COMMENTARY

Priority-Setting on the Path to Universal Health Care

Leah Z. Rand[1]

1. PORTAL, HARVARD MEDICAL SCHOOL, BOSTON, MA, USA.

Keywords: Priority-Setting, Socioeconomic Rights, Healthcare Resource Allocation, Procedural Justice, Health Technology Assessment

DiStefano and colleagues identify a key tension: despite a country's commitment to achieving universal health care, there will be limits on what is available to individuals.[1] While resources dictate the need for limits, the specific limits implemented should be justified by values or reasons. But the identification of the substantive reasons for priority-setting is only part of the task — the process of making priority-setting decisions is important for establishing the legitimacy of the outcome. Priority-setting is a fundamentally public activity that acknowledges the limitations on realizing a right to health and access to all needed health care. As such, priority-setting should not occur in the courtroom, but through accountable government actors assigned the specific role; judicialization of priority-setting should only occur to correct missteps in procedure or unreasonableness.

Though a national insurance system supports population health and individual well-being by providing coverage and access to health care, it is constrained in what it can cover because of limited financial, personnel, and nonfungible resources. In health systems that are tax-funded, health services are in direct competition for public funding with other socially valuable projects, like education, transportation, and social services. Therefore, priority-setting decisions must be made about the provision of services. Because the trade-offs inherent in these decisions affect people's ability to lead healthy lives and achieve social opportunities, priorities should be set fairly and on the basis of justifiable reasons.

Drawing on Rawls's concept of reasonableness, the standard of justifiable basis for priority-setting is that of reasonableness. People are reasonable when they propose to their equals or those whom they are committed to cooperating with (rather than subduing, by contrast) basic principles or reasons that the others can accept, and all agree to follow them.[2] People will interpret evidence, claims, and the application of reasonable principles to make a judgment; these judgments will often differ between people but because they are grounded in reasonableness, they are considered "reasonable disagreement."[3] The fact of reasonable disagreement is inevitable. A priority-setting body should act reasonably, that is offering reasons that its constituents can agree are appropriate for the type of decision, but the possibility of reasonable disagreement over a decision is inescapable.[4]

Reasonable disagreement does not make the resulting decision unreasonable or illegitimate. However, if the priority-setting were to be based on reasons that were unreasonable, then the priority-setting decision would similarly be unreasonable, and it would be right to question it and the process that led to such a decision. The stakes are high for all involved.

Identifying the values that will be used in priority-setting is, therefore, essential to the whole project of

Leah Z. Rand, D.Phil., *is a researcher at the Program On Regulation, Therapeutics, And Law (PORTAL), Division of Pharmacoepidemiology and Pharmacoeconomics, Department of Medicine, Brigham and Women's Hospital and Harvard Medical School, and the Harvard Medical School Center for Bioethics, both in Boston, MA.*

The Journal of Law, Medicine & Ethics, 51 (2023): 150-152. © 2023 The Author(s)
DOI: 10.1017/jme.2023.51

reasonable resource use that is responsive to a population's needs, just, and fair. In their article, DiStefano and colleagues describe two approaches taken by the SAVE-UHC working group to identify values that should be used in health technology assessment (HTA), the evaluation of individual or select therapies or interventions and their effects on health and the health system. Their study began with stakeholder groups who deliberated on simulated HTA cases.[5] Public involvement in the process can surface new values, specifications of broad principles relevant to specific communities, and ensure that priority-setting is informed by those who will be affected but are less likely to have vested interests.[6]

DiStefano and colleagues identify a key tension: despite a country's commitment to achieving universal health care, there will be limits on the health care available to individuals.

However, the principles that are identified can be too broad to be helpful in a specific case or come into conflict with each other when not all can be satisfied. The work of specifying the value to the particular case and balancing competing commitments should fall to an HTA body that has been given political and legal authority to make such decisions. An HTA body, usually a government agency or independent organization, has responsibility to the entire population, so it is responsible for promoting the health rights of the community.[7] HTA bodies are tasked with making decisions about how to use resources to meet both individual health needs and promote the health of all.

DiStefano and colleagues analyze judicial opinions to identify priority-setting values and their specification. This serves as a second source to identify and confirm the choice of guiding values, including surfacing values that were missed through engagement or scholarship and may be legally or culturally relevant in the country. Additionally, the judgements must be more careful in the specification of the values to the case than the proposed framework needs to be, because the judgments interpret what the values mean in practice.

DiStefano and colleagues conclude that the review of judgments reveals which values are most relevant to priority-setting and how many values should be typically considered for any given case. But this is an incomplete explanation. While legal judgments may serve to identify how a particular value, like equity, is interpreted consistent with a country's constitution, the courts themselves act on the constitution and the law. Descriptive claims about the law and what has been decided do not in themselves identify the full scope of reasonable values that should be included or how they should be balanced to arrive at a decision.

