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Courts and the Making of Public Policy

Incrementalism and Complexity

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Executive Summary

- Courts are required to adjudicate complex legal disputes and this is unlikely to change. It is a matter of concern for both judges and policymakers. Judges need an approach for resolving complex disputes in day-to-day adjudication, and lawmakers need an appreciation of what kinds of tasks can be given to judges.

- This brief argues that judicial incrementalism is an appropriate approach to this problem. It is a doctrine under which courts would develop the law in small steps, and seek to avoid substantial, macro-level distortions to public decision making. Yet courts would at the same time be receptive to claims and provide incremental advancements. It is a dynamic and experimental approach to problem solving, not a static one.

- The policy brief shows how incrementalism is a superior judicial decision-making strategy to its possible rivals through discussion of health care rationing, and examines how the courts have managed this problem in three distinct cases. The 'no-go area' approach is unprincipled and often supported with fallacious reasoning. The 'case-by-case' approach is too ill-defined to weed out problem cases. And the 'comprehensive theory' approach is entirely impractical.

- Incrementalism is dynamic and experimental, it respects and promotes the role of other institutions, and is thus democratic in nature, and there are a variety of techniques of incrementalism that judges can deploy in a predictable way.

- The approach has important policy ramifications for lawmakers in the area of tax law, consumer protection, and especially on the content of the proposed bill of rights and responsibilities now being discussed in the United Kingdom.

Incrementalism and Complexity

Courts are very often required to adjudicate complex social policy disputes, and there is no sign of the tide turning back. Such disputes arise under European Community law, in the private law of tort and contract, in constitutional law questions, and whenever policymakers must decide upon the content of an important new statute or even a bill of rights. When contemplating the issue, the question for judges and policymakers alike is: 'should a judge adjudicate this dispute at all, and if so, how?' In this policy brief, I argue that judges can adjudicate complex issues, but that they should take an incrementalist approach. Such an approach means that, when faced with substantial uncertainty, judges should take relatively small steps, acting in awareness of their own limited knowledge and the potential need for future adaptation. They should ordinarily limit the strong effects of their judgments to a small number of parties. But they should also be receptive to new legal claims, because the essence of incrementalism is that we learn by doing. This more open attitude means that judges can offer some of the benefits of legal accountability while overcoming their lack of expertise, time, and democratic legitimacy for dealing with complicated social problems.

Socially complex issues comprise essentially three key considerations: they implicate many persons; it is difficult to know what the outcome of a choice or solution will be (epistemic deficit); and there is always the question of what institution offers the best set of tools for deciding the matter. Judicial incrementalism helps to manage each of these concerns. To illustrate this claim, I will work through the range of potential judicial responses to a paradigmatic complexity problem: that of health care rationing. Doing so will reveal, perhaps surprisingly, that courts *can* offer something of value in an area that is as complex as any. And it also shows how concerns of democratic legitimacy and lack of judicial expertise are answered satisfactorily. The policy implications are significant. On the one hand, incrementalism carries a clear programme of action for judges. And on the other, it suggests policymakers ought to take an open mind to expanding the ambit of judicial review.

The case of health care rationing

Health care rationing is notoriously complex. Consider the decision to fund drugs for breast cancer treatment. This decision requires that public officials (1) assess the likely cost-effectiveness of the drug by reference to medical trials published in reputable medical journals; (2) compare this cost-effectiveness against that of other drugs intended to treat that same particular phase of treatment (e.g. competing varieties of hormone blockers for post-operative treatment of breast cancer); (3) compare such cost-effectiveness against the demand for drugs for treating all other stages of breast cancer; and (4) compare this value against the multiplicity of demands for drugs to treat other conditions such as heart disease, mental health, and liver failure, to name some among thousands. Furthermore, it must (5) adapt to insistence by the government that it *must* fund certain drugs (which is, to make matters more complicated, done from time to time by circular or other notice, often in the midst of the review process just outlined). In the United Kingdom, a central agency has been established to undertake this difficult process: the National Institute on Clinical Excellence (NICE). But local health authorities for different regions still also have discretionary powers to decide whether to fund certain forms of treatment that still have not had NICE approval.

