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Comment

Reflecting on 'Health technology appraisal and the courts: accountability for reasonableness and the judicial model of procedural justice'

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The theoretical concept of 'procedural justice' has been increasingly influential in structuring responses to health care resource allocation decisions (Daniels and Sabin, 2008). But do such models effectively translate out when we scrutinize the fairness of the decisions made by resource allocation bodies? In his influential 2011 Health Economics Policy and Law paper Syrett addresses two fundamental questions. The first question is that of the fairness of national-level technology appraisal agencies decisions. He attempts this through the analysis of how the courts themselves have responded to considering fairness in relation to decision making concerning these national-level processes. Second, he is also concerned with what he refers to as the "judicial understanding of constituent ingredients of procedural justice". In discussing this he uses the model advanced by Daniels and Sabin which is that of "accountability for reasonableness" (Daniels and Sabin, 2008). Syrett's analysis breaks important new ground as he is the first scholar to undertake this task. The paper highlights the challenges and tensions in translating theoretical conceptions of such procedural justice – accountability for reasonableness into the real world when resource allocation decisions come under forensic scrutiny in the courtroom.

'Procedural justice' can at one level be seen as something inherent in all decisions – effectively the 'right to a fair trial'. This is something dear to the heart of lawyers, which is built into civil and political human rights declarations across the world. More problematic is the issue once such procedural questions are involved in a context in which the determination itself is less directly linked with questions of life and of liberty. Where does and indeed should procedural justice bite when administrative decisions in relation to health care resource allocation are concerned? In the context of administrative decision making in the United Kingdom, procedural justice

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can be seen through the lens of the application of the legal principles of 'natural justice'. At a general level this incorporates the right to a fair hearing and the right to an unbiased decision maker. The precise components of that 'fair hearing' right are fundamentally context dependent in relation to the administrative decisions.

Are health resource allocation bodies themselves legitimate decision-makers? As Syrett says there are two possible claims for legitimacy. The first is that of expertise, the second is concerned with procedural justice. He suggests that fairness of process is connected to the legitimacy and acceptance of decisions. Moreover, he argues this can be seen as independent of substantive outcomes. In interrogating whether resource allocation bodies are procedurally just and fair, Syrett draws upon the influential approach to procedural justice in Daniels and Sabin's (2008) accountability for reasonableness model. Daniels and Sabin discuss 'procedural justice' – the very difference in language itself of course here is notable. A 'natural justice' perspective is imbued with principles of fundamental rights to a 'procedural justice' perspective – fairness but in an administrative context which might not be effectively amenable to 'judicial' principles. In relation to health care priority setting procedural justice according to Daniels and Sabin has four elements. These are publicity, relevance, revision and appeals. While this has been a widely adopted model it is not immune from criticism. As Syrett comments, there is a danger in this being taken literally as a 'check list' with criteria being ticked off and that this in itself does not address the question of the 'connective tissue' with the democratic process. A range of other criticisms have been made including the argument that the model itself can downplay the real value of public participation in decision-making itself, to the difficulty of drawing effective boundaries between reasonableness and procedural questions (Hasman and Holm, 2005).

The role of the courts in relation to the debates concerning procedural justice around health care resource allocation is not uncontroversial as Syrett notes. Litigation is seen as problematic by commentators such as Daniels and Sabin. It can be a 'threat' – essentially the game is keeping out the lawyers. Resource allocation decisions can be seen as fundamentally complex polycentric decisions – simply not suitable for judicial resolution. There are also concerns that the judiciary may be seen as having "a relative absence of democratic credentials and at least implicitly- a tendency for judicial inclination towards the individual" (Syrett, 2011: 474). However, as Syrett rightly agues this can be seen as unsatisfactory. There can be real problems in judicial resolution – problems the judiciary themselves recognize. Nonetheless, the role of the judiciary may enable such decisions to be seen as 'legitimate'. This is not simply an exercise in gaining perceived legitimacy. This also operates in ensuring that a decision itself is truly regarded as legitimate because such fundamental criteria have been taken into account.

