'Bridging the gaps between judicial review, administrative guidance, and low visibility decision-making in the courts: a case-study of academic impact'

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Why this talk, and why here?

- “Over recent years, successive *legislation and policies* have directly and indirectly undermined measures which provide safeguards for defendants and offenders appearing in courts to facilitate just and fair decision-making. This symposium will debate the ways in which justice has been curtailed at different points in the process and the legacy of the changes for conceptions of justice in the court process. More specifically, it will chart the ways in which *legal and policy developments* have impacted, in isolation and totality, on defendants‘ and offenders' rights.” (my emphasis)

- The potential for progressive reform of *policy* and *practice* against this gloomy backdrop seems worth exploring

The socio-legal 'gap' project…

A commonplace observation that the 'law in action' is often at odds with the 'law in books' and this is certainly true of the criminal courts as numerous studies have shown:

Bail – Hucklesby

Mode of Trial – Cammiss

Prosecution – McConville et al (1991)

Defence – McConville et al (1994), Newman (2013)

Sentencing – Hutton

Why the gap (and what can be done about it)?

- Inadequate resources leading to cutting of corners
- Court culture (informal norms subverting the law)
- Court workgroups (decision-making is social, not individualised, with decision-makers responding to incentive structures)
- The gap is functional, with formal policies adding a veneer of legitimacy and thereby shielding and entrenching unfair practice
- Lack of understanding of what the law requires (Halliday)

Legal aid decision-making

- The Interests of Justice Test determines whether a grant of legal aid should be made to a defendant. Decision-makers are almost invariably the Justices' clerks or their administrative staff

- Widgery criteria: serious consequences (imprisonment, serious reputational damage, loss of livelihood), or legal complexity (expert cross-examination, question of law, need to trace and interview witnesses) or in the interests of another that the defendant be represented (placed on a statutory footing by s.22 of the Legal Aid Act 1988)

- 1992 project (Young, Moloney and Sanders) commissioned by the Legal Aid Board which wanted to understand apparent inconsistency as between different magistrate courts

- Political backdrop was the desire of the Lord Chancellor's Department that the Legal Aid Board should take over responsibility for legal aid decision-making and exert tighter, more bureaucratic, budgetary control

Main arguments of 1992 study

- Little of the variation in grant rates between courts was attributable to caseload composition, local sentencing policy, or application practices by solicitors
- Variation was attributable in part to differing interpretation and weighting amongst decision-makers of the Widgery criteria
- But most grants occurred where none of the Widgery criteria were seen as applicable, entailing that variation was primarily driven by differing offence-based 'rules of thumb' (across and within courts)
- Underlying the offence-based norms were differing views about the value of legal aid in promoting efficiency and fairness in court (broadly in interests of clerks to grant legal aid)
- Local and national guidance was rarely referred to
- The structured application form directed decision-makers' attention to the Widgery criteria but some of its wording was misleading, effectively making the test more restrictive
- No recommendations sought or made but we did question whether court-based decision-making operated in the interests of justice

Example: the 'Serious damage to reputation' criterion (1992)

1. Guidance: 1984 Lord Chancellor's Guidance: "reputation for these purposes is a question of good character, including honesty and trustworthiness, and is not related to social class"

2. Practice: Evident (and sometimes comical) class bias:

"They would have to be of impeccable character, someone who has a responsible position – Deputy Clerk to the Justices for example."

(Interview with a Deputy Clerk to the Justices)

Academic impact of 1992 study

- The Lord Chancellor used a selective interpretation of the study's findings when warning that, unless greater care was taken by the courts in future, the power to determine legal aid applications would be transferred elsewhere: "Action must and will be taken to see that effective procedures are in place and are properly adhered to, and that legal aid is only granted where it is demonstrably justified under the terms of the present legislation." (October 1992)

- Legal Aid Board issued new guidelines in 1994 which reasserted the need for individualised judgment structured by the Widgery criteria

- President of the Justices' Clerks' Society warned its 1995 annual conference that the LCD had made it clear that unless greater care was taken the power to grant legal aid would be transferred to some other agency, adding that this would lead to 'horrendous delays' in the throughput of criminal cases

Subsequent legal developments…

- Access to Justice Act 1999 (replacing Legal Aid Act 1988) made a few subtle changes to the wording of the Widgery criteria which broadened their ambit somewhat
- Benefit of the doubt for applicants clause was not re-enacted
- Right of appeal against a refusal to an Area Committee of the Legal Aid Board was abolished
- Human Rights Act 1998 allows defendants to invoke Art. 6 ECHR right to be afforded legal assistance free of charge where the interests of justice so require
- Divisional Court decisions exhibited a greater willingness to quash refusals by court clerks and magistrates of legal aid

