

# **States of Transition: Convergence and Diversity in International Youth Justice**

# 13

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## **Introduction**

It is no longer necessary to make the case for a comparative approach to understanding systems of youth and juvenile justice. It is increasingly assumed that developments in any single nation state cannot be fully explored without reference to sub-national, regional and local diversity as well as acknowledging the impact of international and global forces. The advantage of an international focus (even though this volume is restricted to 12 'significant' cases in Western societies only) is that it encourages debate of the structural, cultural and political constraints and dynamics within which juvenile justice was constructed in developed capitalist countries during much of the 20th century and which have then been challenged, and in some cases overturned, since the 1980s. Comparative analysis makes it possible to begin to unravel the relative import of internal, national dynamics and external, international contexts and constraints. But equally it must be recognised that, as a result of competing internal and external pressures, such systems are continually in transition and flux. Whatever future trajectories appear likely on the basis of a reading in the first decade of the 21st century may not hold for a decade in the future. As a result, rather than simply seeking apparent similarities and differences, this volume recognises the increasing complexity of the

mix of different interventions and acknowledges that in all jurisdictions such a mix is likely to increase. Rather than proceeding with a state by state descriptive analysis of powers and procedures, this concluding chapter identifies multiple overlapping and contradictory themes in contemporary international juvenile justice reform – such as repenalisation, adulteration, welfare protectionism, differential justice, restoration, tolerance, decarceration and rights – and applies them to particular exemplary cases.

### **The collapse of welfare protectionism?**

The principle that children and young people should be protected from the full weight of 'adult' criminal jurisdiction underpins the concept of welfare in youth justice. For much of the 20th century most Western systems of juvenile justice have sought legitimacy in a rhetoric of child protection and 'meeting needs'. Custodial institutions were criticised as stigmatising, dehumanising, expensive, brutalising, and as criminogenic rather than rehabilitative agencies. 'Justice' for juveniles was considered best delivered through the establishment of a range of community-based interventions. The care and control of young offenders was thought best placed in the hands of social service agencies and professionals. This 'ideal' found a quite remarkable international consensus until at least the 1970s. Beginning with the first juvenile courts established in South Australia in 1895, in Illinois, USA in 1899 and in England and Canada in 1908, through to the likes of Belgium's Children's Protection Act of 1912, France's 1945 edict prioritising protection and education, or Japan's Juvenile Law of 1948, child welfare models of juvenile justice have been paramount.

But by the 1980s this consensus began to unravel. First, conservative critics argued that the primary function of the youth justice system should be to *control* young offenders rather than to *care* for them. The concept of welfare was widely to be regarded as evidence that juvenile justice had become or was becoming 'too soft'. Second, academic commentators and radical youth justice practitioners questioned the legitimacy of imposing wide-ranging interventions on the basis of 'need', and challenged individualised notions of 'rehabilitation' and 'treatment'. They argued that channelling ostensibly 'welfare' interventions through a youth justice system often produced 'more harm than good'. Third, rights advocates and legal professionals, argued that wide-ranging discretionary judgements in respect of 'welfare' undermined the child's *right* to 'justice'. Young people, particularly young women and girls, were considered in double jeopardy, sentenced for their 'vulnerability' and background as well as for their offence (Hudson, 1987; Goldson, 2004). As a result it has become widely assumed that, by the late 20th century, welfare had been all but formally expunged from most Western systems of juvenile justice. In its place has emerged a series of diverse 'justice-based' principles more concerned with responding to the 'deed' of the offence rather than the 'need' of the offender. Discourses of support and protection have indeed

become increasingly challenged, but not always eclipsed by discourses of accountability, responsibility and the primacy of punishment.

This storyline has played itself out differently across Western jurisdictions. For example, in Scotland the juvenile court was abolished in 1968 and the system has been operating with a welfare tribunal for the majority of under 16 year old offenders for the past 30 years. As a result it has long been maintained that the children's hearing system ensures that child welfare considerations hold a pivotal position for younger offenders and provide a credible alternative to the punitive nature of youth justice pursued in many other jurisdictions (Bottoms, 2002). It has, however, not been without its critics, not least because of the lack of legal safeguards and the apparent tendency for the adult courts to deal with those aged 16 and over with undue severity. Scotland has a relatively high rate of under 21 year olds admitted to prison. Moreover, the Scottish Executive decided in 2003 to pilot the re-establishment of youth courts for 16 and 17 year olds. Ostensibly this was to deal with 'persistent offenders' but would also overcome the Scottish anomaly of being the only Western European country to routinely deal with this age group in the adult courts. Re-introducing youth courts, rather than extending the remit of the children's hearing system, also appears driven by an ensuing moral panic about 'neds': labelled by the media as 'drug fuelled youths' who are 'the scourge of Scottish society' (see McAra, Chapter 9 of this volume).

Belgium, it is claimed, has developed a system that is the 'most deliberately welfare-oriented of all' (see Put and Walgrave, Chapter 8 of this volume). The Youth Protection Act 1965 established principles of social protection and judicial protection to apply to all those under the age of 21. With a few exceptions, no punishments are available to those under 18 (18 being the age of criminal responsibility). All judicial interventions for this group continue to be legitimated through an educative and protective, rather than punitive and responsibilising discourse. In principle it is the needs of the young person that determine the nature of the intervention. The powers of the Youth Court which include reprimand, supervision, community service and fostering, however, also allow for placement in a public institution for the purposes of observation and education. From 2003 the temporary placement of juveniles in closed centres run by the federal Ministry of Justice (rather than the Community run public institutions) has been allowed. For these reasons, Put and Walgrave remain suspicious of Belgian welfarism which 'leads not to justice without punishment but punishment without guaranteed justice'. Moreover they note a developing politicisation of juvenile and street crime in Belgium fuelled by media sensationalism and extremist right-wing vitriol directed at Moroccan and Turkish minorities. Challenges to welfare protectionism appear imminent through a growing emphasis on offender responsibility and accountability.

