

## Taking Probation Abroad

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### Abstract

*At a time of extensive international exchange in probation policies and practices, this paper considers the opportunities and challenges of penal policy transfer. Using Ian Hacking's metaphor of an ecological niche, it is proposed that a number of inter-related vectors constitute an environment in which a transfer might thrive (or fail). A preliminary attempt is made to identify some of these influences. It is argued that the success criteria of transfer have been insufficiently discussed. Transfer can fail, but can also become corrupted. It is proposed that the enhancement of human rights is the single most important criterion for evaluating transfer.*

**Keywords:** Policy transfer – Probation - Penal system - Human rights

### Introduction

In the long history of debate in Europe about criminology and criminal justice (Walters, R., 2003), probation services have often been active contributors. Since 1981, the *Conférence Permanente Européenne de la Probation* has played a particularly important part in knowledge exchange, facilitating dialogue across Europe about the ideas, policies and practices of probation (Gründler, 1997). Especially since 1991, several countries in Eastern Europe, trying to create or develop their probation organisations and practices, have looked to jurisdictions with established probation services for models and for guidance (Karstedt, 2004).

### From knowledge exchange to policy transfer

These projects have been given an additional stimulus by concerns about the size of the prison population. Prison populations are notoriously high in some of the countries of the former Soviet Union and are increasing in most European countries (ICPS, 2008). At first sight, the idea that probation and other sanctions or measures can provide *alternatives to custody* looks like a rational and straightforward response to this predicament. There is, however, a well-known criminological thesis, particularly associated with the work of Stanley Cohen (for example, 1985), that argues that the relationship between prison and its supposed alternatives is a symbiotic one: rather than being in competition, prison and

its ‘alternatives’ work together to extend and to disperse discipline. This thesis has had its critics, of course, (Bottoms, 1983) but it remains the case that it is very difficult to point to a contemporary example of the implementation of ‘alternatives’ leading directly to a reduction in the numbers of people imprisoned.

It should also be noted that community sentences typically displace (at best) those who would have served *short* terms of imprisonment. Since the size of the prison population is largely a function of the length of sentence, community sentences are likely to have no more than a modest effect on the size of the prison population overall (Fitzmaurice and Pease, 1986). So countries seeking to develop probation need to be aware that this cannot offer a ready solution to the growth of the prison population.

The aspiration to enhance the human rights of offenders more generally has been another incentive to develop probation. This is linked to the objective of reducing the use of imprisonment. The rights of prisoners are in the nature of the case particularly vulnerable because of their almost total dependence on those responsible for their detention and care. Community supervision can raise human rights questions of its own - and a zeal to reduce the numbers of people in prison should not mean that anything is acceptable so long as custody is avoided – but to the extent that it displaces offenders from custody and affirms the principles of social inclusion, probation appears to advance the cause of human rights.

A repertoire of community sanctions and measures characterises modern penalty in many countries and developing probation appears to be modernising approach. Again, keeping large numbers of people in prison can be very expensive (though see below), especially if they are to be held in conditions that meet the standards of the Council of Europe.

So for several related reasons, in a number of countries there has been a move beyond the informal exchange of ideas about policy and practice and an active search for specific organisational models and practice methods to adopt in their own jurisdictions. One way of understanding this process is as *penal policy transfer* (Dolowitz *et al.*, 2000; Newburn and Sparks, 2004; Canton, 2006; Jones and Newburn, 2007).

Many countries have approached England and Wales for guidance. Among the countries where the National Probation Service for England and Wales has made direct contributions of this type are Turkey, Bulgaria, Czech Republic, Romania, Croatia, Estonia, Bosnia, Ukraine and Azerbaijan<sup>1</sup>. It is interesting to ponder the reasons why England is often approached (compare Dolowitz, Greenwold and Marsh, 1999 who consider Britain’s borrowings from USA in political and social policy). In the particular case, the dominance of North American research into effective practice has no doubt left Anglophone countries distinctively well-placed to act as a conduit for these ideas. Other countries – the Scandinavian nations, the Netherlands, Switzerland and other jurisdictions - have also been influential probation ‘exporters’ (Walters, J., 2003).

