Judicial Engagement: Lessons from Problem Solving Courts

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INTRODUCTION

This article critically assesses the development of judicial involvement in offender management drawing both on international literature and on experiences of courts in the UK that have adopted 'problem-solving' approaches that aim to enhance the 'therapeutic' potential of court processes. Engaging offenders and encouraging their compliance with community supervision are key probation tasks but in the UK sentencers have typically had little part to play in the management of community penalties once an order has been imposed, unless an offender is brought back to court as a consequence of non-compliance or is made subject to an order that may include an element of periodic judicial review (such as Drug Treatment and Testing Orders (DTTOs) or, more recently, Drug Rehabilitation Requirements).

Increasingly, however, the potential for judges to become actively involved in the management of community sentences is being recognised through the establishment of 'problem solving' courts (such as drug courts, domestic abuse courts and community justice centres) and through provisions that aim to extend the role of sentencers in court-based reviews of offenders' progress. In England and Wales Section 178 of the Criminal Justice Act 2003 provided courts with powers to review offenders' progress on community orders, though initially these powers were only extended to the community justice centres. However, a Green Paper published in April 2009 sought to encourage wider use of the Section 178 powers, with problem-solving principles being extended to all Magistrates Courts in England and Wales "*in order to enable the judiciary to build relationships with offenders, acting as a source of encouragement, praise and reprimand as appropriate*" (Criminal Justice System, 2009, para 51, p. 32). In Scotland, too, the Government sought to extend the use of judicial progress reviews "*as a means of managing compliance and providing encouragement or compulsion where one or the other is required*" (Scottish Government, 2007, p.27). The Criminal Justice and licensing (Scotland) Act 2010 contained provisions for judges to undertake regular reviews of Community Payback Orders[1] to "*enable early identification of potential problems, rather than waiting for formal proceedings for breach of the order…[and] send a positive signal to offenders that those involved in the justice system are there*

to help and support them, as well as to determine and enforce sanctions." (Scottish Government, 2008, p.14).

PERCEIVED ADVANTAGES OF JUDICIAL ENGAGEMENT

Policy interest in and support for periodic judicial review of community penalties appears to hinge principally upon the potential for judicial engagement to enhance offenders' compliance with their orders and there is some evidence that it may be successful in this respect. For example, in the evaluation of pilot DTTOs in Scotland, offenders reported that reviews helped to keep them focused on complying with their orders (Eley et al, 2002) while analysis of interactions between sheriffs and offenders in Scotland's pilot drug courts suggested, as have studies of problem-solving courts in the USA (Frazer, 2006; Gottfredson et al., 2007), that they enhanced participants' perceptions of procedural justice and, in turn, increased the perceived legitimacy of the court (McIvor, 2009). Research on problem-solving courts has highlighted the importance of sentencer continuity over successive reviews in contributing to improved compliance with orders (McKenna, 2007) and reductions in recidivism (Goldkamp, 2004; Matrix Knowledge Group, 2008). It has been argued that the interest and concern shown by judges can help promote *normative* compliance among offenders (McIvor, 2009) and contribute to the 'desistance narratives' (Maruna, 2001) that facilitate and sustain desistance from crime (Wexler, 2001). It has also been suggested that judicial interaction may be particularly beneficial to women, who can more easily communicate their feelings and needs (Saum and Gray, 2008).

CRITICISMS OF JUDICIAL REVIEW

The involvement of the judiciary in periodically reviewing offenders' progress represents a significant cultural shift and enthusiasm for an enhanced role for the judiciary in offender management has not been universal (McIvor, 2010). For example, it has been argued that judicial review may introduce an element of discretionary justice centred on the importance and powerfulness of the judge (Boldt, 1998) that risks "*getting dangerously close to a system that offers scope for accusations of bias and favouritism*" (2002, p. 249). The practice of judicial oversight and its associated exploration of private and personal issues can be conceptualised as a new form of rehabilitation (Nolan, 2001) characterised by newer and deeper forms of surveillance that results in the expansion of state supervision, monitoring and control (Burns and Peyrot, 2003). The individualised nature of sanctions imposed in the event of offenders' failure to comply has been highlighted as evidence that due process may be eroded through the undermining of judicial impartiality and consistency such that information gleaned by sentencers through their interaction with offenders in regular reviews could be used to their disadvantage if their orders are breached or if they reappear in court as a result of further offending (Nolan, 2001).

