

# Relationship between civil and criminal intervention

- Italy: different relations between civil and criminal interventions:
  - Co-ordinate civil and criminal jurisdiction of Italian magistrates provides alternatives for intervention
  - local authorities must define crime problems as welfare problems to justify jurisdiction;
- England and Wales: formal separation of civil and criminal jurisdiction:
  - Youth social services work with Family Courts to promote welfare of YP but lack resources;
  - YOTs work with Youth (Criminal Justice) Courts to reduce offending but are better resourced
  - Welfare needs better addressed when defined as crime concerns

# Magistrates and their relations with police and social workers

- Italy: professional specialist youth justice magistrates, supported by 'expert' lay judges at hearings, with commitment to welfare
- E&W: lay magistrates representing community
- Italian magistrates have hierarchical power to direct social workers/police
- Wales: co-ordinate multi-agency working leaves no formally dominant actor
  - lay magistrates defend their local independence and feel perceived responsibility to express punitive community opinion
  - But police and social workers (within YOTs) also have autonomous decision-making powers



# Social contexts 'syncing' with policies

- Family and community
  - Welsh magistrates: dominant images of 'collapse of the family'
    - Invest minor acts of delinquency with strong social significance so that response cannot be left to family
  - Italian 'default setting':
    - Most delinquency a passing phase;
    - Response could be left to family and community
    - Only families of certain social groups could not be trusted
  - Reflects differing strength of informal social controls
    - 'gilded prison' of Italian family
    - informal family economy
    - schools

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# Challenge of youth justice policy-making

- Fundamental value judgement underpinning youth justice policy across diverse jurisdictions:
  - Blending (priority and relationship) between two linked but separable social objectives
    - Promoting social integration (or limiting social exclusion) of troubled children and young people
    - Prevention or reduction of youth crime through criminal justice sanctions
  - Children first, offenders second or choose to govern troubled youth through criminal justice?

# Learning from Elsewhere?

- Do such comparisons help to make these choices?
- What have we done?
- Drawn complex pictures of two contrasting approaches to use of criminal justice to control and education of troubled and troubling youth
  - Two different youth justice cultures comprising mutual reinforcing philosophies, institutions, and social contexts
  - But Italian youth justice culture points away from punitive intervention and that of E&W towards
  - Can and should one learn from the other? How?

# Problems of radical transposition

- Some British academics and pressure groups have seen Italy as a preferable, more tolerant response to youth crime that limits stigmatizing exclusion of criminal justice
- But the Italian model has number of features that would require 'cultural revolution' in E&W in that they require a certain trust in an active judiciary
  - Dominant professional specialist youth justice magistrates
  - Mixed civil and criminal jurisdiction
  - Controlling intervention in pre-trial process before conviction
- 'Lessons' from Italy may be too politically radical to envisage

# Alternative responses

- If you want simple 'lessons' from elsewhere choose a closer comparator: 'finetuning' may be more politically feasible
  - Same jurisdictions: Wales/Northumbria
  - Different jurisdictions: England and Wales/Scotland
- What radical comparators may do is enable the creative challenging of the deep rooted apparently established wisdoms
  - Nature of 'responsibilization'
  - Regular public punishment and sanction or educative contact with system

# For further and better particulars

- D Nelken (2006) 'Italy: A lesson in tolerance?' in John Muncie and Barry Goldson, eds. *Comparative Youth Justice: Critical Issues*, London, Sage (2006).
- D Nelken 'Italian Juvenile Justice: Tolerance, Leniency or Indulgence?' (2006) 6 *Youth Justice* 107.
- S Field 'Practice Cultures and the 'New' Youth Justice in (England and) Wales' (2007) 47(2) *British Journal of Criminology* 311
- 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)
- S Field 'Early intervention and the 'New' Youth Justice: a study of initial decision-making' [2008] *Crim LR* 177.
- S Field and D Nelken 'Reading and writing youth justice in Italy and (England and) Wales' (2010) 12 (3) *Punishment and Society* 287