Subsequent political developments…

- DCA issued 2004 consultation paper proposing to transfer the grant of legal aid from the courts to the Legal Services Commission, citing ‘evidence that courts have been too favourable to defendants, and certainly inconsistent, in applying the interests of justice test’
- This ‘evidence’ was challenged by the Magistrates’ Association and by the Justices’ Clerks’ Society, and doubted by the Constitutional Affairs Committee
- Legal Services Commission accordingly commissioned further research in 2005

Main arguments of 2005 study

- Decision-making remained stubbornly based on rules of thumb revolving primarily around the likelihood of custody / offence charged (as in 1992)
- Guidelines were largely ignored in favour of experience (as in 1992)
- Guidelines were poorly formulated, and did not include references to numerous judicial review decisions in favour of granting legal aid (much closer analysis of this gap than was true in 1992, partly because the more recent cases took a more interventionist line)
- The legal aid application form was similarly poorly drafted, with the wording sometimes setting out the legal criteria in a more restrictive form than in the statute (as in 1992)
- No evidence that decision-makers were allowing their personal values to influence decision-making (unlike in 1992). Rather, variation arose from their varying understanding of the Widgery criteria
- Likelihood of imprisonment of legal aid applicants had increased from 7% (1992) to 22% (clerks has not become more 'favourable to defendants' but rather the nature of summary justice had become more complex/serious over time)

Example: the Serious Damage to Reputation Criterion (2005)

- Law: *R v Scunthorpe Justices* T.L.R. 1998: A 16 year old A level student, arrested for s.5 POA, but then charged with obstructing a police officer. Court clerk and then the court denied legal aid on the basis that the disgrace of conviction and consequent damage to reputation would not greatly exceed the likely punishment. Divisional Court quashed the decision as irrational and plainly wrong, finding it 'obvious that… if the offence were proved even a modest sentence could seriously damage the reputation of a young man of good character on the threshold of life.'

- Law: *R v Chester Magistrates Court* (1999) 163 JP 757. Two adults of good character were charged with s.5 POA but were denied legal aid on the ground that the offence was minor and that a court clerk's assistance would be sufficient. Divisional Court quashed the decision, and remitted the matter to a differently constituted court with a direction to pay particular heed to the loss of reputation criterion

Example: (continued)

- Guidance: The Criminal Defence Service guidelines of 2002 stated that: 'Social class and position should not be taken into account' (But did not mention any caselaw)

- Practice:

'I think the guidance says you have to be someone of reasonable standing in the community… if you're the town vicar… or a magistrate… that would satisfy it' (C)

'If you have got a vicar or a lawyer then fine…' (C)

'Bank clerk, [or] little old lady who works in a charity shop, appearing for an allegation of shop theft' (S)

'Let's say he's a manual worker… clearly damage to reputation is less important.' (S)

Relevant factors established by JR but otherwise ignored

- The fact that the prosecution is legally represented
- The fact that a demanding community penalty is likely
- The youth of the defendant
- The need for careful examination of *defence* witnesses
- The need to retain an expert defence witness
- The fact that the interests of justice can encompass considerations of saving time and money

Attempting to close the gaps…

- Issuing a new guidance document would be unlikely to make a difference to such long-entrenched erroneous misunderstandings on the part of both solicitors and clerks
- Therefore Young and Wilcox (2005) recommended that the legal aid application form be redesigned to incorporate key guidelines and judicial review decisions, AND set out how such a redesigned form should look
- For example, whereas the pre-existing form included a prompt to solicitors worded ‘Expert cross-examination needed’, our form’s equivalent prompt was worded ‘The proceedings may involve expert cross-examination of a prosecution witness (whether an expert or not)’
- This was an attempt to weave law and guidance into the everyday routines of solicitors’ applications and clerks’ decision-making

Subsequent developments

- Once again, our sense was that the research findings were taken seriously by the commissioning body
- Our proposed new legal aid application form was accepted and, with minor amendments, brought into use
- But it was then almost immediately withdrawn and replaced
- On enquiry we discovered that changes to the means part of the eligibility test for legal aid in 2006 had necessitated changes to the legal aid application form and that, in making these changes, all the elements we had proposed had been lost by the wayside
- Once again, therefore, it appeared that the impact of our research was zero, at least so far as guidance and practice was concerned

Would you like to help draft new guidance?