In Finland juvenile justice policy continues to prioritise an understanding of 'children in trouble' grounded in socio-economic explanations rather than in individual pathology. As a result there remains a remarkable political consensus

that investing in health and social services is more likely to deliver positive outcomes than developing penal institutions. Yet even here warnings emerge that such a consensus may soon unravel in the face of a growing international politicisation of the 'youth crime' issue (see Lappi-Seppälä, Chapter 12 of this volume).

### **'Adulteration': treating children as adults?**

A shift from welfare to justice based philosophies not only opened a door to a consideration of judicial due process but also allowed justice and rights to be usurped, particularly by political conservatism, as a means of delivering 'just deserts' and enforcing individual responsibility. Rather than rehabilitation and meeting needs, a growing international (particularly North American, Australian and English) discourse is now one of risk management (Farrington, 2000) and zero tolerance with an obsession for public safety (Wacquant, 1999). Retribution and deterrence have taken precedence over positive rights agendas. Special consideration given to young offenders is being undermined in favour of adult style justice (Fionda, 1998; Schaffner, 2002). The emphasis has become one of fighting juvenile crime rather than securing juvenile justice.

Certainly this storyline is again pertinent to unravelling the contemporary twists and turns of youth justice in many jurisdictions. But in itself it remains significant that throughout Europe the term *juvenile* justice is preferred to that of *youth* justice, while the UN advocates the formulation of a *child-centred* criminal justice. The UK countries stand out as having some of the lowest ages of criminal responsibility. In the European Union these ages range from 8 in Scotland, and 10 in England and Wales to 15 in Denmark, Norway, Finland and Sweden and 18 in Belgium and Luxembourg. Ireland legislated to raise its age of criminal responsibility from 7 to 12 with its Children Act 2001 (O'Dwyer, 2002) but to date this has not been enacted and a more limited rise to the age of 10 appears more likely (*Irish Times*, 16 June 2003). Spain though has recently moved in the same direction by increasing the age of responsibility from 12 to 14 with its Juvenile Responsibility Act 2001 (Rechea Alberola and Fernandez Molina, 2003). In contrast, England and Wales abolished the principle of *doli incapax* for 10 to 14 year olds in 1998 despite recurring complaints from the UN, and in 2000 Japan lowered its age of criminal responsibility from 16 to 14 (see Table 13.1 overleaf).

In Holland, too, the conditions governing the possibility of transferring juvenile cases to an adult court have been recently relaxed along with early intervention projects, such as STOP, which effectively lowers penal responsibility from 12 to 10 year olds (Junger-Tas, 2004 and see uit Beijerse and van Swaaningen, Chapter 5 of this volume). Similarly Canada's recent youth justice reforms are based on the core principle that the protection of society be uppermost. Under its Youth Criminal Justice Act 2002, the Youth Court has been

**Table 13.1** Ages of criminal responsibility

Scotland	8
England and Wales	10 ( <i>doli incapax</i> abolished 1998)
Northern Ireland	10
Australia	10
Canada	12 (established in 1984)
Ireland	12 (raised from 7 in 2001 but yet to be implemented)
Netherlands	12
Turkey	12
France	13
New Zealand	14
Germany	14
Italy	14
Spain	14 (raised from 12 in 2001)
Japan	14 (lowered from 16 in 2000)
Denmark	15
Finland	15
Norway	15 (raised from 14 in 1990)
Sweden	15
Belgium	18
Luxembourg	18

renamed the Youth *Justice* Court and discretion has been afforded to provincial governments to impose adult sentences on those aged 14 and above (see Smandych, Chapter 2 of this volume).

Such 'adulteration' is most marked in the USA which has witnessed the widespread dismantling of special court procedures that had been in place for much of the 20th century to protect young people from the stigma and formality of adult justice (see Krisberg, Chapter 1 of this volume). Since the 1980s (but beginning in Florida in 1978), most American states have expanded the offenses for which juvenile defendants can be tried as adults in criminal courts, lowered the age at which this can be done, changed the purpose of their juvenile codes to prioritise punishment, and resorted to more punitive training and boot camps. A renewed emphasis on public safety (rather than a child's best interests) has also meant that confidentiality has been removed in most states with the names of juvenile offenders made public and in some cases listed on the internet. Equally, in many states, children below the age of 14 and as young as 7 can have their cases waived by the juvenile court and be processed as if they were adult. Forty-six states can require juvenile court judges to waive jurisdiction over minors and 29 states have laws that do not allow certain cases to be heard in a juvenile court at all. As a result, around 200,000 children under 18 are processed as adults each year (Snyder, 2002). The tendency in the USA to prosecute and punish children as if they were adults is inconsistent with the approach encouraged by international standards adopted by almost every country in the world; that governments should establish laws, procedures, authorities and institutions specifically for children. Since 1997, four countries – the USA, Iran, Pakistan,

and the Democratic Republic of Congo – have executed individuals for crimes committed before they were 18. But the practice is in worldwide decline due to the express provisions of the UN Convention on the Rights of the Child. The USA stubbornly held on to this power into the 21st century. Five US states, notably Texas and Florida, continued to allow execution for 17 year olds and a further 17, notably Alabama and Louisiana, were able to authorise the death penalty for children aged 16 (Streib, 2003). Since 1976 there were 22 executions of juveniles. But in March 2005 the US Supreme Court abolished the practice ruling by a slim majority of 5 to 4 that it amounted to 'cruel and unusual punishment' (see Krisberg, Chapter 1 of this volume).