One interesting question is the extent to which any model of 'procedural justice' itself can be seen as incorporating universal principles which can be effectively

translatable and applicable across jurisdictions in relation to an issue such as health resource allocation. Is there a common understanding of what this actually is? Or other than at a very high level of generality is this context dependent? How would Daniels and Sabin's approach translate out in relation to a real world context? Syrett's analysis encompasses judicial determination in relation to scrutiny of resource allocation agencies across a number of jurisdictions, including England and Wales, Australia and New Zealand. All of these are of course interlinked through their original jurisdictional bases. In addition, Syrett has selected them as they provide useful comparators, since all these jurisdictions have operated what are relatively long standing appraisal systems.

What Syrett's paper demonstrates is that there is a commonality of approach across some of the cases in the jurisdictions studied, although as he acknowledges these are a very Anglo-centric series of examples. Essentially in all the jurisdictions, the courts are prepared to scrutinize and prepared to criticize and hold bodies to account. But what does this show? There are problems here and Syrett acknowledges them. Cases are the tip of the iceberg of actual decision making; below the surface things may be very different indeed. Moreover, a decision may be held to be procedurally unfair but as he suggests may nonetheless be accepted.

Syrett highlights how in scrutinizing the operation of resource allocation agencies, fairness is a central ground for review. This is consistent with the approach historically taken to resource allocation decisions in the NHS. The relationship between the courts and NHS resource allocation has notably developed over the last three decades. Initially the courts were acutely deferential to the NHS itself and to clinical judgment in relation to resource allocation. *R v Secretary of State for Social Services, ex p Hincks*. [1980] 1 BMLR 93. *R v Central Birmingham HA, ex p Walker* (1987) 3 BMLR 32. *R v Central Birmingham Health Authority, ex p Collier*, unreported, Court of Appeal 6 January 1988. LEXIS transcript. The courts were not prepared to pierce the veil and engage with the substance of administrative decisions, at least not initially. This even applied where a decision might literally be a matter of life and death as exemplified in the *Child B* case concerning funding for experimental cancer treatment of a child. Here, while Laws J. held that health authorities could not simply "toll the bell of tight resources", the Court of Appeal in a judgment delivered on the same day were quick to quash such aspirations. As Sir Thomas Bingham held:

> the courts are not, contrary to what is sometimes believed, arbiters as to the merits of cases of this kind. Were we to express opinions as to the likelihood of the effectiveness of medical treatment, or as to the merits of medical judgment, then we should be straying far from the sphere which under our constitution is accorded to us. We have one function only, which is to rule upon the lawfulness of decisions. That is a function to which we should strictly confine ourselves (p. 905).

In many ways of course this was not surprising. However, the courts have shown in other NHS resource allocation cases that they are prepared to scrutinize

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the exercise of discretion and criteria utilized in reaching such decisions and critically their 'reasonableness' and rationality (*R (on the application of Rogers) v Swindon NHS Primary Care Trust and another* [2006] EWCA Civ 392). In relation to resource allocation agencies, the courts steer very much away from scrutiny of the decision making discretion. Does this mean that because the courts are considering the decision of a health resource allocation agency they are even more cautious or does it mean that this is simply indicative of the fact that the courts are in practice only given the opportunity to examine what are a very limited number of such cases? It may be both.

Syrett suggests that the delineation between matters of procedure and of substance can be seen as 'indicative of the courts acceptance or otherwise of the claims to legitimacy by the agency. That may be the case – but equally it may not. The court may simply be undertaking the role of reviewing a decision by a public body in the area of health care. The very fact that it comes under the ambit of judicial review in itself is an assumption of *prima facie* legitimacy as a decision maker, as opposed to whether its specific decisions are legitimate. Whether the body is legitimate is a separate question from which elements of the body's decision on the particular issue under review will be reviewed. The courts across a number of cases in different jurisdictions examined in Syrett's paper showed that they were willing to review procedure while at the same time they pulled back from review that would encroach upon the matter of substance. Thus, for example, in *R (on the application of Servier Laboratories LTD) v NICE* [2009] EWHC 281 (Admin) Holman J. held that:

