

Book Review

Daniel Wei Liang Wang, 'Health Technology Assessment, Courts and the Right to Healthcare'. Routledge, 2022, eBook/Hardback, 202 pp, £33.29 (eB) / £120 (Hb), ISBN: 9781138554757.

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The fulfilment of the human right to health is inextricably tied to the actions and decisions of priority-setters at the domestic level. This is especially the case in systems which strive to achieve 'Universal Health Care' (UHC); free healthcare available to all at the point of need. In *'Health Technology Assessment, Courts and the Right to Healthcare'*,¹ Daniel Wei Liang Wang seeks to draw together an analysis of international human rights law and domestic healthcare priority-setting decisions in a manner which neatly balances both the human and the technocratic sides of modern healthcare decision-making. At its core, the book focuses on the imbalance and conflicts between medical resource scarcity, rationing and healthcare demands. It examines the conflicts through the lens of the courts and the various roles they play within medical resource allocation in a variety of national contexts. Wang identifies a number of gaps in literature which they aim to fill; namely how courts impact health-setting priorities, their impact on health technology assessment (HTA) and the functioning and purpose of HTA bodies. Wang seeks to fill these gaps through a comparative analysis of the jurisdictions of Brazil (Chapter 4), Columbia (Chapter 5) and England (Chapter 6), exploring how their courts have "contributed to the institutionalization of HTA in their respective health systems".²

The countries that form the focus of the book might strike the reader as an odd choice. Wang's argument for choosing these in particular is that they all offer universal health coverage (UHC) and all have had significant legal claims for health treatment. On reflection, whilst the choice to consider Brazil and Columbia is a logical one (since they both have a constitutionally protected and justiciable right to health) the analysis of England does seem detached from the other two case studies in a way that is not reconciled for me. That is not to say that the chapter on England is redundant (as explored below it makes for interesting and informative reading) rather that it does not tie as neatly into the book as the other case studies.

In the first substantive chapter: '*Priority-setting and the right to healthcare*', Wang draws a necessary link between UHC and the right to health, providing a thorough overview of the complexity of the decision-making process required to achieve UHC. Highlighting the essentiality of mechanisms of accountability, Wang highlights the role of domestic courts in controlling and reviewing priority-setting decisions, noting the global growth of the role of the courts in right to health litigation. Wang's analysis of this emergent centrality of courts forms the heart of this work. Within this Chapter, Wang highlights that, at the intersection between UHC, the right to health, and litigation, a tension emerges between choosing the *fairest* way to set healthcare priorities and ensuring individual rights to healthcare. Indeed, in a system based on UHC and the right to health, the legitimate claims of individuals to access healthcare may come into direct conflict with considerations of fair allocation in the face of resource scarcity and difficult rationing decisions.

Against this backdrop, Wang proposes three possible approaches for understanding these tensions, drawing upon existing literature and various domestic approaches. The first is that '*the right to healthcare is compatible with and supports fair priority-setting*', a view which sees priority setting as not only compatible, but *necessary* for the fulfilment of the right to health. The second is that '*the right to healthcare creates substantive entitlements and is a driver for UHC*', a view which, whilst acknowledging some interplay between health-rights and UTC, is clear that where courts are willing

¹ Daniel Wei Liang Wang, 'Health Technology Assessment, Courts and the Right to Healthcare' (Routledge, 2022).

² Ibid, 3.

to “override priority-setting decisions that result in the non-realization of the right to health” (p.30) they can be effective in ensuring the rights of individuals against state interference. Finally, the third position is that *‘the right to health creates substantive entitlements and is an obstacle for UHC’*. This position argues that human rights might be detached from the practical reality of resource scarcity and thus the enforcement of these rights might lead to obstacles in the fair allocation of healthcare resources. Wang does not prioritise one perspective over another, and notes that they are not mutually exclusive. Indeed, it is likely that each reveals significant truths as to the realities in different jurisdictions. It is notable that beyond their detailed explanation, these considerations do not play a direct role in later analysis within the book. It is true that many of them are in evidence within the approaches of the different domestic courts, but explicit reference back to this framework by the author could have solidified the relevance of this analysis in a more concrete and satisfying way.

