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The International and Comparative Criminal Trial Project

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The International and Comparative Criminal Trial Project

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Summary

The International Criminal Trial Project (ICTP) has been in operation within the Centre for Legal Research (CLR), Nottingham Law school since January 2000. To date the project has succeeded in establishing a global network of scholars researching international and comparative criminal justice.

The ICTP examines and compares trial processes and practice in a variety of local, regional and global contexts. The research incorporates particular evaluations of issues and relationships essential to the operation of trial process in different jurisdictions and stages of development. From the focus on the trial the project is producing knowledge about international and comparative criminal justice. In the current global political climate where international terrorist crimes are a focus for the world community, a sharper understanding of comparative criminal justice is vital. The project is achieving this through its research into the operation of the trial across Europe, and in the context of the international tribunals

The policy ramifications of the project's work are significant and are already having some impact on the debate regarding international criminal justice reform. In particular our work on victim participation in sentencing, lay participation in the trial, sentencing in the International Criminal Court, and the influence of regional human rights paradigms on local trial structures is at the forefront of comparative criminal justice research.

So far the project has published research papers dealing with the synthesis of trial procedures; theory and modelling for international criminal justice; how to do comparative research in the field; and is embarking on a major comparison of trial practice in England and Italy.

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In March of this year the project hosted an expert meeting where researchers and policy makers from the US, Australia, the UK and Europe examined the challenge of comparative criminal justice research. The meeting set a diverse and challenging research agenda for the project and was the first stage of an international criminal justice research consortium.

The project has established and maintained a website designed to promote research and debate in the area of international criminal justice. Features of the site include an information clearing-house that provides a valuable research resource. In addition the site is publishing working papers from the project as it progresses, along with a selection of fact-sheets dealing with the operation of the international tribunals. The site can be found at <www.clr.ac.uk/ictp/>.

Introduction

The International and Comparative Criminal Trial Project (ICTP)[2] examines and compares trial processes and practice in a variety of contexts. The research incorporates particular evaluations of issues and relationships[3] essential for the operation of trial process in different jurisdictions and stages of development. From the focus on the trial it is anticipated the project will produce knowledge about international and comparative criminal justice.The ICTP is the research centrepiece of the International and Comparative Criminal Justice Unit (ICJU), Nottingham Law School, which incorporates a network of collaborators interested in the analysis and evaluation of international criminal justice, and comparative socio-legal research.

This research has three interconnected purposes:

1. to understand how the essentials of criminal trial processes and practices in chosen jurisdictions (national, regional and international) are constructed, negotiated and relate to one another.

[2] The ICTP is based in the International Criminal Justice Unit, Centre for Legal Research, Nottingham Law School, Nottingham Trent University, UK.

[3] The preference for issues and relationships as a focus for analysis rather than the structures and functions of the trial is intended to recognise the dynamic nature of the process and the need for interactive analysis which is local and global.

2. to examine the manner in which civil law and common law process styles[4] are influencing the operation and development of international criminal trials, and
3. to refine comparative research in criminal justice so as to produce empirical and analytical knowledge of international criminal justice.

The successful achievement of these aspirations necessarily will require reflection on:

- the most appropriate theoretical framework to inform the comparative endeavour;[5]
- creative methodologies for dealing with jurisdictional idiosyncrasies and transitional processes which challenge comparison at a variety of levels;[6] and
- the analytical outcomes of empirical research into international and comparative criminal justice.

Research background

The interest in transitional criminal trial processes arises from observing recent developments towards international criminal justice, and the debates regarding the synthesis of trial traditions. This is placed against the social and political stimuli for international criminal institutions, as well as the national and regional derivations of more general procedural traditions.

The research develops from a foundation understanding of criminal trial process in the USA, the United Kingdom and certain other European jurisdictions (such as Italy, France, Germany and Spain). It might be argued that by limiting our enquiry to these common law, civil law, and hybrid styles we could not claim a truly international focus for the work. International as it is applied here is not intended to designate jurisdictional coverage but rather to relate to the process of internationalisation. If one accepts that the

[4] As will be argued later in this paper, currently there are no pure common law or civil law traditions of criminal procedure against which procedural derivations might be measured. It is misleading, beyond the most general levels to speak of common law and civil law criminal procedure divorced from specific jurisdictional representations. And as presently is the case with Italy, common law and civil law paradigms may be merging to produce unique hybrid traditions.

[5] See . *Henham & M. Findlay* (2001) 'Theorising the Contextual Analysis of Trial Process' (in print) – see also (www.clr.ac.uk/ictp/index.htm).

[6] See *R. Henham & M. Findlay* (2001) 'Criminal Justice Modelling and the Comparative Contextual Analysis of Trial Process', and *M. Findlay & R. Henham* (2001) 'Methodology and comparative Contextual Analysis of Trial Process: A preliminary study' www.clr.ac.uk/ictp/index.htm.

international institutions of criminal justice such as the International Criminal Court (ICC) and the war crimes tribunals have been legislated for broadly to recognise civil law and common law influences (and those of their principal hybrids) then it is anticipated that the jurisdictions covered in this study will provide satisfactory understandings of predominant trial models.[7]

Why focus on the trial? Despite the reality that most criminal matters do not proceed to trial[8] and that much of what comes for consideration at the trial is crucially determined in pre-trial phases, the trial is an essential symbol of criminal justice in each procedural tradition, and for internationalisation in particular.[9] The public trial is a vital motivator for investigation, prosecution and punishment. Many of the procedural safeguards around which criminal justice traditions have grown relate to ensuring the quality of evidence presented for trial, and guaranteeing the position of the accused within the trial.. The research does not exclude consideration of pre-trial procedures as they inform trial practice, nor will it disregard other structures of justice wherein guilt or innocence is determined and sanction delivered.[10]

Internationalisation

Beyond the creation of international tribunals to investigate and try crimes of world significance, there is emerging an international jurisprudence on criminal law, and procedural hybrids to support and develop international criminal law, requiring integrated analysis. It would appear that the pace and form of such change is largely the product of global political imperatives.[11] The nature of these imperatives[12] has necessitated the operation of penal sanctions

[7] For details concerning the international collaborators and commentators for the project consult the ICTP website. The team consists of academics, legal practitioners, policy-makers and researchers.

[8] Because they may be diverted from the system, negotiated by police, or determined through guilty pleas and as such are not contested and resolved through trial.

[9] It is worth recalling, and somewhat against the diversionary trends in restorative justice, once an offender is prosecuted in the international arena, the potential for diversion is sacrificed. This may support the view that the public theatre of the trial is essential to the construction of international criminal justice.

[10] Such as the execution of summary justice by police.

[11] Such as the need to try war criminals identified as a consequence of more regular global military interventions such as Bosnia and Kosovo. See, *Cotic, D*. (1994) 'A Critical Study of the International Tribunal for the former Yugoslavia' in Criminal Law Forum 5/2-3:223-236. Also note the original US opposition to the establishment of an International Criminal Court was founded on the American view of an inextricable connection between any such court and the mandate and interests of the UN Security Council.

