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Book Note

LAW, LEGITIMACY AND THE RATIONING OF HEALTH CARE,
by Keith Syrett¹

RIVKA BIRKAN

IN *LAW, LEGITIMACY AND THE RATIONING OF HEALTH CARE*, Keith Syrett discusses the ethical and political problems inherent in decisions to ration finite healthcare resources, where need and public expectation of costly treatments exceed supply.² As rationing decisions become more explicit, and the public becomes increasingly aware that resource constraints impact healthcare allocation, the government is increasingly challenged to distribute scarce resources in a way that will be publicly accepted as legitimate.³ Syrett argues that public law adjudication—including judicial review of administrative decisions and constitutional litigation—can help public decision makers devise a legitimate method of rationing publicly funded healthcare resources within the “developed world”⁴ and stimulate deliberation within civil society. The author discusses this first theoretically, and then compares his theory with cases from the United Kingdom, Canada, and South Africa.

Syrett argues that commonalities between public law norms—specifically transparency, accountability,⁵ and reason giving—together with the procedural justice model of “accountability for reasonableness” (AFR) in healthcare rationing⁶ create an opportunity for courts to facilitate the process

1. (Cambridge: Cambridge University Press, 2007) 266 pages.

2. *Ibid.* at 43.

3. *Ibid.* at 100.

4. *Ibid.* at 13, 14, n. 53, 128.

5. *Ibid.* at 231.

6. *Ibid.* at 142-47. The AFR model was conceived by Norman Daniels and James Sabin. See Norman Daniels & James E. Sabin, *Setting Limits Fairly: Can We Learn to Share Medical Resources?* (New York: Oxford University Press, 2002) [Daniels & Sabin, *Setting Limits*

of legitimizing allocation decisions. The AFR model—adopted by the globally influential, UK based, National Institute for Health and Clinical Excellence⁷—is intended to assist government bodies to make healthcare rationing decisions that the public will consider legitimate.⁸ The four AFR requirements are 1) public accessibility to rationing reasoning and decisions; 2) relevance (*i.e.*, rationales for allocation decisions rest on evidence, reasons, and principles that all fair-minded people⁹ can agree are relevant to deciding how to meet the population's diverse needs under necessary resource constraints); 3) internal dispute resolution and appeals mechanisms, and an opportunity for the government decision maker to revise a decision in light of new evidence; and 4) voluntary or publicly regulated enforcement of the other conditions.¹⁰

Syrett says that courts can facilitate legitimate government decision-making by assisting in the dispute resolution and appeal processes and by enforcing the public access and relevance requirements. He adds that parties will resort to litigation if internal dispute mechanisms are inadequate,¹¹ and that the courtroom can become a venue for deliberation over allocation decisions. Judicial reasoning and argumentation, reason-giving requirements imposed on governments,¹² and the publicity of decisions can improve deliberation on specific rationing decisions and allow for informed debate within civil society.¹³

Syrett also contends that judicial review improves legitimacy by allowing public decision makers to use their powers for the common good. Through review of administrative decisions carried out by other public law mechanisms (including tribunals, inquiries, ombudsmen, regulatory mechanisms, and

Fairly]; Norman Daniels & James Sabin, "The Ethics of Accountability in Managed Care Reform" (1998) 17:5 Health Affairs 50 [Daniels & Sabin, "Ethics of Accountability"].

7. Syrett, *ibid.* at 107.

8. *Ibid.* at 100-10.

9. *Ibid.* at 104, citing Daniels & Sabin, *Setting Limits Fairly*, *supra* note 6 at 44.

10. Syrett, *ibid.* at 102, 103 (discussing Daniels & Sabin, *Setting Limits Fairly*, *supra* note 6, and Daniels & Sabin, "Ethics of Accountability," *supra* note 6).

11. *Ibid.* at 134.

12. *Ibid.* at 202.

13. *Ibid.* at 146.

internal complaint systems¹⁴), the courts can enforce a high standard of procedural fairness within internal regulatory processes and internal dispute resolution mechanisms;¹⁵ uphold democratic and constitutional values of equality;¹⁶ and invalidate enactments that are based on personal moral preferences.¹⁷

Syrett compares his theory with judicial decisions about health care rationing in the UK, Canada, and South Africa. He argues that courts in the UK and Canada are overly deferential and restrained in judicial review of allocative decisions of government agencies, hospitals, and administrative tribunals—especially where the authority acknowledges financial constraints—and are not living up to their potential to engage the government in deliberation and respond to the legitimacy problem.

However, in rights-based adjudication founded on constitutional claims, Syrett says Canadian and South African higher courts facilitate transparent deliberation and legitimate decision-making through “dialogue” with government decision makers.¹⁸ The courts review the constitutionality of government decisions and laws and require regulators to explain and justify their reasonability.¹⁹ Syrett commends South Africa’s Constitutional Court for helping to interpret the Republic’s constitutionally entrenched positive obligation on the government to provide medical care;²⁰ subjecting government allocation decisions to a reasonableness standard;²¹ and, without prescribing the remedy, assisting the other branches of government to establish the context of their obligations.²²

14. *Ibid.* at 127.

15. *Ibid.*

16. *Ibid.* at 153, citing Carlos Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996).

17. Syrett, *ibid.*

18. *Ibid.* at 200, citing Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 75.

19. Syrett, *ibid.* at 202.

20. *Ibid.* at 223.

21. *Ibid.* at 219.

22. *Ibid.* at 218, 223-25, 243.

Syrett encourages the judiciary to ensure legal accountability where there is an alleged infringement of constitutional rights or abuse of administrative powers.²³ He cautions, however, against courts crossing the line between facilitating legitimate decision-making and usurping the role of the executive and legislative branches.²⁴ He discusses *Chaoulli v. Quebec (Attorney General)*²⁵ as a case in which the unelected judiciary defeated the wishes of the elected legislators (with respect to Quebec's Medicare program)²⁶ and criticises the Supreme Court of Canada for engaging in unconstitutional judicial activism.²⁷

23. *Ibid.* at 243.

24. *Ibid.* at 240, 242.

25. [2005] 1 SCR 791.

26. Syrett, *supra* note 1, at 196.

27. *Ibid.* at 196, 206, 229, 242.