

“This Is Not A Rule”: COVID-19 in England & Wales and Criminal Justice Governance via Guidance

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Soft law is an integral part of the efficient and effective functioning of public administration in England & Wales, with a long history of use. As such, its deployment per se as part of the regulatory response to COVID-19 in England & Wales is unremarkable. What is more striking, however, is the extent to which soft law was deployed, with over 400 pieces of ‘guidance and regulations’ created by the government in Whitehall, to say nothing of the other primary and secondary legislation passed to deal with the crisis. In this article, we do three things. First, we look at the place of soft law in administrative law in England & Wales. We then turn to the broad regulatory framework, including soft law, which governs the COVID-19 pandemic in our jurisdiction. This background then allows us, in the final part of this article, to take a deep dive into the criminal justice system. Here, we show how the senior judiciary predominately relied on soft law in the form of judicial guidance and protocols to manage the system. This was against the backdrop of targeted legislation that provided for an expansion of access to the criminal courts via video and audio links and also a limited number of Practice Directions that have the force of law. Our deep dive allows us to argue that the approach taken by the senior judiciary to the use of soft law during the COVID-19 pandemic has, in a number of ways, been more effective than that taken by the government. That being said there remains room for improvement, particularly as concerns the nature of the judicial guidance issued and clarity in terms of what guidance was in place and when.

I. Introduction

On 16 March 2020, the UK government put England into lockdown.¹ Individuals with symptoms of COVID-19 were strongly advised, albeit not enjoined, to remain at home for fourteen days. ‘Shielding’ (effectively home quarantine) was to be the norm for ‘vulnerable’ individuals for twelve weeks. Non-

¹ The UK has three separate legal jurisdictions: England and Wales; Scotland; and Northern Ireland. This article is concerned solely with England & Wales and, in many places other than the criminal courts, only with England, given devolution powers granted to Wales which meant that it often went its own way in relation to COVID-19.

essential social contact for all was not to take place. Only essential journeys outside the home were permissible. The nation was to work from home, in so far as that was possible. Individuals were to “avoid pubs, clubs, theatres and other such social venues”.² And, from 23 March 2020, where individuals were outside the home they were to maintain ‘social distancing’, keeping at least two metres apart. Public gatherings of more than two people were also prohibited.³ Notwithstanding the fact that it remained permissible under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 to travel outside the home in order to “to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings,”⁴ these restrictions had an immediate impact on the criminal courts’ (the magistrates’ courts and Crown Court’s) ability to administer the criminal process. It is that impact with which this article is concerned.

The immediate response to the government’s lockdown message of 16 March 2020 by the courts was marked. While they were to attempt to carry on functioning through, for instance, the increased use of telephone or video hearings, significant parts of the judicial process were also essentially put in lockdown.⁵ This was particularly acute where the criminal courts were concerned. By 25 March 2020, Her Majesty’s Courts and Tribunals Service (HMCTS), the courts’ administration, had implemented steps to minimise physical in-person hearings in the criminal courts and introduced social distancing in courts where participants in proceedings had to attend in person.⁶ These measures complemented the prohibition on new jury trials commencing, implemented by the Lord Chief Justice,⁷ as well as other measures to reduce the types of criminal proceedings that were to take place.⁸ Why were these drastic steps taken given that the government had made provision for individuals to attend court in order to participate in legal proceedings? Steps that would result in approximately 1,000 jury trials a month not taking place during the period from March 2020 to July 2020.⁹ The reason was architectural. The design of court buildings and courtrooms was not conducive to social distancing. Nor were they, in the main, equipped with adequate air conditioning, which might have reduced the risk of COVID-

² Prime Minister, ‘Statement on Coronavirus (COVID-19)’ (London, 16 March 2020).

³ Cabinet Office, *Guidance - Staying at home and away from others (social distancing)* (23 March 2020); The Health Protection (Coronavirus) Regulations 2020, SI 2020/129; The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350.

⁴ *Ibid*, Restrictions Regulations, reg. 6(2)(h).

⁵ Lord Burnett CJ, Coronavirus (COVID-19) update from the Lord Chief Justice (17 March 2020:I).

⁶ HMCTS, *daily operational summary on courts and tribunals during coronavirus (COVID-19) outbreak* (March 2020).

⁷ Lord Burnett CJ, Coronavirus (COVID-19): Jury trials, message from the Lord Chief Justice’ (17 March 2020:II).

⁸ See for instance, HMCTS Magistrates Courts cases (25 March 2020).

⁹ House of Commons Justice Select Committee, Coronavirus (COVID-19): The impact on prison, probation and court systems, Oral Evidence Session (22 May 2020) (HC 229), Lord Burnett CJ at Q143.

19 transmission. These issues meant that it was difficult at best to enable participants and the public or media attending court, the latter further to the constitutional principle of open justice, to do so safely.¹⁰

By 31 March 2020, the position had crystallised. No new jury trials were taking place, while some that had commenced prior to 17 March 2020 were permitted to continue. Crown Courts were only conducting urgent work, while magistrates' courts were only dealing with limited categories of urgent work.¹¹ In this article, we examine how these changes to the criminal process and the operation of the criminal courts were managed. In particular, we look at the degree to which soft law, the use of guidance (rather than legislation, rules of court, or Practice Directions that have the force of law) have been relied upon as extra-legal, quasi-normative measures to govern the criminal courts' process.

The first part looks at the role and status of soft law generally in administrative law in England and Wales. Part II sets the scene as to how the government relied upon the Coronavirus Act 2020 to manage some aspects of the criminal process. It also looks at how that Act was buttressed and supported by a variety of soft law documents. Part III then takes a deep dive into the criminal justice system. It shows how the senior judiciary predominately relied on soft law in the form of judicial guidance and protocols to manage the system, and did so against the backdrop of targeted legislation¹² and a limited number of 'Practice Directions' (which have the force of law).¹³ We show that while the approach taken by the senior judiciary to the use of soft law has, in a number of ways, been more effective than that taken by the government, further clarity was (and is) needed on a number of fronts. Little has been written about the uses (and abuses) of soft law in relation to the criminal law and criminal justice systems and so our exploration is important both on its face (that is, the importance of an effective criminal justice system to human rights and the operation of the rule of law) and because of the new ground it covers. What we see, through our deep dive into the criminal justice system judicial guidance and protocols issued in response to COVID-19, are familiar themes: questions about

¹⁰ Ibid. Legally there is only one Crown Court (Senior Courts Act 1981, s.45), which sits at different sites across England and Wales. 'Crown Courts' refers to the court sitting at those various sites.