[12] Driven as they are by the foreign policy concerns of the United States, Western Europe, and members of the Security Council even more than those of world agencies such as the

within two broad and divergent criminal justice traditions. A task for this project is to speculate upon ways in which theory and planned policies of penal sanctioning and criminal justice should underpin such developments.[13] Any informed policy proposals which eventuate, will be available for evaluation against conventional criminal justice criteria and expectations.[14]

The internationalisation of criminal justice has necessitated debates about synthesising two general traditions of criminal procedure (civil law and common law in origin)[15] in the prevailing political perspective of this current trend. This, however, is not a straightforward, bifurcated consideration of model criminal justice traditions. Significant derivations within each main style[16] (and the political systems they support) make the comparative evaluation and exploration of actual and potential synthesis intricate, and essentially critical of this notion of synthesis in practice. The significance of practice and process to the project means being sensitive to the realisation that while jurisdictions may be based on one or other of the great models, they are constantly transforming into unique processes and adaptations of their own.[17]

Such analysis involves more than merely the exploration of broad legal styles. The move away from a consideration of trial procedures in favour of process provides the possibility for examining synthesis and difference within more realistic and inclusive contexts.

United Nations. See, *Goldstone, R.* (1996) 'Justice as a Tool for Peace-making: truth commissions and international criminal tribunals' in New York University Journal of International Law and Politics 28/3:485-503.

[13] It is anticipated that the normative dimension of the project will drive recommendations for internationalised criminal justice policy.

[14] These should be common across procedural styles and include efficiency (against procedural and outcome criteria), accessibility, transparency, predictability, certainty, participation and review.

[15] See, *King, F. & La Rosa, A*. (1997) 'International Criminal Tribunal for the former Yugoslavia: current survey – the jurisprudence of the Yugoslavia Tribunal: 1994–1996' in European Journal of International Law 8/1:123–179.

[16] Such as between English and American common law, Italian and French civil law. While jurisdictions such as Italy have, through recent reforms moved into a more harmonised or hybrid procedural model the reality of trial practice in these jurisdictions is only appreciated by reflection on motives for such reform and its foundations.

[17] While the project is presently focussed on comparisons across common law and European civil law traditions, the potential to widen its comparative scope is there. The present focus has largely been pre-determined by the most significant influences on the international tribunals. The project has also touched on the importance of regional procedural initiatives, particularly in terms of rights guarantees.

Internationalised trial procedures

It is crucial for any understanding of the process influences (formal and less formal) at work in the internationalisation of the criminal trial to:

- explore the historical development of the two main procedural styles in the context of particular jurisdictions;
- analyse the disjuncture between procedure and practice in particular jurisdictions, to get an actual understanding of the impact and application of procedural norms on trial process;
- examine the pressures to modify these styles within particular jurisdictions and their outcomes;
- identify common process themes which remain across trial jurisdictions
- analyse significant hybrid jurisdictions and the historical, social and normative reasons for their development, concentrating on unique issues and relationships;
- explore particular issues and relationships of process which are significant across jurisdictions and levels of analysis; and
- examine and contrast any regional (European) and international criminal process developments in terms of their origins and influences.

However, analysis at the level of criminal procedure is just one paradigm which concerns this project. If not more important is a consideration of the trial as a process of decision-making, and along with procedures what influences impact on trial decisions.

In order to achieve a consideration of the trial as decision-making and decisions, the trial process itself will reduce to its significant sites for decision-making, and the manner in which discretion can be exercised is to be explored in comparative process terms. While decision-making, and discretion could be the key to understanding and comparing styles of process, the different ways in which legal cultures approach decision-making and recognise discretion will complicate the task of comparison. Even so, the trial is about decisions and decision-making. Just because such decisions may carry differing expectations, be informed differently, and discretion may play different roles in decision-making, does not refute the relevance of decision-making as a comparative tool. Decision-making is understood as an active and inter-related process in a variety of trial contexts prior to comparative analysis and reflection.[18] The comparative phase assisted by reference to common issues and relationships (such as access to justice (and in particular the reality

[18] Decision-making in the trial context is defined in process terms, essentially reliant on discretion. It incorporates decision-making procedures, and enabled and actual outcomes.

of representation), or lay[19] and professional participation (and the importance of interaction in decision-making)).

The comparative project

Essential for the comparative dimension of the work is a clear and contextual understanding of the selected trial processes (representing common law, civil law and hybrid traditions) competing for influence in the process of internationalisation. This is the first stage of comparative contextual analysis. From this it is possible to speculate on the viability of models for international criminal trial process and their primary components.

Wider normative discussions of the internationalisation of criminal justice should then have some more substantial grounding, particularly when the interactive nature of the trial and its primary influences are addressed.

It is anticipated that within the larger project will emerge a range of more specific and particular research exercises covering significant sites of decision-making in the trial such as the nature and presentation of evidence, prosecutorial investigation, advocate interaction, judicial decision-making, the place of the victim and the community, verdict delivery, and sentencing. In particular the project has identified:

- the relationship between the judge and the victim in sentencing deliberation;[20]
- professional and lay participation in the trial, beyond verdict delivery;
- the influence and proliferation of investigation stages within the trial;
- the impact of rights-based paradigms on trial decision-making.

These will be viewed jurisdictionally, regionally and internationally as essential levels of comparison.

The importance of a comparative focus for interrogating international criminal justice has been recently identified as important for criminal justice policy making. Yet there has also recently arisen the realisation that any comparative endeavour in this area must go well beyond the traditional boundaries of comparative law scholarship. To do this both legal and social science research methodologies need incorporation, and the research should flow out of a developed theoretical base.

[19] In referring to lay participation at the international level we are not so much focused on verdict delivery, but the role of victims, witnesses, and the accused in other aspects of the trial.

[20] This can be a formalised relationship through impact statements, or may relate to issues of compensation and victim representation.

Theoretical underpinning[21]

It is our view that empirical research such as this cannot advance unless it is informed by theory. While the project is an exercise in grounded theory[22] (analytical induction), it is, particularly in its developmental phases, theoretically tolerant. The methodology to be employed anticipates that through the gradual and careful naturalistic observation of the social phenomena within the trial[23] will emerge (and be confirmed) certain theoretical insights into:

- the place of the trial within criminal justice;
- the essential mechanisms of decision-making within the trial;
- key procedural components of the trial which accord with (or challenge) ideologies of criminal justice;
- the reasons for (and resilience of) difference within (and between) trial traditions;
- common issues and relationships across levels of trial analysis;
- motivations behind the form of international criminal trial process.

The essential place of discretion in the operation of trial traditions, and its ability to generate a procedural environment within which internationalisation may be achieved will provide a language for theorising. Decision-making is our model for the trial, discretion (within institutional and procedural boundaries is the mechanism through which trial decisions are enabled. The individual (professional or lay player in the trial) exercisies different degrees of discretion and with different consequences. Justice in the trial as an outcome of decision-making depends on the interactive decisions of identified, individual trial participants. The individualisation of justice through the means of discretion, and the priority of key players in achieving this sets out an agenda to explore the symbolic power of the trial[24], its domain in resolving conflict, and the creation of procedures for reconciling conflicting principles. Like justice as a concept, the institution of the trial exists to perform various expectations, some of which may be competing or even incompatible. The actions and decisions of individuals within the trial are relied upon to reconcile these expectations (e.g., individual and general deterrence; vengeance and restitution).