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<sup>1</sup> I am grateful to Ian Fox and Kevin Barry for this information.

But while these activities are by now quite widespread they have not always had the critical attention they merit. The (relatively sparse) literature rarely engages with some fundamental questions:

- How are these activities to be understood?
- What are the prospects of success?
- What makes for a successful policy transfer?
- How are such projects to be evaluated for their achievements?

This paper raises these questions and attempts to clarify what might be involved in answering them.

### Contexts

The first – and in some respects the biggest – challenge in working to develop probation in other jurisdictions is to try to understand the penal practices of that society. The challenge of understanding (at least, enough about) the criminal justice and penal system – the processes of arrest, investigation, ‘diversion’, prosecution, conviction and sentence – is indeed formidable. Criminal justice practices are very dependent on context and to attempt to isolate elements without reference to those broader contexts can lead to misunderstanding. For example, jurisdictions are often interested in the practice of *the pre-sentence report*, but establishing this within the judicial process calls for an understanding of all of the procedures of arrest, investigation, ‘diversion’, prosecution, conviction and sentence, as well as the relationships among the probation service, the public prosecutor, defending lawyers and the judiciary. Understanding the sentences of the court can also be less than straightforward – the differences among various conditional, suspended, deferred and supervisory sentences (and the attendant complexity of linguistic translation) are often subtle, but highly significant.

Local experts are an invaluable resource, but their contributions and analyses need to be received critically and interpreted, as Nelken warns:

“When we think of experts in [our] own culture we will normally, without much difficulty, be able to associate them with a given political or policy position. But what knowledge do we have about this factor when we rely on experts from abroad? ... there seems to be little recognition or discussion of the extent to which those relied on for descriptions of the aims or results of legal reforms are themselves part of the context they are describing, in the sense of favouring one position rather than another.”  
(Nelken, 2000: 6)

But the matter of *context* is much wider yet. It includes not only the organisational standing of a probation service and its various lines of accountability and direction – at local and national levels, local line management, relationship to the central directorate (where one exists) and government departments. There is also a need for some understanding of the configuration of agencies in civil society and where probation fits –

or *might* fit or *fail to* fit. This is crucial for several reasons, but principally because a key part of any rehabilitative endeavour must be the attempt to make available to offenders and ex-offenders the goods, services and resources of the wider civil society. These rights and associated responsibilities, precisely what is meant by social inclusion, vary in different countries, with associated implications for the tasks of rehabilitation.

The importance of culture must be recognised as well. Worrall makes the point vividly in her account of an ‘export’ that showed limited sympathy to history and culture, so that policy transfer came close to imperialism – or at least imposition (Worrall, 2000). At the same time, culture is neither static nor discrete and one-dimensional: rather it *evolves* and may well reflect contradictions, not least in the contested realm of penalty. It is characteristic of punishing practices that they represent and reproduce cultural tensions and ambivalences in attitudes towards offenders (Garland, 1990). So while culture must be respected, it must also be remembered that sometimes states seek the inspiration and guidance of other countries precisely because of dissatisfaction with aspects of their own penal practices and a wish to change.

Thus, while there are ideas and practices that can plausibly be offered as resources to other jurisdictions, it must always be borne in mind that these have to find or make their place in a specific national context.

### **The metaphor of an ecological niche**

In an instructive study of a ‘transient’ mental illness, Ian Hacking (1999) addresses the question why a particular psychiatric diagnosis comes into being, flourishes (is readily diagnosed) and then disappears. Plainly no single factor can explain this and Hacking adopts the illuminating metaphor of an ‘ecological niche’. In the case of the transient mental illness under study, Hacking identifies four ‘vectors’<sup>2</sup>, and explores “the concatenation of an extraordinarily large number of diverse types of elements which ... provide a stable home for certain types of manifestation of illness” (Hacking, 1999: 13) – and for the diagnosis which describes and explains these manifestations in a particular way. These vectors, each shaped by a wide range of social, economic, political and cultural factors, collectively constitute the milieu in which the manifestation of the illness and diagnosis will (or will not) thrive.