Now, one might simply think that judges should stay clear of this process. Two cases, however, show why this conclusion has not been accepted by the courts. The first in fact deals with precisely the issue of breast cancer drugs, namely, the case of *R (on the*

application of Ann Marie Rogers) v Swindon NHS Primary Care Trust, Secretary of State for Health. Rogers sought judicial review of a local health authority's policy for funding the provision of a breast cancer drug called Herceptin. Some local authorities began funding Herceptin treatment prior to NICE regulatory approval, but the policy towards funding the drug varied between regions. Some authorities funded the drug upon clinical recommendation, while others applied a policy of 'exceptionality', meaning that a patient had to demonstrate exceptional need. This led to arguments that access to the life-saving drug essentially depended on a 'postcode lottery' and was therefore unfair. It was truly a matter of life and death for people like Rogers. The Swindon Primary Care Trust had a policy of refusing to fund treatment, except for in undefined exceptional circumstances. The Court of Appeal found that such a policy was irrational and thus illegal because it could only be rational if, 'it is possible to envisage, and the decision-maker does envisage, what such exceptional circumstances may be' (*Rogers*: para 62). In other words, the local authority could not maintain a policy of funding in 'exceptional cases' when it had no idea what might constitute an exceptional case. In that case, the issue of cost was not directly relevant.

In the second case, *Treatment Action Campaign* (or '*TAC*'), the Constitutional Court of South Africa faced a claim that the government's entire national treatment strategy for the use of the anti-AIDS retroviral Nevirapene violated the constitutional right to health care. Nevirapene is a drug used to prevent mother-to-child transmission of the HIV virus during and after the birth process. The government, accused by many of being in denial about the AIDS threat, wanted to make this drug available in a trial programme that greatly restricted access to the drug for an undefined period of time, notwithstanding the fact that Nevirapene was made available to the government at no cost. The pilot programme was limited to two testing sites within each province. The Treatment Action Campaign, a nongovernmental organization, argued that the government was stalling without any adequate medical reason. Here as well, the general policy issues involved were highly complex as a matter of both science and the expected behaviour of the population (specifically, whether the drug would take proper effect without an accompanying 'comprehensive package of treatment'). Yet the *Treatment Action Campaign* succeeded. It managed to demonstrate to the Court that the government's position was manifestly unsupported and thus unconstitutional. It showed how the government's arguments relating to the safety of the medicine were not supported by its own medical agency (the Medicines Control Council), and were manifestly contradicted by international medical opinion, notably that of the World Health Organisation. And since the government distributed the drug freely to public employees, its position bordered on incoherent. It ordered the government to remove restrictions on the availability of the drug, to gradually make it more available where it was clinically indicated, but also to review its programme as it was implemented and to adapt it if the circumstances called for it.

In both these cases, the decisions of the courts may well have saved people's lives. But other scenarios are foreseeable in which judicial involvement can be dangerous. One such example in the health care context was the Canadian *Chaoulli* case. In that case, one of the claimants argued that a province's policy of banning private medical insurance contracts, in order to protect the integrity of its one-tier, cost-free, and universally accessible public health care system, violated his right to life and security of the person under the Canadian Charter of Rights and Freedoms as well under as a similar provincial charter of rights. This was a policy maintained by most provinces, and so the decision was of national significance.

The claimant argued that either the long queues in the public system had to go, or the policy of banning private medical insurance had to go. The Supreme Court upheld his claim by a narrow majority. It found that the decision to ban medical insurance contracts was 'arbitrary' and 'irrational' because there was no evidence that a parallel system of private medical insurance had any adverse effect

on the public health care system. The reasoning in support of this result – a comparison between Canada and other OECD countries that ran two-tier systems – was notoriously shabby, one carried out at roughly the same time as a complex (and largely adequate) political solution was being finalized (Choudry 2005: 75–100; King 2006: 631–43). Regardless of whether one agrees with the majority's position on the desirability of a two-tier system, it is hard to endorse the Court's approach to the problem. One needs merely to vary the facts and ask whether a similarly sweeping result, such as the Court-ordered withdrawal from a trade pact, or forbidding of the use of nuclear weapons, is advisable as a matter of institutional competence or even the type of democratic mandate foreseen under a contemporary bill of rights.