[21] For a detailed discussion of the theoretical foundations for this project see, *Henham R. & Findlay M.* (2001) 'Theorising Comparative Contextual Analysis of Trial Process'.

[22] For an examination of grounded theory see, *Glaser, B. & Strauss, A.* (1967) The Discovery of Grounded Theory: Strategies for qualitative research, New York: Aldine Publishing.

[23] These phenomena include the professional players, the contestants, their behaviours, sites for decision-making and important procedural events and requirements.

[24] As the primary structural and systemic representation of justice in action, wherein discretion is said to assure the ideological essence of impartiality and independence.

The analysis of the criminal trial process at the comparative level raises significant theoretical difficulties. These involve recognition that, in developing any theoretical foundations for the project we are governed by:

1. The significance of context – the need to understand the underlying significance of the interaction between legal and social processes in the trial setting. These may be ideologically driven.
2. The need to disentangle competing interests that comprise the trial environment – in this the theoretical context must be capable of identifying and accommodating the social reality of the rival agendas of respective trial participants in order that the ideological significance of the trial *as process* can be contextualised.
3. The continual presence of symbolic as well as process concerns – here the theoretical accommodation must also extend beyond symbolism to conceptualise power and locate symbolic elements in the trial process as significant in the recursive practices of decision-making in the courtroom.
4. The difficulty of drawing out from the description of processes and the narrative of players, interpretations of social action and actual behaviour – in this sense the theoretical framework, whilst not being prescriptive of narrative and descriptive interpretations, must both facilitate their understanding as representing recursively organised processes and provide a conceptualisation of these processes which will sustain a reliable and valid methodology.
5. The challenge provided by narrative analysis – this injects a theoretical imperative to conceptualise the trial process as capable of accommodating notions of difference and synthesis within competing procedural traditions.
6. Various levels of comparison – internal and external, but not conceived of as dichotomous.
7. The challenge of specificity versus universality (for the purposes of comparison).
8. The importance of sites for decision-making[25] with emphasis on the dynamics of process (interaction) rather than structure or function.

It is, therefore, axiomatic that the theoretical problems and underlying assumptions that inform the comparative trial project require a cohesive theoretical framework within which both the research methodology and the empirical findings can be located, and the links between them identified.

[25] Sites for decision-making are actual points in the trial process where decisions are required; as well as situations wherein a combination of features will necessitate a decision (e.g., an application as to the admissibility of evidence; when verdicts are delivered).

The fact that comparative contextual analysis[26] (our preferred comparative methodology) needs an appreciation of the social reality of historical, cultural, political and economic variables as impacting on the trial process makes it necessary to deconstruct the ways in which criminal justice processes are conceptualised in respective jurisdictions. In this regard the context might be intensely political rather than constitutionally legal or procedurally traditional.[27]

A theoretical framework for this project should be capable of elucidating both objective and subjective conceptions of process.[28] In so doing, associated research methodologies will add value to the 'facts' of trial process. The dialectic form of justice within different cultures will require analysis beyond external, or purely historical and structural representations of process which fail to account for human subjectivity and ambivalence about justice.

Recognising the moral relativity of concepts such as 'justice' and 'fairness' requires a contextual appreciation of the subjectivity of trial participants' experiences in terms of these measures. Participant experience so contextualised provides an account of process and it's ideological significance. It also enables us to identify the major dimensions of what might constitute comparable justice referents across jurisdictional boundaries and provides linkage to process.

The project's theoretical considerations are neither an exercise in theory classification nor an attempt to push a particular theoretical stance but rather a flexible theoretical position which is ultimately driven (and refined) by the desire to achieve practical policy outcomes and develop appropriate methodological devices for their achievement.

The development of an appropriate theoretical framework for the advancement of the project's methodology is a foundation responsibility of the research exercise, and has been achieved through the critique of a project working paper by a meeting of expert collaborators and the settling of the document 'Theorising the Contextual Analysis of Trial Process'.

[26] For a discussion of comparative contextual analysis, where the comparative endeavour cannot commence without detailed individual comparative understandings of each referent – see *M. Findlay* (1999) The Globalisation of Crime, Cambridge : CUP; Intro.

[27] For instance, where in Kosovo, UNMIK is creating novel criminal codes and codes of procedure which implant alien concepts into the local legal system and in so doing violate the constitutional requirements present in Yugoslavia.

[28] For instance it should be able to expose the operation of fact/law distinctions across all trial situations while at the same time detailing the unique structures and systems which are enabled by the distinction to separate the verdict and sentencing processes in each trial tradition.

Important conceptual themes

Throughout the project it is anticipated that several central themes bind the methodology and reverberate through the aspirations for the analysis. These themes will no doubt themselves develop meanings and material presence relative to the expanding work of the project. Yet, from the outset it is useful to say something about the way these themes are to be handled.

a) Difference

While seeking to confront and examine difference within and between trial processes, the project is not limited to simple dichotomies as its object of interest. Here we tend to look at difference as a matter of degree.

Each legal style, for instance, has its jurisdictional derivations and in some cases unique and conscious hybrid merging.[29] These represent commonality and difference. It will be impossible to engage in detail all of this, particularly with a research methodology which tends to operate from more general issues and relationships to demonstrate difference or harmony. The project will recognise the manner in which process derivations and hybrids coexist with earlier traditions, and trace the path of these developments.

The treatment of difference must be seen within the wider methodology of comparative contextual analysis. In this regard the internal consistency governing legal procedural styles will be reviewed. Where differences emerge, or where the potential for difference at other levels of comparison is suggested this will be noted.

In order to enable comparison, common process sites need to be located within actual trials. This is where the comparative analysis of difference in process crucially depends on uniformity within and across stages of the trial (style to style). These sites focus on principal points of decision-making in the trial and the players involved. Another common theme to lubricate the exploration of difference is the exercise of discretion. Discretion may also highlight some interesting degrees of difference in the operation of comparable sites for decision-making.

b) Synthesis

While harmonising trial procedures is an explicit and prevailing policy agenda for many of the systems and institutional snap-shots we encounter, the project is not committed to this as a policy outcome. Synthesis, in any case, works at several levels, which may make its realisation somewhat illusory. There can be mechanical and administrative synthesis, while overriding ideologies remain apart. Synthesis can appear to be achieved in practice through

[29] For example, the recent criminal procedure code in Italy.

the exercise of discretion in situations where procedural rules are different. Synthesis can be imposed through the creation of new rules which do not accord with trial experience. Synthesis may be expected through compromise, whereas the professionals involved in the trial process my regularly return to their original legal styles.

Synthesis is a reflexive referent for difference. Having said this, simple dichotomies between procedural difference and potential harmony might only be arguable at the level of modeling. This research will be examining developments on the way to synthesis and analysing these, as well as impediments to its achievement. The project also comments on those imperatives which present synthesis and mask difference. Failure to achieve synthesis will say as much about competing procedural styles as can models for its achievement.

It may be that the operational reconciliation of processual difference becomes the real stuff of the analysis. To date this has been a more dominant feature of the internationalisation of criminal justice. Reconciliation may tend to also disclose the problematic nature of synthesis at various levels of process.

c) Harmonisation (Accommodation)

An important theme when consulting trial processes, particularly in their internationalised form is harmonisation. This was a driving concept behind the recent legislative phase of development for the International Criminal Court.