> It is important to stress at the outset that NICE is the specialist expert body charged with making appraisals and decisions of this type. The court is not. I have neither the right, still less the expertise to review the decisions as to their substance . (*Servier* quoted at p. 480 Syrett, 2011)

Syrett's review of the case law identifies judicial concern with transparency of decision making. This is reflective of the later suggestion made by Daniels of accountability for reasonableness including transparency (Daniels, 2008), although Daniels and Sabin's work does not itself take a broader public participation type approach. The courts are concerned with participation. However, judicial understanding of transparency and participation itself is definitely restrictive. The courts appear to be generally more concerned with stakeholders than with the broader public and participation is seen in narrower terms (though c/f the discussion of *Walsh* on Syrett, 2011: 485).

In relation to the third Daniels and Sabin criteria of appeals and revision different approaches are taken in relation to appeals processes by the resource allocation bodies across the jurisdictions. Syrett suggests that the courts may in effect remedy the defect in the absence of such process through the judicial review process itself being ultimately able to send a decision back to be re-determined. Syrett suggests that judicial involvement can itself fulfil the fourth criteria in Daniels and

Sabin's category that of enforcement or "regulation to ensure that other procedural conditions are met" (Syrett, 2011: 474).

Syrett's article provides an incisive, critically important analysis as to how theoretical approaches to questions of procedural justice can translate out in relation to judicial decision making in the health care context. Daniels and Sabin's criteria provide a very interesting way to interrogate the case law concerning resource allocation agencies, particularly given the importance placed upon such models by bodies like NICE. This in turn informs our interrogation of the case law. It helps us to reflect on what is 'fair' in relation to decision making, but of course this is a theoretical model, one which has already been subject to criticism by many commentators. Moreover, with any such model when it is translated out into the 'real world' it is inevitably subject to the constraints of time and context in its interpretation. What will be interesting to see in the future is whether a defined theoretical approach to procedural fairness and accountability for reasonableness if utilized by policy bodies then in turn ultimately frames and shapes judicial expectations of such approches. Were that to be the case then there would be a clear trajectory from theory to policy to implementation. However, that in turn assumes that the courts will be willing to have their determinations 'shaped' in such a way. Over time the opposite might be the case. In an era in which resource allocation decisions were entrusted to the oversight of the Secretary of State for Health the courts in the United Kingdom at least were cautious in relation to intervening. Will this change? It is not impossible. Look again at the cases concerning patients. Over the last two decades there has been greater, albeit still not radical alterations, in judicial willingness to challenge such decisions (*R v North and east Devon Health Authority, ex p Coughlan* [1999] Lloyd's Rep 306; *R v North Derbyshire HA ex parte Fisher* [1997] 8 Med LR 327. *R (on the application of Rogers) v Swindon NHS Primary Care Trust and another* [2006] EWCA Civ 392). Moreover, now the very role of the Secretary of State itself has changed through the Health and Social Care Act 2012, and bodies are increasingly detached from the centre, might this mean that the courts may be more willing to scrutinize decision-making? An enhanced judicial approach to procedural fairness in this area might have very interesting implications. Nonetheless, given that engagement with even broader principles of human rights-based analysis has been exceedingly limited such increasing judicial scrutiny is likely to still be some way off (*R v North West Lancashire Health Authority ex parte A D and G.* [2000]1 WLR 977. *R (on the application of Alexander Thomas Condliffe) v North Staffordshire PCT* [2011] EWCA Civ 910).

References

Daniels, N. (2000), 'Accountability for reasonableness', *British Medical Journal*, **321**: 1300–1301.

Daniels, N. (2008), *Just Health: Meeting Health Needs Fairly*, New York: Cambridge University Press.

Daniels, N. and J Sabin (2008), *Setting Limits Fairly: Learning to Share Resources for Health*, 2nd edition, Oxford: Oxford University Press.

Hasman, A. and S. Holm (2005), 'Accountability for reasonableness: opening the black box of process', *Health Care Analysis*, **13**: 261–273.

Syrett, K. (2011), 'Health technology appraisal and the courts: accountability for reasonableness and the judicial model of procedural justice', *Health Economics, Policy and the Law*, **8**: 469–488.