¹¹ HMCTS, *daily operational summary on courts and tribunals during coronavirus (COVID-19) outbreak* (31 March 2020).

¹² Coronavirus Act 2020, ss 53-56, schedules 23, 25.

¹³ See Courts and Tribunals Judiciary, 'Coronavirus (Covid-19) advice and guidance' <<https://www.judiciary.uk/coronavirus-COVID-19-advice-and-guidance/#crimeguidance>> last accessed on 19 September 2020.

clarity and transparency that remind us of the pervasive, complex regulatory place that soft law occupies.

II. The Role of Soft Law in English Administrative Law

In this section, we offer a high level sketch of the place and history of soft law in English administrative law. This provides a scaffold for the sections which follow, which sets out how soft law has been deployed generally in relation to COVID-19 and specifically by the criminal courts. While this is not the place to engage in a significant setting out of what soft law is and is not,¹⁴ some introductory framing may be useful for those readers who have stumbled upon this paper primarily because of their interest in the criminal justice system. Soft law is generally thought of as norms which, while they may have significant practical effects, are usually said not to be binding. Various definitions of soft law exist, and various debates are had about those definitions.¹⁵ These do not concern us today. Instead, and like Senden, we are using soft law as a “reasonably satisfactory umbrella concept” to talk about a diverse group of legal instruments which includes things like guidance, guidelines, circulars, protocols, standards (and so on) which have various functions (leading to various practical, and sometimes legal, impacts) but which do not have the same legally binding effects as hard law.¹⁶ Soft law can be used in a variety of ways: in the place of (sometimes as a precursor to) hard law; alongside (but separate from) hard law; and/or foreseen by, and used to build on, hard law.¹⁷ While a lot of the early work in this area was about definition by contrast (i.e. soft law in opposition to hard law), one of us, in other work, has shown how soft law can be just as differentiated, plural, hierarchical, persuasive and intricate as hard law.¹⁸ This is, as such, a complex governance space, and one which is increasingly important given the turn (by states, regulators and agencies, other public bodies, international institutions, etc) to use

¹⁴ Instead, see: Francis Snyder, ‘The Effectiveness of EC Law’ (1993) 56(1) MLR 19; Kenneth W Abbott and others, ‘The Concept of Legalization’ (2000) 54 International Organization 40; Linda Senden, *Soft Law in European Community Law* (Hart 2004); and John J. Kirton and Michael J. Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004).

¹⁵ See, for example: Gustaaf M Borchardt and Karel Wellens, ‘Soft Law in European Community Law’ (1989) 14(5) E.L. Rev. 267; Christine Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 ICLQ 850; and Oana Andreea Stefan and others, ‘EU Soft Law in the EU Legal Order: A Literature Review’ (March 4, 2019). King’s College London Law School Research Paper Forthcoming <<https://ssrn.com/abstract=3346629>> last accessed 23 November 2020.

¹⁶ *Supra* note 14, Senden 110.

¹⁷ See further: Linda Senden and Ton van den Brink, ‘Checks and Balances of Soft EU Rule Making’ (Report for the European Parliament, March 2012); Linda Senden, ‘Soft Post-legislative Rulemaking: A Time for More Stringent Control’ (2013) 19(1) European Law Journal 57.

¹⁸ Steven Vaughan, *EU Chemicals Regulation: New Governance, Hybridity and REACH* (Edward Elgar 2015).

soft law more and more frequently.¹⁹ While soft law has been of particular interest to public international law and to EU law scholars (with soft law being explored as part of a developing, complex legal order; and something which also poses legitimacy, transparency, enforcement, and other challenges to that order) it is also, as we will now see, of interest to English law scholars as well.

Let us come back now to the role of soft law in English administrative law. Putting to one side case law and the role of the judiciary, the classic hierarchy of law in England begins with primary legislation (statutes made by Parliament) at the top, moves on down to secondary legislation (often in the form of statutory instruments, which are usually approved by Parliament and published, via reforms introduced by the Statutory Instruments Act 1946) and then on to what Harlow and Rawlings label a “ragbag” of rules, orders etc. which do not need Parliamentary approval and are called delegated legislation.²⁰ Beyond primary, secondary, and delegated legislation, there is then what Baldwin has labelled ‘tertiary’ legislation, being that which is created without any express statutory conferral of power.²¹ Where soft law fits into this hierarchy is (and has been) debated.²² ‘Soft law’ in England does not share the neat delineations of other types of rules: “unlike delegated legislation, it is not a term of art”.²³ In addition, exactly what sort of legislative approach (primary, secondary, delegated, tertiary) will be taken in any given situation in England is not always clear. Instead, “rule-making is not a wholly rational process”.²⁴ As Harlow and Rawlings have observed, “There is still no equivalent of the American Administrative Procedure Act to regulate administrative rule-making. There is no European-style Official Journal in existence, and no register of documents such as the EU institutions now maintain is held or promulgated by government institutions.”²⁵ While the UK National Archives has a dedicated space in respect of ‘legislation and regulations’, this does not include soft law, and it is then

¹⁹ Supra note 15, Stefan and others.

²⁰ Carol Harlow and Richard Rawlings, *Law and Administration* (CUP 2012) Chapter 5. With delegated legislation, “to constitute law a text must be traceable to and authorised by a superior rule of law; otherwise it could be declared *ultra vires* and invalidated by a court”.

²¹ Robert Baldwin, *Rules and Government* (OUP 1995).