As I have argued elsewhere[30] in its harmonious state globalisation tends to universalise crime problems and generalise control responses. Yet this sense of unity is most convincing at symbolic levels. The real paradox for globalisation is the manner in which it makes harmony a mask for diversity, and difference a concealment of fusion.

Comparative contextual analysis provides the potential to reconcile 'an acute sensitivity to the peculiarities of the local', with 'the universalising imperative'. The novelty in this approach to comparative analysis is not the rediscovery of context. Rather it is in the multi-levelled applications which context invites.To achieve its fullest potential comparative research should, therefore, concentrate within a nominated cultural context; across two or more contexts within the same culture; across time and space within a culture in transition; culture to culture; and (or not) simultaneously at the local and global levels.

Through its focus on interaction within contexts, comparative contextual analysis opens up to understanding dynamic relationships such as trial decision-making, and trends in this. The perennial problem of comparing like with like or a common concept within different contexts is surpassed when

[30] *Findlay M.* (1999) The Globalisation of Crime, Cambridge: CUP Epilogue.

the analysis is of interaction and transition such as the development of trial procedure internationally. Further, the concerns for comparison in terms of motivation or expectation are less likely to be discussed as stark dichotomies if the analysis unfolds through various levels and dimensions.

d) Legal Style[31]

Consistent with what has been said about *difference* and *synthesis*, legal styles are conceptualised as multi-faceted. We are not working from abstract models of common law and civil law trial procedure, nor are we assuming that these logically emerge from single jurisprudential traditions. The concept of *style* is carefully chosen because it elicits notions that are contemporary and individualised while being built on traditions, dynamic while possessing common components, and influential while being susceptible to influence.

By adopting style rather than tradition as a way to describe the influential legal/procedural foundations of the trial processes under analysis it is intended to encompass derivations and hybrids which, claim their origins in a particular style, yet manifest a style of their own or a significant recasting of the style in question.

Style suggests a way of doing things as much as the thing itself. It tolerates contrary interpretations and tastes. It is not omnipotent or neutral. But above everything else it is a living concept, as will be those trials that are encountered.

e) Context

'Context' is employed here as a central concept within the analysis of this study, in preference to overworked notions such as 'community', 'society', or 'culture'. The use of context in this work is not prescriptive. It is essentially a very flexible and subjective mechanism to facilitate comparative analysis. It is not loaded with meanings from its other uses in legal and social science research such as 'law in context'. Simply, context is considered to provide many and varied boundaries for analysis which might be as rigid as the concept of jurisdiction or as fluid as victims' rights.

A central theme in this research is the social contextualisation of the trial, both at the level of culturally specific analysis, and more universal relationships. Recognised is the contradiction that the trial, like many other social phenomena, cannot on the one hand be understood outside its particular social environment. But as a universal social 'fact' common to all cultures, it must possess forms and features with the potential to be generalised. It is the way in which the subjective is linked to the universal through adding value and

[31] For a discussion of the use of *style* see *Findlay, M. & Zvekic, U.* (1993) Alternative Policing Styles, Deventer: Kluwer.

meaning to more generalised 'facts' that will be unique in our comparative methodology.

Internationalisation as considered here, provides a means whereby the localisation of criminal trial procedure may be transformed towards more generalised themes of change without ignoring their original cultural relationships and manifestations.

It is the context of the trial and its representation, which gives these 'universals' their reality. Social context, and its relevance for analysis, lies behind the discussion of particular connections between sites for decision-making within a trial, and across a range of trial contexts. Each principal sub-theme structuring the discussion that follows is a tool for revealing the social context of trial procedure through an understanding of 'real' contexts.

A unifying context of criminal justice in which we have an interest is popular knowledge. Such contemporary 'knowledge' of the trial and its outcomes is now distinctly globalised. With this in mind the discussion that follows takes to task the expected conditions of justice in the trial in a global society.

Context here is viewed as physical space, institutional process, patterns of relationships, and individual variation. Context is a transitional state within which criminal justice and its agencies influence, and have influenced by a variety of social, cultural, political and economic determinants.

Contextual analysis is essentially interactive. As an object of such analysis the trial is not limited to rules, institutions, people, or situations, or reactions. The trial is more effectively understood as relationships which develop along with the dynamics of its selected context. Essential for the motivation of these relationships is the representation of the trial as a series of sites for decision-making.

f) Comparison

In order to appreciate the trial beyond its localised manifestations a contextual analysis needs to be comparative at many levels. The identified interest in globalisation and the internationalisation of criminal procedure suggests several dualities which dominate the comparative contextual analysis to follow. Initially, the comparison will be within context (e.g. the trial as an essential institutional feature of traditions of criminal justice within nominated legal cultures). Concurrently the comparison of context with context (e.g. locality and globe) will evolve. The latter holds out much for critically appreciating the representations of trial justice, and the interests which promote them. To achieve its fullest potential within the theme of globalisation (internationalisation), comparative research should, therefore, concentrate:

- within a nominated cultural context;
- across two or more contexts within the same culture;

- across time and space within a culture in transition;
- culture to culture, and (not or);
- simultaneously at the local and global levels.

The trial assumes a variety of social functions dependent on context. These may co-exist while contradicting or challenging any single understanding of trial justice. With the criminal trial being culturally relative, it has the potential within any particular culture to represent criminal justice. However, the trial's existence and representation at a global level may argue for the unity and generalisation of justice.

Following on from the preceding discussion it may be postulated that within the comparative context there are three levels of analysis that hold good from culture to culture, across time and space and simultaneously at the local and global levels:

1. Legal – concerning the nature and function of norms established by legislation. Substantive legal rights that might be accorded to participants in the trial process would also fall into this category. More widely, instrumental relationships between legal form, policy and power may be analysed within this context.
2. Organisational – concerning the channels and agencies involved in the communication of information relevant to the trial process. It is concerned with strategic rationales (both official and bureaucratic) for the operation and function of legal norms and the organisational 'reality' of discretionary justice as constrained (or promoted) by power and social control variables.
3. Interactive – concerning the social reality of decision-making within the courtroom. This deals essentially with interactive analysis of the relationship between social action and decision-making in the trial process.

The recognition of difference is crucial to the success of comparative contextual analysis. So too is there potential through comparison, to understand the complexity of culture and not only seek explanations for features of culture, such as crime and justice. Comparative investigation turns into the hermeneutic exercise of trying to use evidence about crime and its control to resolve puzzles about culture.[32]

Comparative contextual analysis does not focus on the boundaries of criminal justice and control in order to seek their explanation. It is more likely to explore the relationships within these boundaries, and the manner in which new or transitional contexts impact on and transform these relationships.

[32] *Nelken D.* (1994) 'The Future of Comparative Criminology', in *D. Nelken* (ed) The Futures of Criminology London: Sage; p. 225.

An enlivening, if underdeveloped capacity of comparative analysis is to move away from 'cause and effect' as a narrow frame of analytical reference. An emphasis on interaction and transition avoids simplistic assumptions about criminal justice, and the unfounded construction of policy. It should also prevent the abstraction of effective social control mechanisms from their essential contextual supports, to the extent where an appreciation of the impact of context over control is lost.