### States of incarceration

One widely acknowledged problem in comparative analysis is that of interpreting the experience of other countries through the experiential lens of those countries with which the researcher is most familiar. This is compounded by any tendency to use the 'home' country as the norm against which others are judged. One way out of this impasse has been to turn to the study of aggregated data which are becoming increasingly available from international agencies. The main global comparative statistics on the stock, flow and rates of imprisonment are those collected by the United Nations *Surveys on Crime Trends and the Operations of Criminal Justice Systems* dating back to 1970 and by the *World Prison Population Lists* produced by the Home Office and the International Centre for Prison Studies at King's College London. The sixth edition of the latter details the numbers of prisoners held in 211 countries and in doing so estimates that over 9 million people are being held in penal institutions worldwide at any one time (Walmsley, 2005). The United States has the highest penal population with some 714 incarcerated per 100,000 population. This is followed by the likes of Russia (532) and Belarus (532). The UK rate of 142 places it as the highest in the European Union. The lowest in Europe appears to be Iceland (39). Table 13.2 overleaf records the rates of imprisonment for those countries included in this volume.

As Walmsley points out, these figures should be used with some caution. The figures do not always relate to the same date. Some include those on remand, others do not. Some include juveniles, when held under prison administration, and others do not. Nevertheless, they make an initial and important point of wide global variation. Walmsley's figures of course do not distinguish between juvenile and adult populations. The United Nations' surveys on the operation of criminal justice systems, carried out by its Office for Drug Control and Crime Prevention, have attempted to provide rates of youth/juvenile imprisonment per 100,000 of the population. These are the only global data sets of juvenile incarceration that are available. The most recent, the 8th survey, was sent to 191 countries in 2003; there were 65 replies (United Nations, 2005). Data collected from the 5th, 6th, 7th and 8th surveys dating back to 1994 provide a picture of

**Table 13.2** World prison populations circa 2003–2004

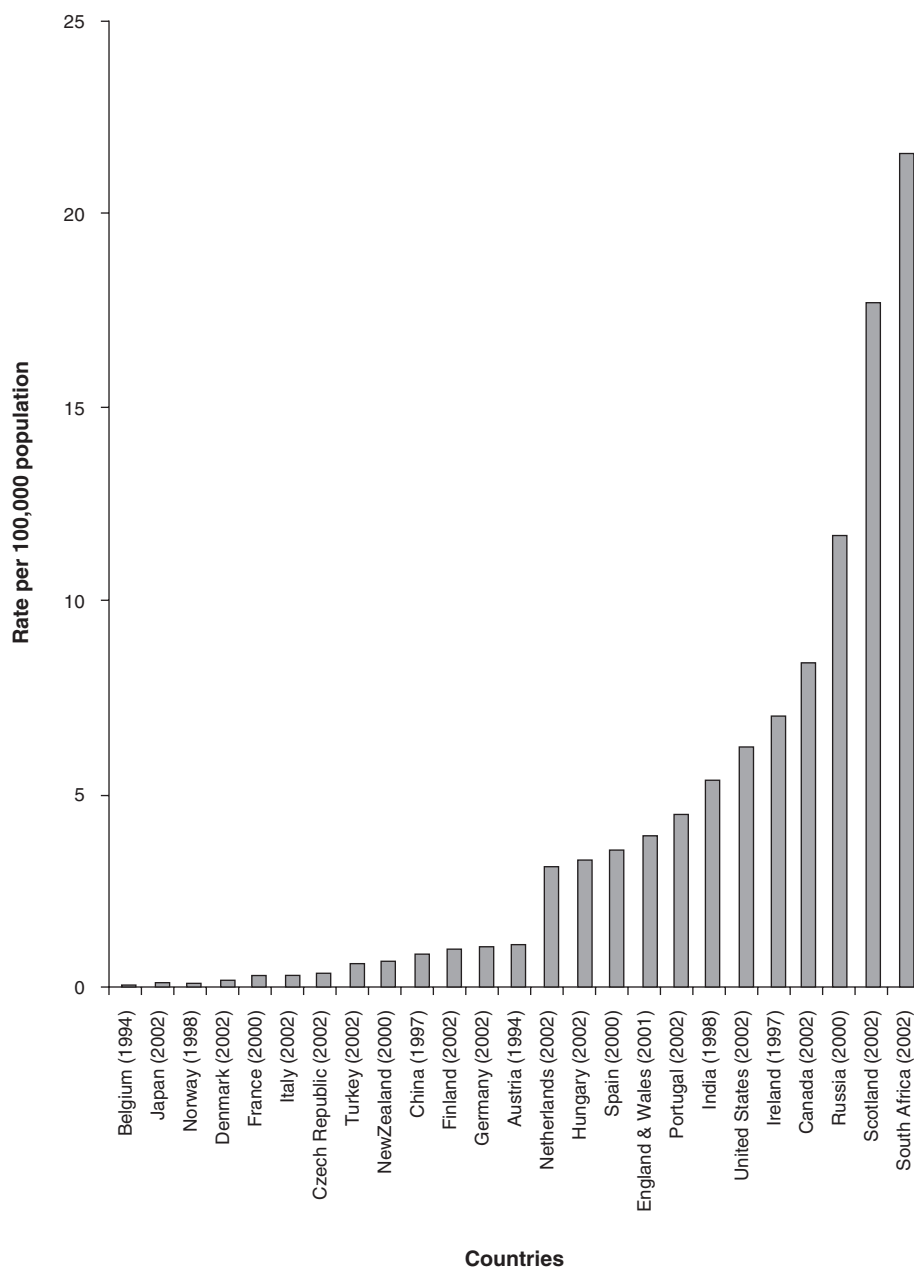
	<i>Total</i>	<i>Rate per 100,000 Population</i>
USA	2,085,620	714
New Zealand	6,802	168
England and Wales	75,320	142
Scotland	6,742	132
Netherlands	19,999	123
Australia	23,362	117
Canada	36,389	116
Italy	57,046	98
France	55,028	91
Belgium	9,245	88
Finland	3,719	71
Japan	73,734	58

*Source:* Derived from World Prison Population List (6th edition) (Walmsley, 2005) Studies, 2004.

an incarceration rate of 21.57 juveniles per 100,000 population in South Africa and 17.71 in Scotland, but an almost absence of juvenile custody in Japan (0.04/100,000) and in Belgium (0.02/100,000). (see Table 13.3 opposite)