In Chapter 3 *Priority-setting and health technology assessment*, Wang focuses upon the process and conceptual underpinnings of HTA. As he explains, “HTA is a mechanism to prevent waste and inefficiency by identifying high-cost and low-impact interventions, which disproportionately absorb scarce resources that could be more efficiently used elsewhere in the health system”.³ Wang’s analysis focuses on what he identifies as the two key elements of HTA: Institutionalisation and Considerations. Institutionalisation refers to the formation of bodies responsible for HTA, for example NICE in the UK. The considerations for HTA include clinical factors (for example the use of evidence-based medicine), economic considerations (for example QALYs), social values, medical ethics and procedural considerations such as transparency. Wang’s analysis here is an outline of what he views to be the gold-standard for HTA, that being an independent and impartial institution taking into consideration a balance of evidence-based factors when making rationing and resource allocation decisions.

Of particular interest here is his argument that these kinds of institutions and considerations act as a counterbalance to the ‘rule of rescue’. In other words, the innate human desire to do all possible to help or save life, regardless of wider consequences. This idea comes directly into play in the later case-studies and raises an interesting challenge to health and human rights researchers in particular. Indeed, the central aim of health-rights is to ensure access to essential medicine and health services for individuals. From this, those of us working in this field may be rightly accused of being some of the most significant ‘rule of rescue’ advocates. Yet Wang here (and throughout this book) provokes questions for us about whether our research and advocacy truly accounts for the potential downstream impacts of our desire to ensure access to healthcare for all.

Taking this theme forward, in Chapter 4, *Brazil: Right to healthcare litigation*, Wang considers the rulings of the Brazilian court-system regarding ‘right to health’ claims. He argues that by upholding the constitutional right to health, the court is overruling rationing decisions in a manner which disregards all the primary considerations which should be undertaken within HTA. He finds that the courts have established a prominent role in health resource allocation and that this process of access to medicines through the court system (while effective for some) makes the overall system far less fair and less efficient, as well as having significant impacts on the national health budget. In essence resources are being distributed based on an individual’s capacity to litigate. This once again provokes critical questions for health-rights researchers, especially when considering how to properly construct a fair system which attempts to balance health-rights against scarce or limited resources.

Chapter 5, *Columbia: Demanding but undermining fair priority-setting via courts*, follows a similar theme, addressing the right to health litigation in Columbia, which has the highest number of judicial claims for healthcare in the world. Here Wang explores how the Courts have promoted changes to health policy and the broader health system by introducing structural remedies and utilising their

³ Ibid, 39.

control of constitutionality to interpret and direct key healthcare legislation. Wang seeks to expand existing literature (which until now has focused upon litigants and outcomes in a positive light) to explore the opportunity costs and failings of the system. He asks whether the courts have been transparent, fair, evidence-based and accountable, arguing that that their approach can in fact be seen as damaging more broadly. For example, the Constitutional Court's decision in 2015, which made it unconstitutional to consider economic considerations when undertaking HTA.⁴ Additionally, the Court refuses to consider treatment refusals legitimate where the treatment may be potentially beneficial, regardless of the HTA considerations, only considering legitimate restrictions upon certain more cosmetic forms of treatment.⁵ Wang considers these rulings as evidence of judicial overstep, undermining those integral factors which comprise 'good' HTA.

From the perspective of a human rights scholar, Wang presents a difficult challenge. International human rights law enshrines "...the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".⁶ This standard requires the dedication of the 'maximum available resources'⁷ in the fulfilment of this standard.⁸ It is thus a natural intuition of human rights scholars to consider decisions of courts which produce access to medicines to be progressive and positive developments in line with the requirements of international human rights law. Yet, Wang presents the challenge that, in the face of limited resources, a supposedly progressive decision of a court may in turn result in strains upon the system which is entrusted to fulfil the right to health. There is thus a clear tension between the aspirational goals of human rights and the harsh reality of limited resources in a domestic context. These challenges presented to a progressive right to health agenda must be addressed in further research, to resolve this inherent tension between progressive and evidence-based health decision making.