Comparative and International Research on Criminal Trials

Aims

This project repositions contemporary analysis of the criminal trial process. Through the use of a comparative and contextual analysis the criminal trial as a process of decision-making is explored.

The central broad purposes of the project are:

- To critically examine contemporary debate over the synthesis of criminal procedure, (locally, regionally and internationally) with special reference to the trial process.[33]
- Through qualitative and quantitative method, to understand the significant identity and features of trial process within and across different jurisdictions, claiming the influence of particular procedural styles.
- To distil comparative data and understandings from the narrative accounts of selected trials and judgements, and to augment this where possible with audio-visual representations of trials, as well as participant observation. This will provide a methodology for adding value and meaning to the official account of the trial. It will produce research into trial decision-making process as well as comparative analysis of trial processes.
- By developing and applying a policy critique for evaluating preferred criminal justice models, to review the trial process within and across different process styles, and against the development of international criminal trial process. In respect of internationalisation to speculate on the influence that international and regional developments may have on local jurisdictions.
- Eventually, to critique criminal justice policy options for reforming trial process (at the local jurisdictional and international levels) in light of the important and universal issues and relationships identified through the

[33] In talking of the trial process it is not intended to preclude limited consideration of pre-trial initiatives particularly directed to influence trial procedure or outcomes.

analysis of trial process in various contexts. Also to facilitate the development of theory, modelling and method issues essential to the creation of informed criminal justice policy.

- To critically evaluate internationalised criminal trial process with the benefit of comparative foundations from local jurisdictions. From this position to monitor the development of international criminal justice institutions and processes.
- Overall, to critically review the social, legal and political context of developments and proposals towards the internationalisation of criminal trial procedure and its institutions, and their fair trial paradigms in particular.

The context of internationalised criminal trial process, both in terms of the current UN tribunals and the proposed International Criminal Court, provide practical trial encounters where the challenge of synthesis is being explored. In order to engage the full potential of this context the trend towards internationalisation of criminal trial procedure, institutions and jurisprudence needs to be critically analysed. The features of the trial process and trial decision-making need close investigation.

Specific aims of the project include:

- Theorising comparative contextual analysis of criminal trials.
- Convening expert commentators to critique theorising and to set the comparative research agenda.
- Modelling comparative trial analysis, and proposing a contextual criminal justice model.
- Proposing and critiquing methodologies for comparative trial analysis.
- Piloting comparative contextual analysis of two trial contexts (one transitional, the other from a different style).
- Publishing a monograph on comparative trial analysis.
- Empirically researching lay/professional participation in various trial contexts.
- Empirically researching victim participation in the sentencing process of selected jurisdictions.
- Empirically researching the prosecution of criminal trials across procedural styles.
- Analysing and evaluating the sentencing regime of the International Criminal Court.
- Analysing and evaluating the fair trial dimensions of international criminal justice, and their impact down through regional and local jurisdictions.
- Establishing a network of expert contributors to maintain research into international criminal justice.

Planning and Foundation Phases

Arising from earlier versions of the project design, the team has prepared work on the international tribunals, appropriate theory and methodology, narrative analysis, and more specific issues such as international rights perspectives, and access to justice. In particular we have prepared and are publishing the following papers:

- Synthesis in Trial Procedures? The experience of the international criminal tribunals.
- Theorising the Contextual Analysis of Trial Process.
- Criminal Justice Modelling and the Comparative Contextual Analysis of Trial Process.
- Methodology and the Comparative Contextual Analysis of Trial Process: A preliminary study.
- Some Issues for Sentencing in the International Criminal Court Internationalised Criminal Trial and Access to Justice.

In addition an expert meeting has been held involving scholars from the UK, the USA, Australia, France, Germany, Italy and Spain, to discuss theory and method issues. Another outcome of the meeting has been the exploration of complementary fields of research which may support both the international and national contexts of the comparative phase.

Comparative Phase:

The project aims to identify styles and phases of criminal trial process amenable to contextual comparative analysis. This is being done primarily by individually examining the position, function and discourse of decision-making within selected trials from jurisdictions of nominated legal styles, and international trial contexts where these legal styles are said to merge. Along with the specific comparative knowledge that these individual research exercises will produce, the purpose of the exercise is to evaluate the workings of such styles and phases against a policy matrix[34] in order to test certain assumptions currently propounded about preferred criminal justice processes and the models from which they emerge. The motivation for such analysis goes beyond rapprochement in procedural styles, to produce a veri-

[34] The matrix will be so constructed as to allow for the inclusion of various measures and concepts of efficiency, dependent on the policy objective in question. The problematic nature of efficiency as a comparative paradigm will be recognised. Its legal/cultural relativity (and hence limitation as a tool for comparison) will be stressed. As for the use of the matrix to evaluate the translation of theory this will rely on the identification of central ideologies (competing or otherwise) within each tradition.

fiable comparative framework for the purposes of policy formulation and law reform.

Recently, managerialist approaches to the existence and operation of criminal justice institutions and processes have promoted speculation on reform through 'cherry-picking' across criminal procedure styles. However, an absence of detailed and contextual knowledge about the way decision-making in criminal justice operates, and the ideological context within which it operates, have made the debate about internationalisation and reform often artificial and abstract. A unique dimension of this project is its potential to ground aspirations for law reform in an understanding of the criminal trial in its practical context, beyond models and rhetoric.[35]

In addition, by adopting a case-study format within jurisdictions which exhibit both conventional criminal justice practice, and the trial process in transition at the local and international level, this enables the project to identify forces for change in crime control policy.

International Context (Figure 1)

Building on recent theorising about crime, control and globalisation,[36] the comparative core of the analysis involves local, regional and international levels. Trends of change from the local to the global and back to the local are an important component of the project's thesis regarding the internationalisation of criminal justice. Not merely tangential to the comparative analysis, and crucially important for its methodology, will be the place of criminal justice within the trend towards internationalised legal practice, and globalised expectations for the processes of the criminal trial.

Within the international context of the comparative phase is the opportunity to construct and consider some overarching themes which arise from more specific decision-making sites at jurisdictional levels (such as the function of discretion, the significance of professionalism, the impact of procedural styles). In this respect the more generalised themes may be informed by the national (and comparative/national) work and the specific research projects which examine stages of trial decision-making (Figure 1).

This study employs paradox and difference (which we have identified as intriguing features of globalisation in several contexts in order to:

– distinguish significant features of the competing models of criminal procedure, criminal justice, and more specifically the trial itself

[35] A further opportunity for this is through examining the forces at work in the evolution of the international criminal court and its proposed procedures. This is not to say that modelling is not useful as a framework for criticising the actuality of trial process.

[36] See, *Findlay* (1999).

- identify applications, both local and international, where particular features of process are appropriate or preferred
- speculate on the impact of trial contexts where particular trends in harmony and difference are evidence, and the manner in which these translate regionally and internationally
- understand the way in which differing international expectations for the penal sanction (and the law and procedure which enables it) may be reconciled within the trial, particularly through a rights-based paradigm, which then influences local trial practice.