²² Can soft law only ever be a type of tertiary rule? Or is (for example) guidance which is authorised and foreseen in a statute a type of delegated legislation and also a form of ‘soft’ law (because its validity, and the extent to which it is an accurate interpretation of the underlying statute, depends on judicial confirmation)? See further the pieces listed supra notes 14 to 18.

²³ Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016) 15.

²⁴ Supra note 20, 196.

²⁵ Ibid 192.

a matter of departmental practice as to which government departments publish soft law, and how easy it is to access such, on their own departmental websites.²⁶

Notwithstanding this regulatory ambiguity, “soft law is a fact of public life” in England.²⁷ While there is a long (and relatively rich) history of academic work which looks specifically at what readers of this special issue would think of as within the limits of soft law in England,²⁸ that body of public law scholarship has often been framed in terms of “different labels”.²⁹ And so what we see is work, from the 1940s onwards, which has variously concerned itself with ‘bureaucratic (or administrative) rule making’, ‘executive practices’, ‘administrative rules’, ‘administrative quasi-legislation’, ‘quasi-law’, and ‘government by circular’.³⁰ What this body of scholarship does is to chart the types and uses of soft law as a feature of English public law, and to question its effects.³¹ Here, as in other places, soft law can call into question what it means to engage in good governance, viewed in particular relation to “the classic trio of transparency, participation, and accountability.”³²

While there is, in English public law, a doctrine known as the ‘no-fettering rule’, being “the rule that administrative decision-makers exercising discretionary powers must not fetter their discretion”,³³ the English courts have come to accept soft law (including rules made by administrators which may have the effect of fettering their own discretion) as, in Lord Steyn’s words, an “integral part of the working of a mature process of public administration”.³⁴ Such rules have been seen by many judges as “an essential element in securing the coherent and consistent performance of administrative functions”.³⁵ This does not mean that the courts in England do not engage with soft law. Far from it.³⁶ What the

²⁶ Daniel Greenberg, ‘Dangerous Trends in Modern Legislation... and How to Reverse Them’ (2016) Centre for Policy Studies Paper 5.

²⁷ Rick Rawlings, ‘Soft Law Never Dies’, in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 215.

²⁸ Stretching back to the end of the World War II. See, for example: Robert Megarry, ‘Administrative quasi-legislation’ (1944) 60 LQR 125.

²⁹ *Supra* note 27, 215.

³⁰ On these, see the discussion in *supra* note 21; Aileen McHarg, ‘Administrative discretion, administrative rule-making, and judicial review’ (2017) CLP 267; and Robert Baldwin and John Houghton, ‘Circular Arguments: The Status and Legitimacy of Administrative Rules’ [1986] Public Law 23.

³¹ See, for an overview: *supra* note 23, Weeks chapter 2.

³² *Supra* note 27, 233.

³³ *Supra* note 30, McHarg 269.

³⁴ *In re McFarland* [2004] 1 WLR 1289, 1299 per Lord Steyn.

³⁵ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, at 143 per Lord Clyde.

³⁶ For a rich discussion of the case law, see: *supra* note 30, McHarg.

case law suggests is that decisions made by a public body as a result of soft law are open to judicial review.³⁷ Furthermore, these cases show how soft law instruments (generally) have binding-like effects on those who made them,³⁸ and may give rise to legitimate expectations in favour of those to whom they are addressed.³⁹ We also know that, even where soft law is foreseen (for example, an Act of Parliament grants an express power to create ‘statutory guidance’), the English courts have the residual right to say that that soft law, while potentially “helpful” to some in terms of interpretation, “is a mis-statement or mis-application of what Parliament has enacted.”⁴⁰ There are even cases where judges have *required* decision-makers to create and publish soft law.⁴¹ We turn later on in this piece to how the courts have responded thus far to soft law issued in relation to COVID-19.

III. Regulating for COVID-19 in England: An Overview

In this part of the article, we set out the broad contours of the regulatory field in England that was created as a response to COVID-19 before moving, in the part that follows, to a deep dive into the criminal justice system. Since 1920 (and the Emergency Powers Act), the UK has had legislation which was specifically designed to respond to emergencies. This is now the Civil Contingencies Act 2004. This Act (among other matters) grants the power to ministers (in ss 20 and 21) to make emergency regulations. As Ewing notes, the exercise of that grant of power in the 2004 Act is subject to Parliamentary scrutiny.⁴² This Act was *not* used as part of the response by the UK government to COVID-19 (very possibly because its use would have required Parliamentary scrutiny).⁴³ Instead, two new primary pieces of legislation were passed on 25 March 2020, the Coronavirus Act 2020 (the 2020 Act) and the Contingencies Fund Act 2020. The former passed all of the stages in the House of Commons in a day (on 23 March 2020) and received royal assent two days later. It comprises 102 sections and 29 schedules and is some 342 pages long (as a pdf). Despite this size, the 2020 Act is merely the “headline piece of legislation”,⁴⁴ and is surrounded and buttressed by a supporting cast of other norms and regulatory responses. These include the Public Health (Control of Disease) Act 1984,

³⁷ See *Gillick v West Norfolk* [1986] AC 112; and the discussion in *supra* note 24, McHarg 284ff.

³⁸ On which see: *R (Kambadzji) v Secretary of State for the Home Department* [2011] 1 WLR 1299.

³⁹ See: Rebecca Williams, ‘The Multiple Doctrines of Legitimate Expectations’ (2016) 132 LQR.

⁴⁰ *Boyle v. SCA Packaging* [2009] UKHL 37; at para 67 per Lady Hale.

⁴¹ See, for example, *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 and *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

⁴² Keith Ewing, ‘Covid-19: Government by Decree.’ (2020) *King's Law Journal* 1, 5.

⁴³ See Ewing (*ibid*) and Alan Greene, *Emergency Powers in a Time of Pandemic* (BUP 2020).

⁴⁴ *Supra* note 12.

under which, as Ewing notes, it is possible to introduce secondary legislation “without any form of parliamentary approval or scrutiny, and for these regulations to operate without any form of parliamentary approval or scrutiny.”⁴⁵ This was exactly what was done, with the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/129) made under an emergency procedure of the 1984 Act and on the day following the adjournment of Parliament (that is, on 26 March).⁴⁶ These Regulations do various things and required the closure of various business (restaurants, pubs, cinemas, gyms etc.), made it an offence for a person to leave their home without a “reasonable excuse”, and restricted public gatherings.