It should be noted that some states, such as Australia have no entry in this particular data set presumably because they either do not regularly collect such data or have always declined to respond to the UN's surveys. We need also to be clear that the term 'juvenile' is differentially applied. For example, in Japan the data includes all those under 20 years of age; in Scotland the data refers to those mostly aged between 16 and 21; in Canada, England and Wales and the USA 'juvenile' only refers to those under the age of 18. It is also interesting to note that the USA's rate of juvenile incarceration is recorded as having been reduced from 38.44/100,000 in 1997 to 6.21/100,000 in 2002 (this may be because the count was restricted to state prisons and private facilities and excluded 'residential custody' at the later date). There are other reasons why caution is advisable. What is classified as penal custody in one country may not be in others though regimes may be similar. The existence of specialised detention centres, training schools, treatment regimes, reception centres, closed care institutions and so on may all hold young people against their will but may not be automatically entered in penal statistics (Muncie and Sparks, 1991). As a result, only guarded comparisons can be made, though from a European point of view it does seem to indicate a generally more tolerant penal climate than that found in North America, Russia or South Africa.

More regular data of young people in European prison populations has been collected by the Council of Europe for the past 20 years. These sources report that in September 2002 England and Wales held 2,754 under 18 year olds in prison, compared to 688 in France, 183 in Scotland, 105 in Belgium, 101 in the Netherlands and just 17 in Finland and 13 in Norway. The corresponding figure for



**Table 13.3** Total convicted juveniles admitted to prison: selected countries 1994–2002

*Source:* Derived from the 7th and 8th United Nations Surveys of Crime Trends and Operations of Criminal Justice Systems, 2002, 2005

juveniles held in residential custody, state prisons and private facilities in the USA in 2000 was 110,284 (International Centre for Prison Studies, 2004). The percentage of under 18s in total national prison populations in these selected countries



**Table 13.4** Under 18s in prison: selected European/USA comparisons 2000–2002

	September 2000	September 2002	% of prison population
Denmark	11	12	0.3
Spain	136	***	0.3
Finland	11	17	0.5
Norway	15	13	0.5
USA	110,284	***	0.5
Netherlands	87	101	0.6
Italy	***	240	0.8 (12/04)
Belgium	97	105	1.1
France	730	688	1.3
Germany	843 (03/01)	***	1.4
Austria	***	114	1.5
Portugal	***	289	2.1
Scotland	164	183	2.8
Turkey	1,929	2,237	3.7
England and Wales	2,480	2,754	3.9

*Sources:* Derived from Penological Information Bulletin, Council of Europe no. 23/24, 2002; no. 25, 2003; Council of Europe SPACE 1, 2003; World Prison Brief, accessed 2005.

ranged from 3.9% in England and Wales to 0.3% in Denmark. All countries, except France and Norway, for which the relevant data is available, reported increases in these penal populations between 2000 and 2002 (see Table 13.4)

Just as significantly these figures again throw up some remarkable divergences. From an English point of view it suggests a closer affinity in European terms to Turkey than to nearer (geographically, politically, culturally) neighbours, and in global terms implies something of a 'pernicious transatlantic punitive emulation' of the USA (Goldson, 2002: 396). Yet these statistics provide some basic comparisons only. They tell us nothing, for example, of the gender or 'race' composition of this particular age group. To address such questions, statistical measures, even when reliable, are of only limited value. As Pease (1994: 125) has argued, on their own they are particularly 'useless for all practical and intellectual purposes' in helping to assess national differences in processes of penal severity or leniency. Either might be present with or without high penal populations (for a discussion of the methodological difficulties involved in comparing relative states of harshness and leniency see Nelken, Chapter 11 of this volume). What is required, as all the chapters in this volume have revealed, are detailed analyses of the politics of policy formation in different jurisdictions.

## Repenalisation

To test the proposition of repenalisation we need to track shifts in incarceration rates over the long term. Walmsley (2005) found in his world prison population list of 211 countries, that 73% had recorded *increases* in their prison populations over the previous five years. However, there are no comparable worldwide

statistical time series records for under 18s. The closest data set can be derived only for parts of Europe by figures collected on under 21 year old populations by the Council of Europe between 1992 and 2002. Even then there are some notable absences, such as Germany and Denmark for which there are no records over this period. There are no figures for Greece beyond 1996. For Austria there are only figures for 2002. Nevertheless, significant increases in the numbers of under 21 year olds in prison are noted in the Netherlands (+54%), Norway (+38%) and England and Wales (+37%), but conversely Italy (-44%), Northern Ireland (-40%) and Finland (-20%) have all recorded significant decreases (Muncie, 2006). If these figures are to be trusted then half of Europe is witnessing some form of youth repenalisation while the other half is pursuing reductionist programmes.

As the chapters in this volume have revealed, the reasons for these dramatic divergences are rooted in a complex of contrasting penal cultures. Certainly international research has consistently found that there is no correlation between custody rates and crime rates. However, the unequivocal message coming from Europe and most Western societies is that over the past 20 years there has been a dramatic shift in juvenile justice policy involving a diminution of discretionary welfare interventions in favour of various justice-based principles and procedures. This, it is claimed, is a key driver of more punitive approaches to young offenders and underpins processes of repenalisation. This shift has also been explained with reference to the burgeoning of neo-liberal economics, political conservatism and the import of penal policies particularly from the USA (Wacquant, 1999; Garland, 2001; Simon, 2001; Pratt et al., 2005). Driven by fears of immigration and an assumed 'new tidal wave of juvenile violent crime', ethnic groups in particular have been increasingly identified as a threatening and permanently excluded 'underclass' about which little can be done but to seek their neutralisation and segregation. There has been a notable swing to the right in many Western, particularly European, countries, with far right parties, fuelled by fears of crime and immigration, claiming some success in England and Wales, Austria, Holland, France, Germany, Denmark and most recently Switzerland. In many jurisdictions, juvenile justice is clearly becoming increasingly racialised. Similarly, many initiatives originating in the USA such as zero tolerance policing (France, Belgium, the Netherlands, Australia), parental sanctions (Japan, Canada, New Zealand), mandatory sentencing (Western Australia), dispersal zones (the Netherlands), curfews (Belgium, France, Scotland), electronic monitoring (the Netherlands, Scotland, France, but also Sweden), naming and shaming (Japan, Canada), 'fast tracking' (New Zealand) and risk prediction (the Netherlands, Australia, Canada) have been transferred globally. Elements of all of these continue to have a presence in England and Wales (see Muncie and Goldson, Chapter 3 of this volume). But it appears their effect has not been uniform; in some cases existing more in political rhetoric than in practice (Jones and Newburn, 2002; Newburn and Sparks, 2004; van Swaaningen, 2005). Juvenile justice reform also remains remarkably nationalised, localised and contingent.