- Then, in August 2008, I was invited to take part in a joint HMCtS and LSC project "to analyse decision-making on the grant of legal aid"
- This involved participating in an 'expert panel' made up primarily of members of the Justices' Clerks' Society, which would meet to discuss each criterion for grant, to attempt to distil the 'correct approach' with a view to producing training and guidance for decision-makers
- The panel would draw on workshops comprising court decision-makers and solicitors who would be asked to undertake mock decision-making using some of the dummy applications we had created for the 1992 research (and re-used in 2005)
- This presented an opportunity to try to ensure that at least the gap between the judicial review cases and the guidance was closed (but knew I would be faced with the 'expertise' of practitioners who shared ingrained, legally inaccurate, norms)

Working with policy-makers/ practitioners (blurred line)

- The ‘expert panel’ met just once, in September 2008
- The main point I pressed on that occasion is that the guidance should reflect and cite the relevant judicial review caselaw
- Draft guidance produced in November 2008 included some but not all of the caselaw, with predictable consequences
- Eg, Under ‘Other reasons’ for granting legal aid, the draft guidance stated ‘Examples in this category could include the likelihood of a demanding community order, and the need for expert examination of a defence witness’ (no citations)
- XXX Justices’ Clerk responded by email: ‘Not convinced! I see the difficulty of giving examples, but if you can’t think of a good one, leave it out?’

Perseverance is needed…

- In my own response to the draft guidance I pressed again the point that decision-makers would discount any examples or norms that did not accord with their own entrenched views UNLESS the caselaw citation was included

- 2nd iteration of the draft guidance in December 2008 noted: "The comments made by XXX [Justices' clerk] and Richard demonstrate the tension which exists throughout this document between attempting to produce working guidance which can be applied in a simple, practical manner, whilst at the same time not short-changing the known law as it stands. The guidance cannot ride roughshod over the law, but nor can it be an academic textbook"

- Compromise was to include the case citations in footnotes

The rest is (mainly) silence…

- October 2009: RY email to HMCtS - “What was the final outcome of this exercise? Was new guidance issued?”
- December 2009: “The project stalled [because of] some inertia from the LSC… throughout 2009 IoJ has been rather left in the shade by the preparations for the Crown Court means testing pilots and rollout beginning next month… “
- September 2010: HMCtS email to RY - “The project has now become live again – would you be willing to assist in proof-reading and commenting on what I hope is a final draft?”
- November 2012: RY email - “I am still willing to comment on the final draft… but would in any event be grateful for an update on progress”.
- November 2012: HMCtS email to RY - “I submitted the final version in May 2012. I had no confirmation that it had even been received!”
- Further checks by HMCtS revealed that the guidance (dated July 2012) was published by LSC on its website on 30 August 2012

The long and winding road…

- S.17 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 reproduces the Widgery criteria (no changes or additions)
- LAPSO abolished the Legal Services Commission (replacing it with the Legal Aid Agency) as from 1 April 2013
- Legal Aid Agency web pages within the Ministry of Justice web-site contain no obvious link to the July 2012 guidance
- That guidance can still be located on the web at: http://www.justice.gov.uk/downloads/legal-aid/eligibility/guidance-on-consideration-of-defence-representation-order-applications.pdf
- But it appears to be 'hidden' from practitioners so its impact remains very doubtful
- But the current legal aid application and accompanying brief guidance reflects *some* of the recommendations made in the 2005 report!

Impact of research (example)

- Access to Justice Act 1999: "…whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law"
- 2004 legal aid application form prompt: "A substantial question of law is involved. Please give authorities to be quoted" (my emphases)
- 2005 Report: "In order to reflect accurately the statutory language, the prompt should be changed to read 'a substantial question of law may be involved' [Moreover] the assumption that such questions necessarily involve case-law is false, and the wording of the criterion should therefore be amended by adding the words 'whether arising from statute, judicial authority or other source of law'
- 2013 application form now reads: 'A substantial question of law may be involved (whether arising from legislation, judicial authority, or other source of law)

Conclusions…

- Policy-making is dispersed across networks, and policy-makers have different interests, viewpoints and agendas to one another
- Thus the Lord Chancellor's Department / DCA / Ministry of Justice agenda has been that court clerks are too generous in the grant of legal aid, whereas the Legal Aid Board / Legal Services Commission have been more concerned with inconsistency and inaccuracy, while practitioner and parlt bodies have questioned whether evidence supports change
- This creates opportunities for independent research to achieve some measure of progressive reform, even in unpromising political circumstances
- The ability to use law as 'trumps' to close the socio-legal gap can be helpful in countering the influence of practitioners on formal policy
- But because policy-making networks are constantly in flux, any academic impact may be 'lost through the cracks' (but may also re-appear unexpectedly)
- Achieving lasting academic impact requires a certain amount of luck and willingness to exploit whatever opportunities present themselves
- But I would not wish to argue with those who see this story as no more than a brief glimmer of light in an otherwise bleak and depressing landscape (hence my choice of Powerpoint design)