Despite his criticisms of judicial review, Nolan (2009) suggests that these problems can be avoided if appropriate procedural safeguards are in place, citing the Scottish drug courts as evidence that problem solving practices can operate without conflicting with other legal and judicial concerns. Such safeguards have also been highlighted as a means of ensuring that judges involved in reviewing offenders' progress do not step beyond their professional expertise and jeopardise offenders' rights (Bean, 2002) by making 'therapeutic' decisions that they are neither trained nor competent to make (Hoffman, 2000). They are, however, unlikely to have an impact upon the *content* and *quality* of court-based interactions between sentencers and offenders, yet this may have an important bearing upon the effectiveness of judicial engagement in securing compliance and promoting desistance from crime, particularly given Goldkamp's (2004) finding that recidivism levels of drug court participants varied between judges. Evidence that sentencers' approaches to reviewing orders are highly individualised and context-specific comes from the evaluation of pilot drug courts and youth courts in Scotland where markedly contrasting practices were observed.

JUDICIAL ENGAGEMENT IN PRACTICE

In the Scottish drug court pilots, regular reviews of offenders' progress were regarded by sentencers and offenders alike as a central part of the drug court process. Although some interactions in court

focused on the consequences of failure to comply, court-based dialogues were usually aimed at providing offenders with encouragement and motivation. These dialogues helped to foster engagement between sentencers and offenders that would not have been possible within a traditional adversarial court setting and some participants alluded directly to the *relationship* they established with the sheriff, which helped them to open up and engendered trust. An important feature was the equality and reciprocity that characterised the discussions, even though authority ultimately rested with the sheriff. Offenders believed they were being treated fairly and it was rare for them to be critical of sheriffs even if their orders were breached (McIvor et al., 2006). In the youth courts, by contrast, there was usually very little direct exchange during reviews and sheriffs mostly directed their comments to the defence agent. Judicial dialogue with young people was usually brief and tended to emphasise the consequences of non-compliance, with sheriffs often making normative judgements about the kind of person the young person should strive to become (Popham et al., 2005). While broadly supportive of the review process, sheriffs were keen to stress that the purpose was *not* to establish a relationship or build rapport with the young person. In fact, young people spoke rarely in court and appeared awkward when they did (Popham et al., 2005; Barnsdale et al., 2006). Contrasting approaches to court-based reviews have similarly been observed in the pilot community justice centres in England where in one court they were employed routinely and in another used selectively with offenders who were considered at greater risk of failure to comply (Brown and Payne, 2007).

CONCLUSIONS

While there is growing evidence that court-based reviews can enhance the effectiveness of community supervision and produce positive outcomes, the individualised approach that characterises judicial engagement suggests that this may not always be the case. As Bean (2002, p. 248) has observed, "*drug courts have been designed for judges with high levels of imagination, insight, and moral integrity; there are few controls and few formal constraints…What then of an overly enthusiastic judge, a sadistic judge or an incompetent judge?*". There is clearly a risk that judicial reviews conducted by sentencers who have not received appropriate training for the role might, in practice, do more harm than good by, for example, giving mixed or contradictory messages that undermine rather than enhance the process of supervision. If sentencers are to have a more central role in offender engagement, the limitations of judicial competence need to be recognised and addressed. This will require working closely with those responsible for supervising orders who, in addition to having a better knowledge of individual offenders and their progress, have relevant experience and expertise. An example of such closer working can be found in the Scottish drug court pilots where pre-court review meetings enabled multi-professional discussion of the progress of individual offenders prior to their appearance at review hearings in court (McIvor, 2009). These meetings were valued by sheriffs as a means of informing their engagement with offenders so that that the aims and practices of supervisors were supported and reinforced and the likelihood of achieving 'therapeutic' outcomes was increased.

NOTES

[1] The Community Payback Order was introduced by the Criminal Justice and Licensing (Scotland) Act 2010 and came into effect in February 2011. It replaced existing community penalties (excluding DTTOs) with a single generic order to which, as with the Community Order in England and Wales, a range of specific requirements can be attached.