Nevertheless the commentaries included in this volume have all detected a growing hardening of (public, political, media) attitudes and criminal justice responses to young people: particularly evident in discourses of accountability and responsibility even if not always reflected in growing rates of incarceration. The only exception is Krisberg's (see Chapter 1 of this volume) account of contra tendencies in the USA which may be beginning to herald a partial retreat from its draconian penal populism of the 1990s and the re-awakening of some earlier juvenile justice ideals.

In England and Wales the numbers of 15 to 20 year olds in prison almost doubled in a decade from some 5,000 in 1993 to nearing 9,000 in 2002. The apparent fall in crime in many US cities has proved to be an irresistible draw for British politicians. Any number of 'zero tolerance' initiatives have targeted anti-social behaviour and incivilities, effectively criminalising non-criminal behaviour. A tough stance on crime and welfare has become the taken-for-granted mantra to achieve electoral success (see Muncie and Goldson, Chapter 3 of this volume).

In the Netherlands there has also been a dramatic reversal in Dutch penal policy from the mid 1980s onwards (see uit Beijerse and van Swaaningen, Chapter 5 of this volume). Once heralded as a beacon of tolerance and humanity (Downes, 1988), the Netherlands has embarked on a substantial prison building programme linked to a tendency to expand pre-trial detention and to deliver longer sentences on conviction (Pakes, 2000; 2004). In 2002, Dutch city councils gave the police new powers to arbitrarily stop and search without reasonable suspicion in designated areas of 'security risk'. The practice has amounted to the criminalisation of poor and black neighbourhoods, targeting in particular Moroccan youth (*Statewatch* Jan-Feb, 2003: 8). For van Swaaningen and uit Beijerse such shifts are symptomatic of a resurgent law and order discourse which prioritises security over justice, as epitomised by the remarkable rise of punitive populism often associated with the right-wing politician Pim Fortuyn (van Swaaningen, 2005). The result is an uneasy mix of punitive and welfare rationales. Between 1990 and 2003 the number of youth custodial places increased from 700 to 2,400.

In France, the right-wing Government of Alain Juppe from 1993 to 1997 reversed its traditional, *Bonnemaïson* social crime prevention policy based on conceptions of *solidarity*, instead prioritising a police-led zero tolerance and *disciplinary* approach (See Gendrot, Chapter 4 of this volume). It is a policy that was continued by the left-wing Jospin Government. The socio-economic conditions that produce youth marginalisation and estrangement are no longer given central political or academic attention (Bailleau, 1998). Rather, concern appears directed to migrant children, particularly from Africa, Asia and Eastern Europe, who have arrived in search of political asylum and economic opportunity. Special surveillance units have been established to repress delinquency in 'sensitive neighbourhoods', penalties for recidivism have been increased and the deportation of foreigners speeded up (Wacquant, 2001). With the return to power of the right in 2002 a new public safety law expanded police powers of search, seizure and arrest, instituted prison sentences for public order offences

(such as being disrespectful to those in authority), lowered (from 16 to 13) the age at which young offenders can be imprisoned, and introduced benefit sanctions for parents of offending children. A generalised prioritisation of 'security' over social prevention has called into question the continuing ability of French republicanism, traditionally driven by 'progressive centre' notions of legal equality and of social inclusion, solidarity and integration, to ensure more of a lasting rejection of American punitiveness than seems to be politically acceptable in countries such as England and Wales (Pitts, 2001; Rutherford, 2002). This was underlined in 2005 when France's interior minister responded to over two weeks of national disturbances (when an increasingly marginalised ethnic minority youth set thousands of cars alight) by announcing an uncompromising police crackdown. High profile repression was preferred to long term prevention.

Tham (2001) reports similar shifts in the 1990s across many European social democracies, driven by a complex constellation of a break up of social democratic welfare humanitarianism, neo-liberal market reform, fears of illegal migrants, changes in labour markets, the emergence of a new moralism of 'zero tolerance' associated with the disciplinary techniques of the free market and a related lowering of the tolerance level for crime and violence. Governments of all persuasions appear to be increasingly turning to law and order as a means of providing symbols of security and to enhance their own chances of electoral support. But while many countries may have added punitive elements to their legislation in the 1990s, only the Netherlands and England and Wales can claim (on the basis of the Council of Europe's prison statistics) to have witnessed a dramatic US style youth repenalisation. In these jurisdictions in particular there appears little reluctance to locking up young people and to designate such places of detention as 'prison' when doing so. Elsewhere a philosophy of child protection seems to continue to hold sway albeit increasingly tested by new discourses of responsibility. The irony for all though is that during the last decade youth crime rates across much of the Western world have been mostly falling or at least stable.

### **A future for the 'non-punitive' and decarceration?**

It is not difficult to find examples of decarceration in the history of Western juvenile justice. Arguably the most significant was the closure of all juvenile facilities in Massachusetts in the 1970s. In England and Wales the numbers in custody were dramatically reduced between 1981 and 1992 as a result of permissive policy practitioner initiative and magisterial decision-making (Rutherford, 1989). Less well known is that most jurisdictions in Australia have witnessed substantial falls in juvenile incarceration since the 1980s probably as a result of extending diversionary options including the use of youth conferencing. Recent evidence from Canada also suggests a growing decarcerative movement. A number of European countries, such as Italy and Finland, have been able to report significant decreases in their daily count of youth (under 21) incarceration

between 1992 and 2002. According to the UN data, such countries as Japan, Norway and Sweden similarly stand out as having been able to keep youth imprisonment to an absolute minimum and as maintaining such toleration throughout the 1990s. Whether politically, pragmatically or economically inspired, a case establishing the damaging effects of custody on children (and the wider community) has repeatedly been made and acknowledged. The willingness and ability to act on this knowledge, however, remains piecemeal.