Indeed, courts in South Africa and elsewhere have, on most accounts, been reluctant to become involved in deciding priority-setting cases.[8] In the judgement for *Soobramoney*, the justices wrote "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters." and "Courts are not the proper place to resolve the agonising personal and medical problems that underlie these choices."[9] The judiciary can only examine in isolation an individual case before it, and cannot judge its effects on others or the programmatic decision-making about how to use society's resources to best advance welfare.[10] Litigation around access to a specific therapy raises concerns: it is focused on achieving access to a medicine for some people (prisoners, pregnant women with HIV) rather than considering the effects on the population as a whole and improving their health.[11] This concern was expressed in the *TAC* judgment:

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.[12]

The resource constraints remain a barrier to the full realization of social and economic rights, and the individual, judicial approach may undermine communal advancement towards their realization.[13] Rather, as the justices in *TAC* note, the role of the courts is in determining that the state (or HTA body) is working towards the realization of meeting health needs and doing so on the basis of reasonable values.

Beyond specifying the constitutional acceptability of values, the courts have an important role to play in enforcing the procedure of priority-setting, independent of its outcome. The substantive content of deci-

The Journal of Law, Medicine & Ethics, 51 (2023): 150-152. © 2023 The Author(s)

sions — the values that inform them — are only one part of priority-setting; the other is a fair and legitimate process. Procedures for making decisions should include specifying values and fitting them to the case at hand to determine their relevance (rather than the assumption that only some will be relevant). Following Daniels and Sabin's accountability for reasonableness framework, which has informed HTA agencies and priority-setting, the fair process must also include transparency about the reasons for decisions and a means to both appeal the decision and enforce the process.[14]

It is in realizing the process of priority-setting that courts play an important role. Courts make explicit the reasons for a decision and the specification of those reasons to a case, allowing the public to assess the reasonableness of the decision.[15] They provide a means of appeal and enforcement, even when there is reasonable disagreement, dissatisfaction, and anguish that will come with decisions to limit access. The courts play an essential role to ensure the fair application of priority-setting procedures by HTA bodies and to determine whether the values that inform these decisions are reasonable.

The need for priority-setting will continue until there are inexhaustible resources to meet health needs and all other social goods. It is not the fact of making reasonable and fair decisions about priorities that undermines equality. However, the fairness of the decisions depends on having an HTA body that is established to make such decisions and has the proper legal authority and procedures in place. DiStefano and colleagues highlight the need for fair and reasonable priority-setting even as a country makes progress towards universal health care. In *Soobramoney*, Justice Sachs writes "In all open and democratic societies based upon dignity, freedom and equality … the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care."[16] When that process of rationing or priority-setting is conducted in the right way and using values that meet the standards of reasonableness, then the decisions that result are fair to those who need health care now and in the future.

Note

This work was supported by Arnold Ventures; the author reports contracts between the National Academy of State Health Policy, Colorado, and Massachusetts with Mass General Brigham for consulting on state prescription drug policy.

References

1. M. J. DiStefano, S. Abdool Karim, C.B. Kubiner, and K. J. Hofman, "Integrating Health Technology Assessment and the Right to Health in South Africa: A Qualitative Content Analysis of Substantive Values in Landmark Judicial Decisions," *Journal of Law, Medicine & Ethics* 51, no. 1 (2023): 131-149.
2. J. Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005).
3. *Id.*
4. B. Rumbold, A. Weale, A. Rid, J. Wilson, and P. Littlejohns, "Public Reasoning and Health-Care Priority Setting: The Case of NICE," *Kennedy Institute of Ethics Journal* 27, no. 1 (2017): 107-134, doi.org/10.1353/ken.2017.0005.
5. DiStefano, et al., *supra* note 1; SAVE-UHC Working Group. *South African Values & Ethics for Universal Health Coverage: An Ethics Framework for Health Priority-Setting*, *available at* <https://save-uhc.org/the-framework/domains> (last visited December 27, 2022).
6. M. S. McCoy, J. Warsh, L. Rand, M. Parker, and M. Sheehan, "Patient and Public Involvement: Two Sides of the Same Coin or Different Coins Altogether?" *Bioethics* 33, no. 6 (2017): 708-715, doi.org/10.1111/bioe.12584.
7. C. Newdick, "Can Judges Ration with Compassion? A Priority-Setting Rights Matrix," *Health and Human Rights Journal* 20, no. 1 (2018): 107-120.
8. K. Syrett, "Courts, Expertise and Resource Allocation: Is there a Judicial 'Legitimacy Problem'?" *Public Health Ethics* 7, no. 2 (2013): 112-122, doi.org/10.1093/phe/pht040.
9. *Thiagraj Soobramoney v Minister of Health* (Kawzulu-Natal). 1997. Constitutional Court of South Africa.
10. Syrett, *supra* note 8.
11. M. Mahajan, "The Right to Health as the Right to Treatment: Shifting Conceptions of Public Health," *Social Research: An International Quarterly* 79 (2012): 819-836, doi.org/10.1353/sor.2012.0005.
12. *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721 (CC). 2002. Constitutional Court of South Africa.
13. Newdick, *supra* note 7.
14. N. Daniels, "Justice, Health, and Healthcare," *American Journal of Bioethics* 1, no. 2 (2001): 2-16, doi.org/10.1162/152651601300168834.
15. Syrett, *supra* note 8.
16. *Thiagraj Soobramoney v Minister of Health*, *supra* note 9.

The Journal of Law, Medicine & Ethics, 51 (2023): 150-152. © 2023 The Author(s)