The Restrictions Regulations are just one set of over 130 pieces of secondary legislation statutory instruments (SIs) which speak to COVID-19 in England, and where these SIs have been made under 84 different Acts of Parliament.⁴⁷ Beyond the two 2020 Acts, and the more than 130 SIs, there is also a sea of dedicated COVID-19 guidance documents issued by the government to which we now turn. Rawlings’ work shows how in “different periods and different policy contexts certain types of soft law take on a new importance.”⁴⁸ The importance of soft law to the governance of COVID-19 in England cannot be overstated. As of 6 August 2020, the UK government’s COVID-19 ‘guidance and support’ section of its gov.uk website is broken down into 14 sub-fields which apply to England; there being other websites (and other rules, guidance, and support) for Wales, Scotland, and Northern Ireland. Each of the 14 sub-fields (from ‘When someone dies’ to ‘School openings’ to ‘Working safely’) comprises various ‘guidance and support’ documents and web pages. There are, in total, over 400 items which the government has labelled as COVID-19 “guidance and regulation”. As far as we can see, each piece of COVID-19 guidance on the gov.uk website sets out the date it was published, the date it was last updated, and the relevant author (e.g. the Cabinet Office). There is also a list of the updates to the guidance (though these are often insubstantial and, for example, often simply say things like “Updated to reflect latest guidance”). The gov.uk COVID-19 webpages do not keep nor link to copies of the previous guidance. These COVID-19 guidance documents also speak to each other (though there is no clarity as to which, if any, should take precedence in the event of a clash). So, for example,

⁴⁵ Supra note 42.

⁴⁶ These Regulations have been subsequently amended, on 13 May 2020 and 1 June 2020.

⁴⁷ Hansard Society, ‘Coronavirus Statutory Instruments Dashboard’ <<https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard#powers-used-by-ministers>> last accessed on 19 September 2020.

⁴⁸ Supra note 27, 216.

what we might think of as the main piece of guidance (given its ambit) is titled ‘Staying alert and safe (social distancing)’, cross-refers to other, more specific guidance documents (e.g. on travel to work), and is underpinned by a series of specific FAQs. This document contains various statements which begin with “*you should*” but does not speak to its own validity or normative force (nor does it set out how it connects with the 2020 Act or the various SIs discussed above; the “regulations” are mentioned in passing, but nothing more). On a different part of the government website (under ‘Public Health’) the public is told that, “The advice for everyone is to follow this guidance.”⁴⁹ Elsewhere, the public is told that while “Public Health England recommends trying to keep 2m away from people as a precaution” the next line says that “this is not a rule”.⁵⁰

One of the challenges here, as Hickman has noted, is that while the government webpages were set up to provide public health advice on the virus and information on the new, virus-related rules, “rather than distinguishing between these two functions, the coronavirus guidance elided them, obscuring the *nature* of the instructions that the guidance contained.”⁵¹ Another issue that it is not immediately clear to us is the exact basis on which the government has issued all of the COVID-19 guidance that it has. Hickman suggests that the “most likely” candidate is the power granted to the Secretary of State for Health in the National Health Service Act 2006 to provide “information and advice” to the public for the purpose of “protecting the public in England from disease”.⁵² This may well be the case, but the matter is up for debate. The Restrictions Regulations do not refer to “guidance”. The 2020 Act does, however, and in 16 different places. These 16 speak to various matters and various groups who need to “have regard” to certain guidance (e.g. to managers of schools who are subject to guidance issued by the Department for Education), but there is no general power granted in the Act to make guidance. What we have not done, and will leave for others to do, is to check, for each of the more than 130 SIs created to respond to COVID-19, whether they grant any specific guidance-making powers.

The government’s voluminous COVID-19 guidance seems to fulfil various functions, including amplifying the legislation and filling in operational gaps,⁵³ with the gloss (noted by Hickman) that this

⁴⁹ See: <https://www.gov.uk/government/collections/coronavirus-COVID-19-list-of-guidance>.

⁵⁰ See: <https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-COVID-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-COVID-19-recovery-strategy>.

⁵¹ Tom Hickman, ‘The Use and Misuse of Guidance during the UK’s Coronavirus Lockdown’ (2020) 1 < <https://ssrn.com/abstract=3686857> > last accessed on 19 September 2020.

⁵² National Health Service Act 2006 section 2A.

⁵³ On the functions of soft law, see *supra* note 18, Vaughan.

guidance also contains what we might think of as ‘mere’ public health advice.⁵⁴ The complex of the two COVID-19 Acts, 1984 Act, the 130+ statutory instruments (including the Restriction Regulations), the 400+ pieces of gov.uk guidance, and political ‘advice’ (speeches and statements on COVID-19 made inside and outside of Parliament) creates a space in which clarity as to the content, boundaries, and effect of the ‘rules’ is lacking, and where the onus is placed on individuals to parse that which is merely good practice and/or advisory from that which creates binding obligations (something which is both no easy task and, we think, understandably unlikely to be taking place on any sort of close, careful, meticulous basis in the minds of each of the 55 million people who live in England). As Sean Wilken has put it, “the law is not clearly accessible – there is no one document, one can point to and say “do or do not do that which is said here”.”⁵⁵ This COVID-19 regulatory space has been called, variously, “government by decree”,⁵⁶ “the quadripartite approach or the puzzle”,⁵⁷ and (reminiscent of Scott’s idea of post-legislative guidance creating a “legal limbo”)⁵⁸ a place of “normative ambiguity” (where the difference between legal rules and public health advisory norms is uncertain).⁵⁹ We would agree with each of these framings. What we have is a regulatory hot mess.

IV. COVID-19 and the Criminal Justice System

The criminal justice system in England operates within a tripartite framework of statute and common law, procedural rules and Practice Directions, and guidance. In order to consider the extent to which the COVID-19 pandemic has affected this framework, and appraise its consequences, it is first necessary to set out its structure. In doing so we focus on one part of the system: the operation of the magistrates’ courts and the Crown Court (the criminal courts).