Finland made an explicit decision some 40 years ago to abandon its Soviet style tradition of punitive criminal justice in favour of decarceration and diversion (see Lappi-Seppälä, Chapter 12 of this volume). As a result, the young offender prison population has been reduced by 90% since 1960. There has been no associated rise in known offending. This was achieved by a long-term programme of applying indefinite detention to a small number of violent offenders and by suspending imprisonment for a majority of others on the condition that a period of probation was successfully completed. Immediate 'unconditional' sentencing to custody is now a rarity. Prison home leave, early release and family visits are commonplace. There are no specific juvenile courts but 15 to 21 year olds are only imprisoned for the most exceptional reasons. The voluntary acceptance of mediation can be used as grounds for the waiving of sentence (Lappi-Seppälä, 1998, 2001). This dramatic shift has been facilitated by a conscious effort on the part of successive Finnish governments to formulate a national identity closer to that of other Scandinavian states. Certainly it has been made possible by an insistence that elites and experts are better placed to formulate and decide penal policy rather than the whims of public opinion and party politics. Finland's experience seems to show that high incarceration rates and tough penal regimes do not control crime. They are unnecessary. Decarceration can be pursued without sacrificing public safety. Indeed something of a consensus appears to exist in Nordic countries (Iceland, Norway, Sweden, Finland, Denmark) that 'forward looking' social and educational measures together with mediation take precedence over prosecution and punishment. Compliance with the UN Convention of the Rights on the Child also results in juveniles not being incarcerated with adults and because of an absence of prisons dedicated to juveniles most do not endure penal custody at all (Nordic Working Group, 2001: 147-148).

The case of Italy deserves comment as it currently appears at the forefront of youth penal reductionism in Europe (see Nelken, Chapter 11 of this volume). This has been accounted for by the introduction of new penal laws in the late 1980s which explicitly stressed penal leniency for this age group in order to not interrupt educational processes and personal development. It is backed by a widespread cultural attitude which prioritises the Church and the family (rather than formal juvenile justice) as the key agencies of social control. Diversion takes precedence over formal early intervention. In particular, avoidance of conviction and refusal of punishment is facilitated through the mechanisms of *irrilevanza* (insufficient seriousness), *perdono* (judicial pardon) and *messa alla prova* (pre-trial probation for all offences). As a result, young people tend to be incarcerated only for

very few serious violent offences and only when the conditions of *messa alla prova* have not been met (though this may be differentially applied to immigrants and gypsies). As Nelken notes, this means that many serious offences do not even end up with a conviction, let alone a prison sentence. Gatti and Verde's (2002: 312) data shows a marked decline in the numbers of juveniles entering penal institutions in the late 1980s but some increase during the 1990s following the introduction of reception centres. Nevertheless, the daily average of juveniles placed in *prigione scuola* in 1998 was just 176. More fundamentally an Italian cultural tradition of familial control has been traditionally linked to something of a 'benevolent tolerance' and subsequently low levels of penal repression (Nelken, 2002, 2005). The 'cultural embeddedness' of Catholic paternalism (compared, for example, to US evangelical Protestantism) may not determine penal policy but provides the parameters in which differential readings of the purpose and meaning of punishment become possible (Melossi, 2000). Young people in trouble with the law are more regarded as in need of help and support than requiring of retribution, denunciation or indeed punitive responsabilisation. Moreover, as Nelken (2005: 231) argues, juvenile justice procedures in Italy tend to be based more on principles of what is philosophically defensible rather than because they can be 'scientifically' shown to work as in more supposedly pragmatic cultures such as England and Wales.

Similarly Japan's often assumed non-punitiveness (at least in terms of custody rates – see Table 13.2) has been accounted for in the context of a tradition of 'maternal protectionism' and a culture of 'amae sensitivity' which prioritises interdependence over individual accountability. The juvenile offender is deemed as much a victim as a criminal (Morita, 2002). But Japan also appears to be facing a renewed politicisation of juvenile crime, evident in amendments to the Juvenile Law in 2000 and further proposals in 2005 in which principles of child protection have been challenged by those of a resurgent penal populism. Of most significance has been a lowering of the age of criminal responsibility from 16 to 14 and a generalised introduction of a moral rhetoric of responsibility, guilt and condemnation into juvenile justice discourse (Fenwick, 2004 and see Fenwick, Chapter 10 of this volume).

### Experiments in restoration and mediation

There has been a substantial growth in interest in restorative justice and victim-offender mediation across Western jurisdictions in the past 20 years and restorative models have penetrated most juvenile justice systems. In contrast to processes of 'adulteration' and 'repenalisation', contemporary juvenile justice reform also appears informed by contra penal trajectories such as those derived from the import of family group conferencing pioneered in New Zealand, Australia and North America. Within restorative justice the talk is less of formal crime control and more of informal offender/victim mediation and harm minimisation.