It seems to me that this metaphor of an ecological niche has considerable explanatory potential for an understanding of penal policy and practices. As David Garland (1990) has shown, penalty is not reducible to any single social influence and one way of describing his project and that of other analysts of penalty would be to say that he is attempting to identify and understand the vectors that influence the ecology of punishment.

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<sup>2</sup> Hacking writes: “I mean nothing technical by the word *vector*, whose origins are in mechanics, and which is also used in epidemiology. Here I use it as a metaphor. ... {in some ways} the metaphor fails for niches ... Yet the metaphor has the virtue of suggesting **different kinds of phenomena, acting in different ways, but whose resultant may be a possible niche** in which a mental illness may thrive.” (Hacking, 1999: 81 – my emphasis).

In the same way, if policy or practice is to be transferred from one jurisdiction to another, the task of identifying these vectors – the circumstances that are propitious to a successful transfer or which may turn out to vitiate it – is inescapable. To push the metaphor further: the fate of a plant transplanted from one environment to another will depend presumably upon vectors like - climate (does it get enough sun and rain? will the frosts kill it?) soil (does the soil provide the required nutrients or contain toxic substances?), competitors and predators (are there other plants with which the newcomer must compete to survive? are there insects that will prey upon it or diseases that may blight it?) What are the counterparts for a penal practice?

A new penal policy or practice will have to find – or more probably make – its place in the context of an existing system. It will meet resistance and competition, perhaps simply because it is unfamiliar but perhaps too because it disturbs practices in which others have an interest. To take again the example of the pre-sentence report: this influences (is intended to influence) the existing practices of sentencing; sentence may be proposed by the prosecution and challenged by the defence; or the judiciary may have a particular view about their autonomy here. In any case, there will be variable reaction to the new practice of the pre-sentence report precisely because it disturbs the power relationships in the sentencing process.

### **Example: a niche for community service**

Many countries have adopted the practice of community service (see, for example, the insightful discussion in Stern, 1999). Among the vectors that might plausibly influence the likelihood of this thriving are:

- certain attitudes about appropriate responses to crime (even if these attitudes are complex and may involve ideas of retribution, reparation and rehabilitation which may not always be easily reconciled)
- a cultural view of what counts as making amends
- a particular cultural attitude towards labour and the extent to which it can constitute either punishment or reparation
- popular and judicial attitudes about what constitutes socially useful and reparative activity
- a source of referral for community service tasks
- an employment context - the availability of and remuneration for work plainly make a difference
- a welfare state or some other infrastructure that enables people to give up time and labour, without prejudice to their own well-being.

### **The vectors of penal policy**

Some of the more obvious vectors – those circumstances and influences that will shape the character of a new policy or practice – are set out below. It is to be noted that these vectors are fully operative in the ‘exporting’ countries, but this sometimes only becomes

apparent in the process of transfer. (One of the most instructive aspects of transfer is precisely this capacity to lay bare local influences.)