The statutory and common law aspects of the framework are well-established. The criminal courts exercise the common law judicial power of the state in respect of the adjudication of prosecutions

⁵⁴ Supra note 51, Hickman 13.

⁵⁵ See: <http://www.keatingchambers.com/wp-content/uploads/2020/05/Legal-impact-of-Government-COVID-19-Advice-by-Sean-Wilken-QC.pdf>.

⁵⁶ Supra note 42, Ewing.

⁵⁷ Supra note 55, Wilken.

⁵⁸ Joanne Scott, ‘In legal limbo: post-legislative guidance as a challenge for European administrative law’ (2012) *RRDE* 76.

⁵⁹ Supra note 51, Hickman.

brought in respect of alleged criminal offences.⁶⁰ Their jurisdiction is exercised by different categories of judge,⁶¹ and, in respect of the Crown Court, jurors.⁶² Their administration, HMCTS, is provided by the executive further to a statutory duty imposed on the Lord Chancellor and it operates as a formal, constitutional partnership between the executive and the judiciary.⁶³ Within the overarching structure, a further combination of statute and common law governs the criminal courts' operation and procedure.

First, the courts' operation. A number of statutory and common law provisions govern the proper operation of the criminal courts. At the most basic level, the courts are required to secure the common law and article 6 ECHR right to a fair trial.⁶⁴ They must operate consistently with the common law principle of open justice,⁶⁵ which is itself an aspect of the common law principle of the rule of law.⁶⁶ Such requirements are, however, subject to a number of restrictions. For instance, criminal proceedings cannot be photographed, video recorded or broadcast outside the court building or its precincts,⁶⁷ except where that is authorised by statutory authority.⁶⁸ Nor can they be audio recorded without the court's permission.⁶⁹ Exceptions to statutory restrictions on broadcasting proceedings outside the court building or precincts are also set out in statute. The Criminal Justice Act 2003, for instance, makes provision to hear witness evidence by way of live television link ('live link').⁷⁰ It further authorises the making of rules of court concerning such processes.⁷¹

⁶⁰ On the judicial power of the state, see *Attorney-General v British Broadcasting Corporation* [1981] A.C. 303; *Peach Grey & Co v Sommers* [1995] I.C.R. 549; Contempt of Court Act 1980, s 19.

⁶¹ Courts Act 1971, s 5; Senior Courts Act 1981, s 16; Courts Act 2003, ss 7, 10, 22, 65 and 66; Constitutional Reform Act 2005, s 7(1).

⁶² Juries Act 1974.

⁶³ Courts Act 2003, s 1; *HM Courts and Tribunals Service Framework Document*, para 1.1, (Cm 8882) (July 2014); *The Lord Chancellor's Judiciary-Related Functions: Proposals (The "Concordat")*, (The Concordat) reprinted in House of Lords' Select Committee on the Constitutional Reform Bill, *Constitutional Reform Bill, Report*, Vol. 1, at 205.

⁶⁴ *R v Horseferry Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, 68; *R v Bentley, decd.* [2001] 1 Cr App R 307, 334; Article 6 of the European Convention on Human Rights; Human Rights Act 1998.

⁶⁵ *Scott v Scott* [1913] A.C. 417; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

⁶⁶ Constitutional Reform Act 2005, s 1.

⁶⁷ See *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 528 (Admin) [2019] EMLR 2016 on the scope of the prohibition on broadcasting. Also see *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB).

⁶⁸ Criminal Justice Act 1925, s 41; Crime and Courts Act 2013, s 32.

⁶⁹ Contempt of Court Act 1981, s 9.

⁷⁰ Criminal Justice Act 2003, pt 8.

⁷¹ Criminal Justice Act 2003, s 55, Criminal Procedure Rules (2015) (CrimPR) rr.18.23-18.26.

Second, the courts' procedure. Again, this is governed by a mix of statute and common law⁷². The most significant part of the procedural framework, which governs the pre-trial and trial process, is contained within the Criminal Procedure Rules (the CrimPR);⁷³ secondary legislation made under authority provided by Part 7 of the Courts Act 2003. The CrimPR are then complemented and supplemented by Practice Directions, which are made under the common law via a statutory procedure and have the force of law.

Within this framework there is, ordinarily, little room for the use of guidance. Where guidance is issued, such as through the Guidance on Reporting Restrictions,⁷⁴ or its Crown Court Compendium, that guidance is generally issued by the Judicial College, which provides training to the judiciary.⁷⁵ The purpose of such guidance is to explain applicable law and procedure, to set out, or offer advice on, best practice. It is descriptive or explicative. Only exceptionally is guidance in the criminal courts used as a means to set out a quasi-normative process that could otherwise have been made via rules of court or Practice Directions. When such guidance has been used in this way by the criminal courts (to set out a quasi-normative process) it is issued by a member of the senior judiciary, rather than the Judicial College. Where guidance like this has been issued, such as the 'Twitter Guidance',⁷⁶ it has not been a substitute for formal law-making either by rules of court or Practice Direction, but either an explanation of best practice to standardize conduct, to fill gaps in the existing law either generally, or as a means to hold-the-ring pending the formal law-making process.

The COVID-19 pandemic effected a number of temporary changes to each aspect of the tripartite framework, while also seeing one aspect of it, the Lord Chief Justice's statutory power under section 7(1) of the Constitutional Reform Act 2005 to issue general listing directions,⁷⁷ used for the first time.

⁷² For instance legal professional privilege (*R v Derby Magistrates' Court, ex p. B* [1996] 1 AC 487, common law), Police and Criminal Evidence Act 1984, s 10(1) (statute); Police and Criminal Evidence Act 1984 Pts VII and VIII (statute).

⁷³ See the Criminal Procedure Rules 2015 (as amended).

⁷⁴ The Judicial College, *Reporting Restrictions in the Criminal Courts* (April 2015; Revised May 2016).