Both these chapters are thought provoking. They highlight a key question of *who* we want to make health resource allocation decisions and *how* those decisions should be made. Indeed, from a human rights perspective, the existence of an impartial judiciary providing checks over government decision-makers is critical, not only for the protection of human rights, but for the protection of the rule of law more broadly. Yet as Wang demonstrates in this chapter, those Courts which appear so critical can themselves overstep in a manner which may in fact cause broader damage to the right to health for society, whilst prioritising an individualistic approach to rights.

Perhaps missing from his analysis was some consideration of the beneficial aspects of these judicial interventions. Indeed, it can be said of the book as a whole that it adopts a rather sceptical attitude towards the introduction of judicially enforceable health-rights, yet I feel it does not engage with the literature supporting such interventions in enough critical detail. As such, whilst raising thought provoking questions for health-rights researcher, does not necessarily undermine the entirety of the argument *for* judicial protection of the right to health. This point speaks to a broader criticism I have of this work: for a book with 'right to healthcare' in its title, its critical engagement with human rights law, theory and perspectives is often limited. Understandably, the primary focus within each of the case-studies are domestic courts and approaches. However, given the title and stated aims of the book, I would have liked to have seen more critical engagement with the implications of human rights law upon these systems beyond cursory references to the constitutional incorporations and the Committee on Economic, Social and Cultural Rights' General Comment 14.⁹ I recognise that this may have taken

⁴ Decision of the Columbian Constitutional Court, C-313 (2015).

⁵ Decision of the Columbian Constitutional Court, T-760 (2008).

⁶ International Covenant on Economic, Social and Cultural Rights (1966), Article 12.

⁷ Ibid, Article 2.

⁸ Committee on Economic, Social and Cultural Rights, 'General Comment 14: The Right to the Highest Attainable Standard of Physical and Mental Health (Article 12)', (E/C.12/2000/4, 11th August 2000), para.47.

⁹ Ibid.

the book beyond the core focus on domestic approaches. However, a more careful contextual engagement with these broader human rights frameworks would have added important nuance.

In his final case study, Chapter 6, *England: From Wednesbury unreasonableness to accountability for reasonableness*, Wang considers the role of the English courts in healthcare provision. Here he traces what he views as a transition from a deferential to more scrutinous approach of the courts when considering rationing decisions. He sees this as a move towards requiring far clearer and evidence-based reasoning for the denial of treatment. He argues that this shift can be understood in the context of the court's wider departure from *Wednesbury unreasonableness* towards a more heightened level of scrutiny. In contrast to the other two cases studies the move of the courts towards greater scrutiny seems to increase transparency in rationing and HTA. Wang conceptually links the courts increased scrutiny to the eventual creation of NICE, reflecting the demand and need for greater transparency and accountability in rationing decision making.

This chapter also makes for an interesting and informative read. As noted above however, I feel as though this chapter is disconnected thematically from the other two case-studies, which raise similar provocative questions for health-rights and medical law researchers. It does however supply an interesting contrast, demonstrating the power of a more restrained approach towards judicial review of medical decision-making. Indeed, Wang's in-depth historical analysis of a shift in approach through relevant case law will be of particular interest to those working specifically in the field of resource allocation within the UK context. Unlike the other case studies however, its utility for human rights scholars, or those interested in a more international dimension may not find as much here.

In conclusion, Wang presents a detailed and considered examination of health technology assessment and the ways in which courts in three different jurisdictions have interested, impacted and controlled medical resource allocation in their respective national contexts. He provides a much-needed grounding of human rights law within the practical reality of every-day, ground-level decision-making, something noticeably absent from much right to health scholarship. This 'grounding' provokes a number of challenging questions for medical law and human rights scholars alike, despite the obvious limitations of this books human rights analysis.

For those interested in the details of resource allocation and HTA systems, I do not think this book will introduce many new concepts but it may provide some additional human rights-based contextualisation (despite the limitations identified) Additionally, Chapter 6 may provide an interesting overview of historical legal developments in the UK context for those working within that jurisdiction. For anyone working in health-rights, access to medicines, or those with an interest in the ways in which the court system interacts with medical decision-making, this will make for a challenging and informative read, albeit from purely domestic perspectives. Indeed, despite my criticisms, I believe the questions and challenges posed here for human rights researchers require careful attention and consideration.