These initiatives in part draw upon notions of informal customary practices in Maori, Aboriginal and Native American indigenous populations. Both the United Nations and the Council of Europe have given restorative justice their firm backing. Community safety, reparation, community work, courses in social training and so on, together with compliance with United Nations conventions and Council of Europe recommendations, have all been advocated as means to achieve participative justice and to reduce the recourse to youth imprisonment. The Council of Europe has recommended to all jurisdictions that mediation should be made generally available, that it should cover all stages of the criminal justice process and, most significantly, that it should be autonomous to formal means of judicial processing. The European Forum for Victim-Offender Mediation and Restorative Justice was established in 2000. Across many parts of Africa, Stern (2001) records renewed interest in solidarity, reconciliation and restoration as the guiding principles for resolving disputes rather than the colonial prison. The Child Justice Bill, under consideration by the South African government since 2000, is particularly influenced by a recognition of children's rights coupled with application of the ideals of restorative justice (Skelton, 2002; van Zyl Smit and van der Spuy, 2004). In 2002 the UN's Economic and Social Council formulated some basic universal principles of restorative justice, including non-coercive offender and victim participation, confidentiality and procedural safeguards. It is clear that restorative justice is no longer marginal but a burgeoning worldwide industry with local projects proliferating across much of Europe, Africa, Canada, the USA and Australasia (Justice, 2000, Miers, 2001; Tickell and Akester, 2004).

The key issue remains of how far restoration can work as a radical alternative in those instances when it appears to be simply co-opted into systems that are otherwise driven by punitive, authoritarian rationales. As has been repeatedly pointed out, there is a clear danger that any form of compulsory restoration may degenerate into a ceremony of public shaming and degradation, precisely because the underlying intent is simply to reinforce (Western-inspired) notions of individual responsibility rather than develop those of social justice for indigenous and non-indigenous populations alike (see, in this volume, Bradley, Tauri and Walters, Chapter 6; Cunneen and White, Chapter 7; and Smandych, Chapter 2). Further, international evaluation research has cast some doubt on whether restorative justice 'works' to reduce recidivism. The results tend to be mixed, but with some reductions in re-offending for young violent offenders. All of this encourages significant scepticism and ambivalence towards the claims made for restoration and its future potential to overhaul the injustices of retribution (White, 2000, 2002; Daly, 2002).

### **Protecting children's rights?**

The 1989 United Nations Convention on the Rights of the Child (UNCRC) established a near global consensus that all children have a right to *protection*, to

*participation*, to *personal development* and to basic material *provision*. It upholds children's right to life, to be protected in armed conflicts, to be safe-guarded from degrading and cruel punishment, to receive special treatment in justice systems and grants freedom from discrimination, exploitation and abuse. The only UN member states that have not ratified are Somalia and the USA (Somalia has had no internationally recognised government since 1991, the US has claimed that ratification would undermine parental rights). The UNCRC builds upon the 1985 USA Standard Minimum Rules for the Administration of Youth Justice (the Beijing Rules) which recognised the 'special needs of children' and the importance of dealing with offenders flexibly. It promoted diversion from formal court procedures, non-custodial disposals and insisted that custody should be a last resort and for minimum periods. In addition the Rules emphasised the need for anonymity in order to protect children from life-long stigma and labelling. The Convention cemented these themes in the fundamental right that in all legal actions concerning those under the age of 18, the 'best interests of the child shall be a primary consideration' (Article 3.1). Further it reasserts the need to treat children differently from adults, to promote their dignity and worth with minimum use of custody and that children should participate in any proceedings relating to them (Article 12). In 1990 the UN guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines) added that youth justice policy should avoid criminalising children for minor misdemeanours. The International Covenant on Civil and Political Rights, expressly outlaws capital punishment for under 18s and promotes rehabilitative interventions. The European Convention on Human Rights first formulated in 1953, provides for the due process of law, fairness in trial proceedings, a right to education, a right to privacy and declares that any deprivation of liberty (including curfews, electronic monitoring and community supervision) should not be arbitrary or consist of any degrading treatment. Collectively these Conventions and Rules might be viewed as tantamount to a growing legal globalisation of juvenile justice (Muncie, 2005).

Many countries have now used the UNCRC to improve protections for children and have appointed special commissioners or ombudspersons to champion children's rights. A monitoring body – the UN Committee on the Rights of the Child – reports under the Convention and presses governments for reform. Yet, Human Rights Watch (1999) and Amnesty International (n.d.) have noted that implementation has often been half-hearted and piecemeal. The UNCRC is persuasive but breach attracts no formal sanction. Millions of children worldwide continue to live in poverty, have no access to education and are routinely employed in armed conflicts. Child trafficking and forced labour are rife. Street children on every continent continue to endure harassment and physical abuse from the police and many others work long hours in hazardous conditions in flagrant violation of the rights guaranteed to them under the Convention. Countries give lip service to rights simply to be granted status as a 'modern developed state' and acceptance into world monetary systems. The pressure to ratify is both moral and economic (Harris-Short, 2003). It may be the most ratified of all international



human rights directives but it is also the most violated. Abramson's (2000) analysis of UN observations on the implementation of juvenile justice in 141 countries notes a widespread lack of 'sympathetic understanding' necessary for compliance with the UNCRC. Describing these obligations as being largely received as 'unwanted', he notes that a complete overhaul of juvenile justice is required in 21 countries and that in others torture, inhumane treatment, lack of separation from adults, police brutality, bad conditions in detention facilities, overcrowding, lack of rehabilitation, failure to develop alternatives to incarceration, inadequate contact between minors and their families, lack of training of judges, police, and prison authorities, lack of speedy trial, no legal assistance, disproportionate sentences, insufficient respect for the rule of law and improper use of the juvenile justice system to tackle other social problems, are of common occurrence.

Thirty-three countries continue to accompany their ratification with reservations. For example the Netherlands, Canada and the UK have issued reservations to the requirement to separate children from adults in detention. In the English case this has long rested on an inability to fund suitable places for girls and young women. The UK has also reserved its option to deploy children in active military combat. It is the only state in Europe that extensively targets under 18s for recruitment into the armed forces. Similarly those jurisdictions that have introduced schemes to enforce parental responsibility, curfews and anti-social behaviour legislation (most notably in England and Wales, France and the USA), would again appear to be in contempt of the right to respect for private and family life and protection from arbitrary interference (Freeman, 2002). More seriously, many of the principles of restorative justice which rely on informality, flexibility and discretion sit uneasily against legal requirements for due process and a fair and just trial. Indeed the UN Committee on the Rights of the Child report on the UK in 2002 expressed concern that the UNCRC has not been incorporated into UK domestic law. The low age of criminal responsibility, the increasing numbers of children in custody at earlier ages, for lesser offences and for longer periods, the lack of separation of female juveniles from adults in prison, the retention of 'reasonable chastisement' as justification for the corporal disciplining of children, the resistance to grant child refugees a right to humanitarian assistance and a general lack of a rights based approach to youth policy have all come under stringent attack (Paton, 2003). It was only in 2002 that the UK reluctantly, after a High Court challenge to comply with the Human Rights Act 1998, accepted that the welfare of children applies as much to those in prison as elsewhere.