REFERENCES

Barnsdale, L., MacRae, R., McIvor, G., Brown, A., Eley, S., Malloch, M., Murray, C., Murray, L., Piacentini, L., Popham, F. and Walters, R. (2006). *Evaluation of the Airdrie Sheriff Youth Court Pilot***.** Edinburgh: Scottish Executive Social Research.

Bean, P. (2002). 'Drug courts, the judge, and the rehabilitative ideal', in J. L. Nolan Jr. (ed) *Drug Courts: In Theory and in Practice*. New York, NY: Aldine de Gruyter.

Boldt, R. C. (1998). 'Rehabilitative punishment and the drug treatment court movement', *Washington University Law Quarterly,* 76:1205-1306.

Brown, R. and Payne, S. (2007). *Process Evaluation of the Salford Community Justice Initiative*, London: Ministry of Justice.

Burns, S. L. and Peyrot, M. (2003). 'Tough love: Nurturing and coercing responsibility and recovery in California drug courts', *Social Problems,* 50 (3)*:* 416-38.

Criminal Justice System (2009). *Engaging Communities in Criminal Justice, Cm 7583*, London: The Stationary Office.

Eley, S., Gallop, K., McIvor, G., Morgan, K. and Yates, R. (2002). *Drug Treatment and Testing Orders: Evaluation of The Scottish Pilots*, Edinburgh: Scottish Executive Social Research.

Frazer, M. S. (2006). *The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study of the Red Hook Community Justice Center*.New York, NY: Center for Court Innovation.

Goldkamp, J. S. (2004). *Judicial 'Hands On' in Drug Courts: Moving from Whether to How Drug Courts Work*. Paper presented at the 1st Key Issues Conference of the International Societies of Criminology, Paris.

Gottfedson, D. C., Kearley, B. W., Najaka, S. S. and Rocha, C. M. (2007). 'How Drug Treatment Courts work: An analysis of mediators', *Journal of Research in Crime and Delinquency,* 44 (1): 3-35.

Hoffman, M. B. (2000). 'The drug court scandal', *North Carolina Law Review,* 78: 1437-1534.

Maruna, S. (2001). *Making Good: How Ex-inmates Reform and Rebuild their Lives*. Washington DC: American Psychological Association.

Matrix Knowledge Group (2008). *Dedicated Drug Court Pilots: A Process Report*. London: Ministry of Justice.

McIvor, G. (2009). 'Therapeutic jurisprudence and procedural justice in Scottish Drug Courts', *Criminology and Criminal Justice, 9, 1,* 29-49.

McIvor, G. (2010). Beyond supervision: Judicial involvement in offender management, in F. McNeill, P. Raynor and C. Trotter (eds.) *Offender Supervision: New Directions in Theory, Research and Practice*, Cullompton: Willan.

McIvor, G., Barnsdale, L. Malloch, M., Eley, S. and Yates, R. (2006). *The Operation and Effectiveness of the Scottish Drug Court Pilots*, Edinburgh: Scottish Executive Social Research.

McKenna, K. (2007). *Evaluation of the North Liverpool Community Justice Centre*. London: Ministry of Justice.

Nolan, J. L. Jr. (2001). *Reinventing Justice: The American Drug Court Movement*. Princeton, NJ: Princeton University Press.

Nolan, J. L. Jr. (2009). *Legal Accents, Legal Borrowing: The International Problem-solving Court Movement*. Princeton, NJ: Princeton University Press.

Popham, F., McIvor, G., Brown, A,. Eley, S., Malloch, M., Piacentini, L. and Walters, R. (2005). *Evaluation of the Hamilton Sheriff Youth Court*. Edinburgh: Scottish Executive Social Research.

Saum, C. A. and Gray, A. R. (2008). 'Facilitating change for women?: Exploring the role of therapeutic jurisprudence in drug court', in T. Anderson (ed) *Neither Villain Nor Victim: Empowerment and Agency Among Women Substance Abusers.* New Brunswick, NJ: Rutgers University Press.

Scottish Government (2007). *Reforming and Revitalising: Report of the Review of Community Penalties*, Edinburgh: Scottish Government.

Scottish Government (2008). *Protecting Scotland's Communities: Fair, Fast and Flexible Justice*, Edinburgh: Scottish Government.

Wexler, D. B (2001). 'Robes and rehabilitation: How judges can help offenders "make good"', *Court Review*, Spring: 18-23.