National Contexts – National/Comparative Contexts (Figure 1)

Another crucial component of the comparative phase is research focused on the national jurisdictions. Here what we have referred to as sub-projects on the process in specific contexts are being mounted and compared. These involve very different methodologies and work towards individual research aspirations. However it is through the comparative analysis which is a feature of this work that these contexts will inform the meta project in the international context.

Policy Dimension:

Often reforms in the criminal justice process are driven by politics, without the benefit of critical information.[37] This may prove both costly and unrewarding. More crucial to this research, however, is the common absence of any technique for evaluating the expectations for reform against the procedures that give it form, and the operation of those procedures.[38] The policy matrix which will be produced as a key feature of this analysis, will provide such an evaluative tool. In particular, the matrix will enable the comparative evaluation of deficiencies in justice delivery identified within and beyond the project.

Criminal justice modelling is of limited policy consequence without contextual application and testing.[39] The project is directing its attention to the limitations and potentials of such modelling in order to construct a workable policy matrix. It also applies unique theorising and modelling through an interactive methodology to analyse actual trial decision-making in a variety

[37] *Hogg, R.* (1991) 'Identifying and Reforming the Problems of the Justice System', in *Carrington* (et al) (eds) Travesty, Sydney: Pluto Press.

[38] *Alder, C. & Polk, K.* (1986) 'Criminal Justice Reform in Australia', in *Chappell & Wilson* (eds) Australian Criminal Justice system: the mid 1980's, Sydney: Butterworths.

[39] See, *Henham, R.* (2000) 'Sentencing Theory, Proportionality and Pragmatism', International Journal of the Sociology of Law 28/3.

of process contexts. This means that more accurate comparative trial data will be available for policy formulation locally and globally.

Vital for the project is the commitment to the detailed examination of features which, in practice, are said to confirm the model in question.[40] Further, the experiential evaluation of these features within their immediate context, and against competing processes and claims (and at different levels of jurisdictional location) provides data on which the matrix itself can be tested. The outcome should be a policy evaluation framework with potential beyond the critical analysis of synthesising competing models (worthy as this may be).

Expected Outcomes:

- A considerable advance in the understanding of competing criminal justice models.
- An international network of scholars and practitioners capable of providing critical commentary on developments within selected criminal justice models.
- A timely clarification of the appropriate issues for debate and synthesis.
- A wider exploration of the place of common law and civil law criminal justice procedures within trends towards globalisation.
- A critical evaluation of trends towards the internationalisation of criminal law, procedure and institutions
- Unique insights for law reformers and policy analysts charged with addressing the current crisis in criminal justice delivery.
- An evaluation matrix which will lend itself to a variety of policy formulation requirements.
- The potential, through the use of the matrix to evaluate a critique of justice delivery in any jurisdiction, from a comparative context.
- Specific insights into the principal sites of decision-making within competing (and combined) trail procedural settings
- Recommendations as to the reform of criminal procedure, with particular reference to the trial process, and its crucial components.
- Advice concerning the more systematic direction for the reform of criminal justice institutions and processes
- A refinement and re-affirmation of those features of common law and civil law criminal justice supportive of good governance and civil inclusion.

[40] At this point it will be necessary to record and analyse the features of the recent debate around procedural synthesis for the criminal trial. To gain the greatest value in this it will be necessary to review all justifications and criticisms, even those which fail to progress from ideology or symbolism.

- A meeting to consider and evaluate the importance of the outcomes and other potentials for the enterprise.
- A facility to monitor these concerns ongoing.

The Macro and Micro Dimensions of the Project:

Internationalisation of Criminal Trial Process **[international context]**

{meta-project}

- Critical evaluation of trial institutions and processes (decision sites and participants)
- Examination of internationalisation through universal issues and relationships
  Eg.
  - lay/professional participation
  - accountability/transparency in decision-making
  - rights of the accused and due process
  - forms and significance of evidence
  - roles and responsibilities of legal professionals
  - mechanisms for verdict delivery
  - trial modelling

Global

Comparative Dimension

Context

Context

Local

Jurisdictional Criminal Trial Process **[national contexts] {sub-projects}**

- Critical evaluating features of criminal trial within and across jurisdictions
- Examination of process development and transformation through universal issues and relationships
  Eg.
  - Mode of trial
  - judicial interaction with trial participants
  - lay/professional participation
  - prosecutorial/judicial interaction (eg. victim impact)
  - pre-trial evidence production (eg. police investigation)
  - accountability at stages of the trial
  - due process protections for the accused (eg. representation)
  - disclosure
  - expert evidence
  - verdict delivery (eg. juries)
  - sentencing
  - appellate review
  - trial modelling

Research agenda

Research Plan, Methods, and Techniques:

Comparative contextual analysis was identified in recent work on globalisation.[41] This research explored the potential of comparative research with the globalisation of crime as a significant context. The insights gained formed a basis for the project more developed work on theorising, modelling and methodology, now to be applied both to the local jurisdictional and to the international criminal procedure dimensions of the project.

Findlay and Duff have refined their methodology for the analysis of criminal justice institutions.[42] The value of case-study analysis has been confirmed in Findlay's work on law and custom in the South Pacific.[43] Findlay employed the application of expert commentary to the collection of descriptive insights in cross-cultural studies on policing, and crime control.[44] The reconstruction of official accounts in trials has been developed by Henham in his analysis of sentencing judgements. He has further developed these when viewing rights-based paradigms in sentencing, and sentencing policy development. These methodologies form a background to the research, along with a detailed consideration of narrative analysis, ethnographic trial analysis and criminal justice modelling.

The Comparative Phase:

- Critically Reviewing International Trial Process

The project is developing a detailed descriptive knowledge of the international criminal tribunals. This includes writing on:

- synthesis of trial procedures internationally,
- international war crimes tribunal bibliography, and literature review,
- policy paper on sentencing and the international criminal court
- processual synthesis in international tribunals (Rwanda, Yugoslavia)
- judicial organisation of the international tribunals
- rules of procedure and evidence in the international tribunals

[41] See *Findlay* (1999) Intro., Also see, *Findlay, M.* (2000) 'Decolonising Restoration and Justice: notes on the comparative project' in Howard Journal of Criminal Justice 39/4: 398–411.

[42] *Findlay, M.* (1994) Jury Management in NSW, Melbourne: AIJA – in particular see chaps 2, 3, 5 & 7.

[43] 'Crime, Community Penalty, and the Integration with Legal Formalism in the South Pacific', in (1997) Journal of Pacific Studies 21: 145–160.

[44] See *Findlay and Zvekic* (1993) Alternative Policing Styles, Deventer: Kluwer, and (1988) Analysing Informal Mechanisms of Crime Control, Rome: UNICRI.

– victims and witnesses in the international tribunals

Associated with these will be the need to position the tribunals and their trials within wider normative considerations for international criminal justice which may be derived from their social/political context.

The narratives which are produced as a result of tribunal hearings are being analysed and deconstructed under a range of headings relating to the aspirations of the tribunals and expectations of them from within the international community. The nature of the legal professionals servicing the tribunals and the details of their mandate are explored against the background of their legal traditions. Sentencing in particular, in the context of the international criminal court, provides a critical research focus against a background of sentencing theory and practice in different jurisdictional settings, with the ICC being a particular focus.