- The framework of law. It is obvious but too easy to overlook that a new penal measure must be prescribed by law. The ramifications of this are less obvious. For example, accustomed to wide judicial discretion in their own country, English advisers can forget that in many jurisdictions a penalty for a particular offence is prescribed by law and cannot simply be displaced by a community sanction. Again, many countries require a Criminal Proceedings Code, as well as the Criminal Code, before a new measure can be implemented. In one country, I was among those told that community service orders could not be made because, even though this measure existed in the Criminal Code, this Code specified that supervision must be undertaken by the competent authority. It would not do to try to make proposals about who *might* be appropriate for this role: the authority had to be prescribed by statute and since no authority had been so empowered, community services orders could not be made.
- Politics. Policy or practice may fit but can quite as well be at odds with other policies. For example, introducing or developing probation may be one component of a broader political aspiration to be seen to be modernising socially and economically. (One of the pushes towards modern probation practices has been these socio-economic ambitions, rather than the intrinsic requirements of criminal justice policy.) Yet at the same time, these same penal innovations may follow a quite different trajectory from other aspects of criminal justice or social policy.
- Political economy. Recent important work by Cavadino and Dignan (2006a, 2006b) has emphasised the strong association between penal policy and political economy. Applying a broad categorisation to the political economies of twelve contemporary capitalist societies – neo-liberal, conservative corporatist, social democratic, oriental corporatist – they argue a compelling case for the influence of political economy on punitiveness and rates of imprisonment. This, then, is a critical vector, even though there is much more to be said about the way in which it has its influence - how, as Garland puts it, such broad social characteristics are specifically “translated into the folkways of the [penal] field” (Garland, 2001: 24). At the same time, Cavadino and Dignan show that there are many other influential variables. They conclude “... however many factors we incorporate into our theory, it will still not give us the whole story. Individual nations, and their cultures, histories and politics, can be just as quirky and esoteric as individual human beings.” (2006a: 452) Perhaps the concepts of vectors and niche illuminate the matter further: there is a degree of inherent *indeterminacy* in the upshot of these several vectors - “different kinds of phenomena, acting in different ways”. (Hacking, 1999: 81 – see footnote 2 above).
- Cost. Innovation must be affordable. The costs of imprisonment are often adduced in debate, but it must be remembered that the *marginal* costs of imprisonment –

the additional cost incurred by sending people to prison – are often quite small. The expense has already been committed by the construction and running of the prison estate. Sending a few more people to prison incurs a negligible extra cost: creating a probation service and developing community sanctions and measures requires new money.

- Criminal justice institutions and practices. These may be competitors or allies to the newcomer. It may be that the newcomer is sufficiently well supported or robust enough to fare well in competition, but it will need to make its place within existing arrangements. Similarly, new practices can represent a direct threat - or conversely an opportunity - to established professions, who will at least mediate the implementation of policy and can resist it decisively. A professionalising of probation also has implications for the relationship between staff and managers – perhaps around their accountability and the proper boundaries of their discretion - and probation’s standing among other professions.
- Technology and commerce. Technology is increasingly a feature of modern penalty in all kinds of ways (Mair, 2001), from the processing and exchange of information to electronic monitoring. The manner in which information is collected and processed can reciprocally influence the way in which the penal subject is understood (Franko Aas, 2004). Technological capacity and infrastructure constrain the potential of an innovation and shape its development. This consideration is linked too to commercial markets, as private enterprise become increasingly, though variably, involved in penal practices that have traditionally been the prerogative of the state (Christie, 2000).
- Research. Even if penal practice is rarely determined by research, research findings may lend support to (or may discourage) policy initiatives. Many of the ‘what works’ research findings are culturally specific and may not simply be assumed to have a relevance in another country. The findings of research are more or less compelling in determining policies in different countries.
- Pressure groups, networks, public opinion. Innovations need their champions and the support or opposition of a pressure group can make a significant difference (Nellis, 2000). Similarly, the extent to which the media represent the innovation accurately or else seek to distort it can make a difference to its acceptance at large. There may be local differences in the extent to which people regard crime reduction as something that the state should (or even could) achieve. The idea, for example, that the police are in the service of the community is not the legacy of many countries.
- The ethical environment. This is an elusive, but significant influence. Simon Blackburn speaks of – “the surrounding climate of ideas ... [that] determines what we find acceptable or unacceptable ... our conception of when things are going well and when they are going badly ... our conception of what is due to us, and what is due from us, as we relate to others.” (Blackburn, 2001: 1) The language of

human rights, perhaps, as an accepted international discourse, now gives cogency to arguments for change.

- Culture. There is a sense in which penal practice must resonate with culture (Worrall, 2000). At the same time, transfer typically occurs when a country is already exposed to other kinds of outside social, economic and cultural influences. Cultures are neither discrete nor static.

This list of factors – factors that are inter-related and mutually influential, sometimes in not-obvious ways - is a rough, initial sketch of the domain. No doubt other vectors can be added. There is also the important consideration that transfers of *policy* do not translate into the expected changes in *practice* in a straightforward way (Canton, 2006). This is a banal enough point, but again one that can be readily overlooked, even by consultants whose management experience in their own countries has shown them that there are any number of mediating (and perhaps subversive) influences that stand between a written policy and its implementation.