⁷⁵ It does so further to: Constitutional Reform Act 2005, s 7(2)(b); Tribunals, Courts and Enforcement Act 2007, schd 2, para 8, schd 3, para 9.

⁷⁶ Which was a form of interim guidance (those which are, ought to be or are intended, to be formalised within rules or Practice Directions) and concerned '[t]he use of live text-based forms of communication (including twitter) from court for the purposes of fair and accurate reporting'. The Twitter Guidance is now part of the Criminal Practice Direction. See: Lord Judge, Interim Practice Guidance: The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purposes of Fair and Accurate Reporting, (20 December 2010); and Lord Judge, Practice Guidance: The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purposes of Fair and Accurate Reporting; Criminal Practice Directions 2015 [2015] EWCA Crim 1567.

⁷⁷ *R (McKenzie) v The Lord Chancellor* [2020] EWHC 1867 (Admin) at [21]-[26].

That listing power was used to suspend the listing of jury trials.⁷⁸ Further to it, arrangements were also put in place to monitor whether and when jury trials could resume.⁷⁹ The temporary changes stemmed from the 2020 Act, which in turn led to amendments to the CrimPR and its Practice Directions. Those amendments were, as will be seen, limited in scope. Of a wider scope of application, there was also an increase in the use of guidance issued by the judiciary and HMCTS.

The focus of the statutory and rule-based amendments was the problem, as noted earlier, of the compatibility of holding face-to-face hearings in court buildings with the national lockdown. As a consequence, there was a need for there to be, as Lord Burnett CJ explained, “an urgent increase in the use of telephone and video technology immediately to hold remote hearings where possible.”⁸⁰ In order to enable that to happen, primary legislation was required in two respects. First, additional statutory powers needed to be given to enable individuals to take part in criminal proceedings via a ‘live link’. Through such amendments, the criminal courts were given expanded powers to hold video or audio hearings.⁸¹

Additional provision to enable the criminal courts to hold video and audio hearings was not sufficient, however. It was also necessary for statutory intervention to enable such hearings to be held consistently with the constitutional principle of open justice. For that reason, the 2020 Act made provision for such proceedings, where they were wholly remote (i.e., no part of the proceeding took place in a physical court) to be accessible to the public.⁸² The focus of the statutory and rule-based amendments thus concerned enabling remote hearings, albeit not jury trials, to take place and facilitating public access to them. They provided the architecture for expanding the use of such hearings. As with the general approach taken by the government, outlined above, legislation was supplemented by guidance, which was issued both by the judiciary and by HMCTS.

⁷⁸ Lord Burnett CJ, *Review of court arrangements due to COVID-19, message from the Lord Chief Justice*, (23 March 2020).

⁷⁹ Judicial Office, *Jury Trials* (24 April 2020).

⁸⁰ Lord Burnett CJ, (17 March 2020:I) and (17 March 2020: II).

⁸¹ Schedule 23 of the 2020 Act inserted temporary provisions to this effect in to the Criminal Justice Act 2003, while schedules 24 and 26 did the same for, amongst others, the Crime and Disorder Act 1998 and the Magistrates’ Courts Act 1980.

⁸² Schedule 25 of the 2020 Act inserted what had been schedule 6 of the Prisons and Courts Bill 2017 as Courts Act 2003, ss.85A to 85D.

At a national level, guidance was issued by the senior judiciary. On 27 March 2020, for instance, the President of the Queen’s Bench Division issued a Protocol that had been jointly agreed by the Senior Presiding Judge, the Chief Executive of HMCTS, and the Director of Public Prosecutions, which concerned the management of custody time limits in the criminal courts.⁸³ Similarly, national guidance on listing decisions in Magistrates’ courts was issued jointly by the Senior Presiding Judge (SPJ) and deputy Senior Presiding Judge (DSPJ) on 14 April 2020.⁸⁴ Further national judicial guidance also concerned health measures to be taken in Crown Courts (i.e. social distancing, use of hand sanitisers etc.)⁸⁵ and the multi-handers cases guidance, which supplemented prior listing guidance.⁸⁶ By way of contrast, the senior judiciary declined to issue a national protocol or guidance setting out how jury trials should be conducted. They did so on the basis that trial management was a matter for individual trial judges, and was an aspect of judicial independence i.e., soft law could not be issued in a way that was inconsistent with the basic aspects of the right to a fair trial and the rule of law.⁸⁷

At a regional (i.e. circuit) level, guidance was also used to manage the criminal courts’ operation. Here less material is publicly available. One circuit that has made significant amounts of guidance accessible was the Northern Circuit.⁸⁸ Such local guidance can, again, be understood to fall under the two broad headings of best practice guidance and general listing decisions. Examples of the former are: guidance on the use of BTMeetMe, as a means to hold remote hearings;⁸⁹ and information on the re-opening of court buildings, including public health guidance.⁹⁰ Examples of the latter include: guidance on the return of jury trials in North Wales, which includes a combination of public health guidance concerning the holding of trials and general listing directions;⁹¹ and general listing guidance for virtual (remote) hearings.⁹² The basis for such listing guidance on a local, circuit, level is set out in the Criminal Practice Direction.⁹³

⁸³ *Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates’ and the Crown Court* (27 March 2020).

⁸⁴ Senior and deputy Senior Presiding Judge, *Note on Listing in Magistrates’ Courts – COVID-19* (14 April 2020).

⁸⁵ Issued by the Senior and deputy Senior Presiding Judge (23 March 2020).

⁸⁶ Issued by the deputy Senior Presiding Judge (16 June 2020).

⁸⁷ Letter from the Senior Presiding Judge to the Chair of the Bar of England and Wales (17 June 2020).

⁸⁸ See <<https://www.northerncircuit.org.uk/COVID-19/crime/>>.

⁸⁹ Mr Justice Dove, *User Guidance for the use of BT MeetME in the Crown Court on the Northern Circuit* (30 March 2020).

⁹⁰ The Recorder of Leeds, *Information for the Crown Prosecution Service Representatives* (7 May 2020).