In many countries it seems abundantly clear that it is possible to claim an adherence to the principle of universal rights whilst simultaneously pursuing policies which exacerbate structural inequalities and punitive institutional regimes. 'Cultural difference' and the absence of localised human rights cultures preclude meaningful adoption of international agreements (Harris-Short, 2003).

## Global convergence and local diversity

It is undoubtedly the case that the core business of juvenile/youth justice systems worldwide is to process those children who are routinely exposed to poverty, abuse, inequality, ill health, poor (or lack of) housing and educational disadvantage (Goldson, 2000). Or as Amnesty (n.d.:4) have put it: 'when children come into conflict with law, it is most often for minor, non-violent offences - usually theft - and in some cases their only 'crime' is that they are poor, homeless and disadvantaged'. Further, some have argued that processes of repenalisation and adulteration suggest an acceleration of the governance of all young people *through* the motifs of crime and disorder (Simon, 1997; Muncie and Hughes, 2002). As the chapters in this volume attest, such analysis resonates with developments in many Western societies. New sets of juvenile justice laws are being put in place which mark a retreat from welfare and a dual commitment to severely punish the 'persistent offender' while attempting to prevent offending by pre-emptive early targeting of 'at risk' populations. Ironically compliance with the UNCRC is often stated as a key driver of such reforms. Similarly a growing interest in restoration is being used as an alternative to rehabilitation. The emphasis appears now to be one of *punitive responsibilisation*.

However, while there is clearly some evidence to support this thesis (as expressed by new discourses of responsibilisation as well as custodial increases), there remain marked and significant global variations in policy, extent of adherence to UN Conventions and resort to custody. National difference seems to be explicable primarily in the extent of a political willingness to sustain welfare protectionism or to subsume juvenile justice within alternative forms of conflict resolution. A cultural and political sensibility that imprisoning young people is not only harmful but also self-defeating would also appear crucial. Some of the key drivers of a reductionist and decarcera-tive policy seem to lie in restatements of a 'children first' philosophy: an ability to pardon and to protect but above all in the wholesale removal of the issue of juvenile crime for the purposes of media and/or political gain. In policy terms this involves removing all children from prison administration establishments, a greater commitment to suspending sentences and employing inclusionary and participative community based interventions, such as mediation, as direct alternatives to custody. Acknowledgement of, and full adherence to, the spirit and principles of the UNCRC would also appear to be pivotal. However it is explained, it is clear that locking up young people is driven by something other than crime, or, as has been most recently assumed, by increases in violent crime. The use of custody appears politically and culturally, rather than pragmatically, inspired. For some countries, prison seems to 'work' at a political and symbolic level even when it is a demonstrable failure. To understand why, we need to look more closely at what drives the recurring punitive mentality in 'cultures of control'. What appears lacking in those

countries witnessing penal expansion is a wholesale depoliticisation of the youth crime issue.

Neo-liberal economics, conservative politics, policy transfer and international conventions are undoubtedly creating some standardised and homogenised response to youth offending. But youth justice is also significantly localised through national, regional and local enclaves of difference (Muncie, 2005). Pressures towards adulteration, zero tolerance and repenalisation are mediated by distinctive national and sub-national cultures and socio-cultural norms (O'Malley, 2002). As Tonry (2001: 518) has argued, the best explanations for penal severity or leniency remain 'parochially national and cultural'. In such countries as Australia, Canada, Italy, and France it is also difficult to prioritise national developments above widely divergent regional differences, most evident in sentencing disparities. In Canada, juvenile justice appears more resistant to punitive challenge in Quebec than, say, in Saskatchewan. In the Netherlands the new dispersal zones in Rotterdam may have no equivalence in other major Dutch cities, such as Amsterdam. Such sub-national divergence is also apparent in the USA where there is no uniform juvenile justice system but 50 different state systems each with their own distinctive history, laws, policies and practices. While overall the USA still incarcerates to an extent unknown elsewhere, custody rates in states such as Maine and Minnesota are much closer to a European average than in other US states such as Texas and Oklahoma. In Australia, too, state variance in sentencing is remarkable, with Victoria recording a detention rate of 13.2 juveniles per 100,000 population compared to 103.5 in the Northern Territories (see Cunneen and White, 2002, and Chapter 7 of this volume). Pursuing such an argument further, once it is recognised that differences *within* nation state territories may also be greater than some differences *between* them, then taking the national (let alone the international and the global) as the basic unit for understanding policy shifts and implementation becomes questionable (Stenson and Edwards, 2004; Crawford, 2002; Edwards and Hughes, 2005). Moreover, a renewed emphasis on local political cultures and governance may well open up an 'implementation gap' in which spaces for re-working, re-interpretation and avoidance of national or international trends can be forged.

Modern juvenile justice appears as ever more hybrid: attempting to deliver neither welfare or justice but a complex and contradictory amalgam of the punitive, the responsabilising, the inclusionary, the exclusionary and the protective (Muncie and Hughes, 2002). Within this mix, possibilities for transition and change are forever present. In the USA and Canada we may now be witnessing the beginnings of some exhaustion of extreme penal populism. In Finland and Italy decarceration and tolerance continue to remain in some ascendancy. Coupled to a growing recourse to rights agendas, comparative analysis is capable of not simply revealing difference and diversity but also a wide range of positions from which the logic of the punitive can be disputed and overcome.

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