The mode of trial and case selection by the tribunals is being critically analysed against issues such as sealed indictments, hearing location, broadcasting of hearings, witness protection etc.

Contact has been made with administrators and practitioners in the international criminal tribunals so as to provide an understanding of the harmonisation and compromise of procedural styles, and the difficulties associated with these. In addition, the policy developments towards the International Criminal Court are monitored as they relate to common trial procedures.

Where possible a detailed questionnaire will be administered to the legal professionals working in the tribunals covering areas such as

– procedural harmonisation and compromise,
– adequacy of investigation,
– adequacy of evidential techniques,
– legal/cultural conflict,
– limitations of indictments,
– legal representation,
– access to justice,
– deterrent outcomes,
– victim satisfaction,
– international criminal jurisprudence,
– political expectations and agenda setting,
– future of internationalisation of criminal trial,
– confidence in sentencing principle and practice.

These insights will then be tabulated and made available to selected scholars for their comment and evaluation. Our descriptive findings are being released as reports or as fact-sheets on the project web-site.

- Analysing Competing Models of Trial Process – International and national contexts

The comparative phase of the research design involves work on competing styles of trial process at focal points of harmony and difference. Beyond this, a more detailed understanding of trial decision-making in different contexts enables thematic analysis of critical concepts and actions normatively, organisationally, legally, and each interactively.

These focal points, whether they be procedures or players within the trial, are selected following a detailed examination of the recent debates regarding the synthesis of procedural styles, and by examining specific trial transcripts, and other related narrative records.[45] Importantly, the analysis of focal points in the trial are approached both from the perspective of relevant common law jurisdictions (such as England and the States of Australia), and the civil law (France, Spain and Germany), as well as from the hybrid traditions (USA, Italy) and the international tribunals.

A checklist instrument has been settled which deconstructs the most significant sites of decision-making within the trial.

Commentators (expert contributors) have been identified in each of the selected jurisdictions and engaged for the purpose of identifying and accessing nominated trial narratives, as well as advising on the check-list of process focal points, critiquing the theory and methodology of the comparative project, and enabling the research within their jurisdictions. Where appropriate these commentators will also contribute ethnographic records of selected trial (such as audio visual recording, and personal observations) providing greater and more sensitive meanings to be injected into the narrative record (what we have called *value-added facts*).

The commentators are being requested to identify (and help make available) important historical and legislative sources, which contextualise trial procedure within their particular legal style. As a consequence of this the comparative method is constantly revised against the challenges of differential data access. In addition their professional/scholarly knowledge of their jurisdiction and its trial process will inform unique understandings of the trial record and its processes which may not be evident from the record. Further, they will add value to narrative meaning by experientially evaluating binding themes such as the relevance and presence of discretion in trial decision-making, jurisdiction to jurisdiction.

A detailed legislative and procedural analysis of the selected jurisdictions has been commenced, along with the identification of trials for analysis. This

[45] Trials are selected from accessible common law and civil law jurisdictions, and from recent hearings of international criminal tribunals. Difficulties with comparative trial narrative and access issues are discussed elsewhere. Access here is not simply a question of linguistics but more significantly it relates to the availability of trial narrative for research even in the researchers' home jurisdictions.

work will be supported with reference to specific analyses of players and procedures within the criminal trial (national context research).

Once the descriptive material on focal points of the selected trial processes has been collected, comparative contextual analysis is now being applied trailed against a prospective methodology of narrative and observational analysis. Once the pilot exercise has been completed, examining several trial transcripts (Italian and English), a more universal methodology for comparison will be settled and applied to specific objects of research (e.g. victim participation in sentencing decisions).

The purpose of individual trial transcript analysis is to appreciate the context of each trial, discover and apply common issues and relationships which can become the platform for critical comparison and may inform the construction of the policy matrix to follow.

The trial analysis engaging local jurisdictional processes, should indicate the types of influences over international applications, and prepare the ground to test the thesis that this influence may also run in reverse.

Case-study Analysis – the Comparative Phase:

Essential for the methodology of both the preceding project examples is the need for trial case-study analysis. The challenge at the comparative level is to find data sources that are sufficient, comparable, and more importantly accessible. In addition, our methodology to date is conscious of the need to:

- Contextualise transcript within historical and procedural developments of trial process.
- Harmonise subjective and objective appreciations of trial process (fact/value).
- Evaluate what transcript analysis does and does not say about trial process.
- Add meaning to narrative through legitimate inference, merging of narrative forms, and observation (value added fact).
- Utilise the experience of expert commentators to predict and interpret otherwise obscure indicators.

Trial narrative examined so far indicates the difficulties in doing this jurisdiction to jurisdiction. Further, where we seek to add value and meaning to the written trial record in order to reflect the unspoken methods of communication and power relations at work in the trial, the difficulties with observational analysis in trials should not be underestimated.

Trials for case-study comparative analysis need to be selected on the basis of some general comparable process indicators. For this purpose, a selection

of major contested trials has been examined and compared in detail.[46] These include some of the trials earlier identified by commentators. The trials were drawn from common law jurisdictions and the participating civil law jurisdictions and hybrid, as well as from the international criminal tribunals.[47] It is not intended that these trials should be representative of process styles beyond the desire that they involve offences and circumstances common to the trial practice of the style concerned.

Measures of comparability include:[48]

- trial length,
- charges,
- number and nature of accused,
- disclosure,
- pre-trial documentation,
- expert evidence,
- contested issues of procedure,
- judicial intervention,
- role of the accused,
- frameworks for decision-making,
- outcome.

Accepted indicators of harmonisation or difference include:

- nature of indictment,
- case management,
- role of the prosecutor,
- significance of documentary evidence,
- role of defence advocate,
- accused's rights, and the requirement on the accused to participate,
- role of the victim,
- mechanisms for verdict.

Along with trial narrative, the team of commentators have been required to seek further local elaboration particularly in respect of the investigation and pre-trial phase, the nature of trial decision- making, the institutions of the trial, and added meaning and value to the written record. The individual trial material is compared with the information acquired during the earlier descriptive phase.

[46] This analysis is restricted to the investigation of trial transcripts, and where possible, limited interviews with trial participants, and non-participant observations.

[47] These trials form a control over the examination of procedural difference insofar as the procedures of the tribunals to some extent recognise the need to harmonise procedural traditions.

[48] The chosen trials also need to identify comparable sites for trial decision-making which are apparent and comprehensive, as well as accessible. Accessibility is proving a considerable methodological challenge.

This material is then qualified and elaborated upon by trials in the jurisdictions chosen where there is the opportunity for ethnological method, such as observation and audio, visual recording. This additional data adds qualitative depth to trial process understandings and flesh out the narrative record of trials in progress.

The most effective trial-case study is one which incorporates written record, observation, and audio visual recording methods. This obviously will be limited to cases selected prior to commencement, or in those rare occasions where data from each of these sources is available.