There is a need for much more research about which considerations are *necessary* (policy transfer will not take place in their absence) and which are (merely) significant. More needs to be known too about the *tolerance* of these vectors. How far can circumstances depart from the (unachievable) ideal before transfer is blocked or corrupted?

### **Success, failure or something in between**

In a profession that has been preoccupied (in England and Wales at any rate) with indicators of its own performance, it is surprising that the question of evaluation has not been more prominent in accounts of policy transfer. Depending on the source of funding of any initiative, a more or less detailed set of *outputs* is indeed specified and the project will be evaluated against them. This is naturally a very necessary part of the activity and a measure of the project's efficiency.

But the matter of *outcomes* is altogether less likely to be considered (for the distinction between outputs and outcomes, see, for example, Hough 1997). This may be because these outcomes are, in principle, so hard to investigate. Evaluation of the transfer is inseparable from the wider question of the evaluation of the performance of probation in any country. And as Durnescu (2008) shows, countries set a range of purposes for probation, requiring different – and typically multi-modal – methods of evaluation. But it may also be that, apart from the inherent methodological problems, when representatives of both parties to a transfer are enthusiastic, it becomes politically less necessary to inquire searchingly into the purpose of the initiative.

Dolowitz (2000) recognises different *degrees of transfer* – copying, emulation, a mixture of these, and inspiration. (Emulation differs from copying in that it implies transfer of the ideas behind, but not the details of, a policy or programme.) The evaluation of copying or emulation is, to be sure, hard enough. But inspiration too is invaluable and, however difficult to evaluate, in many respects more important than the introduction of a new

technique or programme. The idea that there may be other ways of responding to offending than imprisonment, that people can change, that effective rehabilitation enhances public safety, that the community has responsibilities towards those of its members who have been punished – these are inspirational ideas of enduring value that probation represents.

It is on the other hand rather easier to recognise some of the ways in which a transfer initiative may *fail*. Take again the example of community service. The introduction of a scheme may be said to have failed if:

- no (or very few) orders are made
- too many of those on community service would otherwise have received lesser sentences (net-widening)

but a corrupted transfer may be said to have occurred if:

- community service is awarded only to the relatively affluent or powerful, while others who are less privileged continue to be sent to prison
- community tasks are undertaken for the benefit of supervisors ... or for private / commercial interests.

Probation, Robert Harris said "is not a 'thing' to be taken or left but a set of ideas and possibilities to be used creatively and strategically to solve local problems of criminal justice ... a framework into which locally feasible and desirable solutions may be fitted." (Harris, 1995: 207) The aspiration, presumably, is to enable each country to introduce and develop probation practices that they can recognise and value as their own, even if modelled on the organisation, policies and practices of others.

Yet this cannot mean that a transfer can be allowed to take *any* form: there are, as we have seen, corruptions in transfer as well as failures. As it seems to me, the principles that should guide the transfer of policy and set the parameters of success are ethical values, grounded in the European Convention on Human Rights and Fundamental Freedoms. Since almost all European states are members of the Council of Europe, using the Convention to shape policy transfer ensures its legitimacy and avoids any imputation of *imposition*: these are common standards that belong to all Europeans.

The case law of the European Court and the Rules and Recommendations promulgated by the Council progressively refine our understanding of the real world implications of the Convention for policy and practice (see also Canton, 2009). To this extent, the Council and the European Court can be seen as another (transnational) vector<sup>3</sup> supporting the practical realisation of the ethical aspirations of the Convention itself. While ways must be found of realising its general principles and ideals in specific penal policies and practices, the Convention stands as an ethical foundation to appraise the success of policy

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<sup>3</sup> I am grateful to an anonymous reviewer for this Journal for suggesting this point.

and practice transfer by reference to its influence on the protection and enhancement of human rights – of victims, of offenders and of the community.

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