⁹¹ Unattributed, *The Return of Jury Trials to North Wales* (12 June 2020).

⁹² HHJ Altham QC, *Local Practice Direction 1/2020: (i) The Virtual Court (ii) Trial Assessment and Resolution Hearings*, (3 July 2020).

⁹³ See Criminal Practice Direction XIII Listing A: Judicial Responsibility for Listing and Key Principles, A2-A6.

In addition to judicial guidance, from the start of the pandemic, HMCTS issued operational guidance concerning the administration of the courts. At its most basic level, this was intended to ensure that court hearings were conducted consistently with government public health guidance,⁹⁴ and how to access remote technology to take part in criminal proceedings.⁹⁵ Where the public and media are concerned, practical guidance was issued explaining what steps could be taken to access remote hearings, where that was permitted by judicial decision.⁹⁶

V. Appraising the approach taken in the Criminal Justice System

In this part of the article, we appraise the use of soft law in the criminal justice system during the pandemic. It considers two issues, both of which focus on clarity: first, clarity in terms of what guidance was in place and when; and secondly, clarity in terms of the nature of the guidance – was it soft or hard law? Generally, what can be seen is that the approach taken to the use of COVID-19 linked guidance in the criminal justice system has avoided some of the problems identified above in respect of the government’s use of soft law as a regulatory response. That is not to say that there is no room for improvement.

One criticism of the government’s approach during the COVID-19 pandemic has been the lack of clarity concerning soft law publication. As noted above, while government guidance carries the date on which it was published or updated, it does not maintain links to previous versions of guidance or illustrate how documents have been updated. Its guidance is also spread across a host of websites i.e., there is no single repository of government guidance. It is thus difficult to ascertain what guidance was in place at any particular time. HMCTS take a more effective approach to the judiciary in terms of accessibility to obsolete and previous versions of documents. HMCTS’s webpages provide access to updates that were issued on specific dates. Those updates provide links to guidance as issued at that time, where it was issued by HMCTS. In that way, it is possible to ascertain what guidance was in place at any particular time and to track changes in guidance by date. The judiciary’s website does not maintain such a historic record. While the judiciary does have an ‘Archived Messages and Guidance’

⁹⁴ HMCTS, *Guidance – Keeping court and tribunal buildings safe, secure and clean*. First issued on 29 March 2020 and updated regularly, with the nature of the updates recorded by date.

⁹⁵ HMCTS, *Guidance – Video enabled criminal hearings: guidance for defence practitioners*. First issued on 1 June 2020 and updated regularly, with the nature of the updates recorded by date.

⁹⁶ HMCTS, *Media Access to Proceedings*; HMCTS, *Open Justice*.

section on its guidance webpage, this only contains five sets of such guidance, none of which relate to the criminal courts. While that might mean that only five such sets of guidance are now obsolete and have been overtaken by later guidance, it is apparent that that is not the case. That is clear from the judiciary's approach to document version control. Like the government, when the judiciary have updated guidance, they have indicated that by date or by reference to a version number. For instance, *Listing Guidance for the Magistrates' Courts* was originally issued on 14 April 2020. It was amended on 7 July 2020. The amendment is by way of an addition highlighted in red. The original version of the guidance is not archived. It is not therefore possible to say what the amendment was i.e., was the text in red entirely new or an amended version of the previously published text? Ironically, the original version can be accessed via HMCTS's daily updates for 24 April 2020.

A more substantive criticism of the judiciary's approach concerns clarity regarding the nature of criminal justice guidance that has been issued. While the judiciary have, generally, taken a more effective approach to differentiate between hard and soft law than the government during the pandemic, there have been exceptions. The suspension of jury trials by the Lord Chief Justice is one such exception. It was announced via a message on the judiciary's website.⁹⁷ It did not provide any reference to or explanation of the basis on which the announcement was made. It could have been any one of guidance, a Practice Direction, or the first exercise of the Lord Chief Justice's general discretion as provided by the Constitutional Reform Act 2005. It was, in fact, the last of the three, and hence hard law. This only became apparent as a result of legal proceedings, which focused on the validity of the suspension of jury trials.⁹⁸ A similar lack of clarity was evident in the *Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in The Magistrates' and the Crown Court*. It was issued as a Protocol, and hence appeared on the face of it to be soft law guidance. That conclusion is borne out by the majority of its substantive contents. However, it also referred explicitly to it setting out 'rules of practice', albeit it went on to state that the 'relevant law was unaffected'; a point reiterated when the guidance was later withdrawn.⁹⁹ There is an ambiguity here. The law referred to within the Protocol is both substantive and procedural law, the latter set out in the CrimPR.¹⁰⁰ Clearly, such a

⁹⁷ Lord Burnett CJ, (23 March 2020).

⁹⁸ R (*McKenzie*) v *The Lord Chancellor* [2020] EWHC 1867 (Admin).

⁹⁹ *Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates' and the Crown Court*, (27 March 2020) at [5]; *Direction from the President of the Queen's Bench Division and the Senior Presiding Judge –Withdrawal of Custody Time Limits Protocol of 9 April 2020* (2 September 2020).

¹⁰⁰ *Ibid.* at [12]-[18] and [23]-[26].

document could not impact substantive law. However, by stating that it sets out rules of practice, that could lead to the conclusion that it was intended to create new rules of practice, and the reference to leaving the law unaffected was a reference to the substantive law. Rules of practice can, however, only be made by statutory instrument and Practice Directions can only be made by the procedure set out in the Courts Act 2003.¹⁰¹ As such, the Protocol clearly could *not* have set out rules of practice in the strict, hard law, sense as it was neither a statutory instrument nor made under the Courts Act 2003 procedure. Given this, it may well have been better for the Protocol to have stated that it set out ‘rules of best practice’, to more properly reflect the fact that it was not seeking to vary or add to the CrimPR, and made clear therefore that it was soft law.