The trial information is subject to content and discourse analysis against the prepared check-list of features and our deliberations on theory and criminal justice modelling. Arising out of this exercise will be a fuller understanding of the institutions and procedures at work at the points of difference. For instance, the indictment, the introduction of the prosecution, the presentation of evidence by the accused, the mechanisms for verdict, and the role of the judge each will receive detailed coverage and contextual analysis

The methodology employed for the interrogation of trial transcripts is a development on that used by Henham in the examination of sentencing practice in the magistrates and crown courts of England and Wales.[49] The official account of the trial is deconstructed against a template of variables which represent decision-making phenomena within the trial.[50] The status of the transcript as an official account of the trial,[51] a verbal record of the interaction of the professional players, as well as a response to legislative and procedural requirements, suits it well as data from which common themes may be sought and impressions drawn.

The understandings gained from this case-study analysis will provide the basis for a preliminary policy evaluation of the nominated processes within the context of the alternative form of criminal justice. This evaluation will be directed towards both local jurisdictional and emerging international concerns in criminal procedure. A bi-product of this evaluation will be the identification of key determinants of efficiency and appropriateness[52] that will form the outline of an evaluation matrix.

[49] See *Henham, R.* (1999) 'Bargaining Justice or Justice Denied? Sentencing discounts and the criminal process', Modern Law Review 62: 515–538; *Henham, R.* (1990) Sentencing Principles and Magistrates' Sentencing Behaviour Avebury: Aldershot.

[50] This template centres on the sites of decision-making within the procedural styles of trial. It will also be located on the roles of different players within the trial who make decisions. It builds on the work of *Roger Hood* and *Ralph Henham* in standardising elements of trial transcript for the purpose of analysis.

[51] And in this respect gaining authenticity in a similar way as might official law reporting.

[52] Obviously, a theoretical difficulty here will be the extrapolation of common or generalisable themes of efficiency and appropriateness from different procedural traditions wherein

There is also provision within these trial reviews for some work on particular players (such as the judge as sentencer, and the prosecutor as investigator), particular procedural events (such as the nature of evidence, and the form of verdict delivery) and particular decisions or exercises of discretion (like the involvement of victims, and the role of the accused). The individual research exercises have an expanded comparative dimension through reflection on other detailed research into the same or similar topics. These exercises have their own discrete research agendas as well as feeding into the wider comparative purpose.

Besides the methodological difficulties of different trial record keeping practices, and problems with access, the selection of the trial as a centre for comparative research may be criticised on another more fundamental level. It could be said that in neither procedural style is the trial exemplary of the procedures of criminal justice. In common law the vast majority of prosecutions are settled through guilty pleas and never go to trial. In the civil law traditions most prosecutions are diverted or settled through plea during the detailed investigation process preceding the trial. Aligned with this issue of procedural representativeness is a comparative dilemma. Trials differ in form and significance between the two styles. For instance, the adversarial process in common law trial means that the visual theatre of the trial through the examination of witnesses in person may appear in stark contrast to the dossier led trial in civil law, where most of the action has occurred beyond the court-room.

Recognising these challenges to the comparative project we remain convinced of the value of the trial as the procedural focus for the research. Across both styles serious crime is tried. Serious crime is also far more likely to be defended and therefore tried. Serious crimes and their trial have produced many of the procedural safeguards around which criminal justice traditions have grown. In practice there may prove to be less that divides the adversarial from the inquisitorial trial. For instance, the more complex the case the more that the significance of documentary evidence will prevail. And there is little doubt that the ideology of criminal justice in both traditions takes the trial as its manifestation. This is confirmed by the paramount place of the trial in the institutionalisation of international criminal justice.

It is intended to hold a series of international meetings as part of the project at which commentators will discuss and review particular empirical projects as well as demonstrate the importance of contextual sensitivity in the development of comparative method. In light of the earlier expressed expected project outcomes these meetings will facilitate:

these concerns may be very culturally specific. Here the expectations for the International Criminal Court may be helpful.

- The establishment, consolidation and renewal of an expert network of contributors.
- The testing and evaluation of comparative research methodologies.
- The development and evaluation of comparative criminal justice theorizing and modelling against specific jurisdictional experience.
- The contextual location of the research.
- The production of empirical knowledge through comparative research over which the international contributors may claim ownership.
- Detailed policy and reform discussions within specific jurisdictional contexts.
- The evaluation of international criminal justice against particular trial environments, and
- The preparation of project reporting for several languages and socio-legal cultures.

- Policy Evaluation.

Following the pilot of the comparative trial analysis the project will develop an evaluation matrix. This instrument will provide policy analysts with the potential to critically assess the viability of potential process reforms, and to evaluate the performance of particular procedures and players against nominated common policy aspirations. The matrix will have application both at the level of local jurisdictional concern, and international interests.

Once devised, the matrix will be discussed and critically reviewed at a scholarly seminar, where it may be contextualised against a specific process setting in keeping with one of the empirical exercises (i.e. from the perspective of judicial officers required to recognise victims in sentencing). In addition, the research team will meet occasionally and individually with practitioners and commentators in order to test the matrix against expectations for synthesising common law to civil law reforms. In this way the relevance of the matrix, as a predictor for reform in models of justice beyond the civil and common law distinction, will be tested.

The resultant refinement of the matrix will enable its application to the reform process. As a controlled test of its effectiveness the matrix will be applied to several recent procedural reform initiatives each within civil law and common law contexts, and suggestive of synthesis. These will be identified at the time to maximise their policy relevance. The outcome of these applications will be monitored and discussed.

Conclusion

As yet there is not written a convincing comparative analysis of criminal trial process, particularly addressing trends to internationalisation.[53] There are encyclopaedias about courts and the trial in different jurisdictions throughout the world. Research has been done which analyses trial procedures and process in a particular jurisdiction and then juxtaposes this against similar analyses in other settings. The trial (and its more controversial features) is mentioned in conventional comparative law or criminal procedure reviews. What makes this project unique is that it takes the task of comparison seriously, and interrogates the trial as a dynamic decision-making process. From a clear theoretical and comparative foundation the analysis argues for a concept of international trial within a 'rights paradigm' which can be understood against different procedural traditions and practices. Essential to this understanding is an intimate inquiry into how trial decisions come about within different jurisdictional settings, and what binds trial decision-making together.

The trial is a focus of that interest because of its significance as a symbol of developing international models of justice. From their experience in researching juries, and sentencing, the project team have expanded their considerations of trial structures and functions into the realm of interactive decision-making processes, their synthesis and difference at local and global levels. The detailed descriptions of trials in action which forms the empirical dimension of the project reveals new insights into trial-decision-making in different jurisdictions.

The International Criminal Trial Project argues for a new understanding of trial process and a radical approach to comparative contextual analysis within socio-legal studies. Along with the formulation of effective research strategies for comparative criminal justice research, the project claims success in setting out to interrogate specific trial narratives and meanings in different contemporary legal cultures. Throughout, the themes of internationalisation, fair trial, and the exercise of discretion in justice resolutions are resonant. The importance of interaction between lay and professional participants in the trial process (even in its more limited conceptualisation within the international arena) exposes the relative significance of different trial structures and systems.

[53] Recent publications such as *Safferling C.* (2001) Towards an International Criminal Procedure OUP., touch on the trial as part of a wider review of the internationalisation of criminal justice. However, this book in particular has no strong theoretical foundation and fails to treat comparative legal traditions seriously. The present proposal recognises these needs.

This is a project about doing research in a dynamic policy environment such as the internationalisation of criminal justice. The essential foundations for future policy are provided by the analysis.