A related issue in respect of clarity concerning the nature of guidance issued arose in respect of the Local Practice Direction 1/2020 concerning the Crown Courts in Lancashire.¹⁰² It was explicitly said to set out binding directions; i.e. it was hard law. In this, it differs from other such Circuit-based, regional guidance issued as well as the *Coronavirus Crisis Protocol* discussed above. On the face of it, it could not, however, have been a Practice Direction, as it was not issued with the concurrence of the Lord Chief Justice and the Lord Chancellor.¹⁰³ Consequently, it would have been soft law despite its wording. Given its substantive content, however, it is clear that it is in fact binding hard law as it is a general listing direction analogous to that issued by the Lord Chief Justice,¹⁰⁴ concerning jury trials, noted above. Our point here is that this document lacked on-its-face specificity as to its own nature.

What we can see here is the judiciary, in a small number of circumstances, issuing guidance documents that are in reality binding decisions, yet there was a lack of clarity over their vires. In others, guidance has been issued that could be said to have the appearance of being binding when it was in fact only best practice. A small number of changes, drawing on existing practice in the civil courts and previous practice in the criminal courts, could be made to ensure that clarity is achieved. Prior to the introduction of the statutory scheme for making Practice Directions in 2005, little-to-no differentiation was made in civil proceedings between what were called Practice Directions, Practice Statements, or Practice Notes. Some, irrespective of their title, were hard law (i.e. a ‘true’ Practice Direction); others

¹⁰¹ *Bonale v Secretary of State* [2009] EWCA Civ 171, [2009] 3 All ER 340.

¹⁰² *Supra* note 92, Altham.

¹⁰³ Courts Act 2003, s 74(2).

¹⁰⁴ One presumably issued under section A.5 of Division XIII of the Criminal Practice Direction 2015.

were soft law.¹⁰⁵ With the introduction of the statutory scheme, the term Practice Direction has been reserved to (true) Practice Directions issued under that scheme.¹⁰⁶ The approach taken in the civil courts could beneficially be adopted in the criminal courts. If adopted, it would provide a clear indication of what was hard law and what was soft law.

Additional clarity has also, generally, been provided by Practice Guidance specifying that it is issued as guidance and not as a Practice Direction. While that approach has generally been adopted in the civil courts, it was also applied to the criminal courts' 'Twitter Guidance', discussed above.¹⁰⁷ Alternatively, all soft law guidance issued by the judiciary could explicitly state that it is not intended to be prescriptive.¹⁰⁸ If these further approaches were adopted in the criminal courts, greater clarity would arise as to what was and was not intended to be guidance and what is law. Similarly, where the intention was to issue binding directions that were not rules of court or Practice Directions, clarity could be given by adopting either the approach taken by the High Court's Queen's Bench Division's Senior Master, where she issued a general direction as a court order¹⁰⁹ or it specify that it is a listing direction or general listing direction. And where there was a need for new rules of practice to be issued, which would require an amendment to the CrimPR and which could not, therefore, be achieved via the Practice Direction-making power,¹¹⁰ the CrimPR could be amended for the future to enable temporary rules, which could vary or amend the CrimPR subject to a time-limited review or sun-set clause, to be made by Practice Direction during an emergency. In this way, greater clarity and transparency could be achieved and, with the final proposed change, an effective mechanism for rule change during emergencies could be introduced so as to ensure that hard law was not issued in the guise of soft law. If they were to do so they would reduce the risk that they would inadvertently go beyond their proper powers or give the impression that they had done so. Given that the judiciary are the guardians of the

¹⁰⁵ See Practice Statement (Companies: Schemes of Arrangement) [2002] 1 W.L.R. 1345, which was replaced by Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006), unrep., (26 June 2020). If the 2002 Practice Statement had been a Practice Direction it could only have been revoked by a Practice Direction, which complied with the statutory scheme for Practice-Direction Making i.e., the 2020 Practice Statement would have had to have been agreed to by the Lord Chancellor.

¹⁰⁶ Civil Procedure Act 1997, s 5, which is comparable to that for the criminal courts set out in Courts Act 2003, s 74.

¹⁰⁷ See Interim Practice Guidance, para 4; Practice Guidance, para 1; also see, in respect of civil proceedings, Practice Guidance on Interim Non-Disclosure Orders [2012] 1 W.L.R. 1003, para 1.

¹⁰⁸ As was done for instance in: Senior and deputy Senior Presiding Judge, *Guidance for Crown Court Judges – Covid-19 Measures* (23 March 2020).

¹⁰⁹ Order, dated 25 March 2020, IN THE MATTER OF the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Taking of Evidence Regulation (Council Regulation (EC) 1206/ 2001) and IN THE MATTER OF the Coronavirus Act 2020, reprinted in G. Vos (ed), *Civil Procedure* 2020 Vol.1 at A.7.8 (Thomson Reuters, 2020).

¹¹⁰ *Bovale v Secretary of State* [2009] EWCA Civ 171, [2009] 3 All ER 340 at [11].

rule of law, it would appear imperative that they take such steps. Where a criminal conviction is a possibility and individual liberty is at risk, the importance of that imperative cannot and should not be underestimated. On the contrary, satisfying it is a necessity in all circumstances, pandemic or otherwise.

VI. Conclusion

While soft law is an integral part of the efficient and effective functioning of public administration in England & Wales and has a long history of use, the extent of its deployment as part of the regulatory response to COVID-19 in England & Wales is striking. To date, over 400 pieces of ‘guidance and regulations’ have been created by the government in Whitehall, to say nothing of the other primary and secondary legislation passed to deal with the crisis. This article considered the place of soft law in English administrative law, charted the regulatory field that governs the COVID-19 pandemic in our jurisdiction, and then took a deep dive into the English criminal justice system. Here, we have shown how, and against the backdrop of targeted legislation that provided for an expansion of access to the criminal courts via video and audio links and a limited number of Practice Directions that have the force of law, the senior judiciary predominately relied on soft law in the form of judicial guidance and protocols to manage the system. Our deep dive allowed us to argue that the approach taken by the senior judiciary to the use of soft law during the COVID-19 pandemic has, in a number of ways, been more effective than that taken by the government. That being said there remains room for improvement, particularly as concerns the nature of the guidance issued and clarity in terms of what guidance was in place and when.