How might we explain what makes *Rogers* and *Treatment Action Campaign* seem like sensible judgments, and *Chaoulli* seem like a mistake?

Confronting legal complexity: some options

There are a number of ways that judges may choose to address the problem presented in the disputes just mentioned. One must recall that in each case, the judge is faced with a situation of significant uncertainty, one where the traditional theories of adjudication advocated by legal theorists offer no real direction. There are a range of options as to how a judge might actually proceed, which I will now outline.

The 'no-go area' approach

The judge might hold that courts should simply stay out of such disputes (Calabresi and Bobbit 1978). This has historically been a popular solution for disputes involving social welfare or public funding. Commentators have said such cases raise 'non-justiciable' issues, meaning, those issues inappropriate for judicial resolution on grounds of judicial capacity and legitimacy. Clearly there are many issues within such a process that judges indeed should not resolve. But there are three basic problems with the nonjusticiability approach.

The first is that it creates an unprincipled inconsistency in the law, a violation of a political virtue that Ronald Dworkin called 'integrity'. While true that health care rationing is highly complex and expertise-dependent, so are other decision-making processes regulated by law and courts such as competition/anti-trust policy, taxation, social security, free movements of goods and persons within the European Community, and even core areas of private law such as tort and contract. And if one thinks that judges lack democratic legitimacy, what about the Human Rights Act 1998 and other judicially enforceable bills of rights that are found throughout the world?

The second problem is that this response is often joined to arguments (more often statements) that are at base hyperbolic and thus fallacious. Arguments such as 'courts should not run the health care system' are akin to arguments such as 'courts should not decide who our elected officials are' or 'build our prisons' or 'run our immigration policy'. Such hyperbolic, tabloid-style arguments misrepresent the essentially restricted nature of what courts ordinarily do under civil rights and administrative law. Even if true in a sense, they are irrelevant claims because they misstate the issues.

The final problem with this view is that it fails to give credence to plausible alternatives. Such alternatives show that judges can modulate the degree of judicial scrutiny so that they do not decide the entire range of social issues. Under such scenarios, the judicial role ends up looking more familiar than foreign.

The comprehensive theory approach

One might think that if judges are to decide such disputes, they had better have the right answer to hand when the issues arise. One might thus claim that judges need a fully developed theory for what constitutes a just health care allocation or drug-funding process. The problem with this approach is strikingly clear. It is extremely difficult to develop a comprehensive model for use in such situations, and in any case entirely inappropriate for judges to

develop it (ibid.; Daniels 2008). Even administrative decision makers operate under conditions of 'bounded rationality', that is, under conditions where they cannot even identify, let alone evaluate all possible options (Simon 1997). Not even well-resourced bureaucracies like NICE can decide the complex rationing issues in this way. It would take judges a tremendous amount of time, expertise, and flexible working methods, none of which they enjoy in any significant measure. The judges in *Rogers* and *Treatment Action Campaign* did not offer comprehensive theories about whether certain types of drugs must be funded under certain situations. Rather, they focused on the decision-making process leading up to that particular decision and avoided any pretension to a general approach to the problem.

The case-by-case approach

One might adopt the opposite position, then, and argue that judges should keep a completely open mind to health care rationing cases, to rule nothing out from the outset. *Rogers* and *Treatment Action Campaign* may confirm the wisdom of this approach, one might argue, as in both cases the judges exercised prudence but adopted no particular doctrinal approach to the problem of complexity in health care rationing. Those advocating the case-by-case approach might argue that both judges and the legal standards they apply embody an institutional memory of prudence. In administrative law, for instance, the 'reasonableness' standard of review used by English judges is notoriously deferential. Why should we have another theory, like incrementalism, to further deflect the judge away from deciding cases in context? The reason is that the case-by-case approach is insufficiently cautious. Judges do make mistakes. *Chaoulli* is precisely such a case, and is merely one drawn from a range of other examples, both past and present. In *Chaoulli*, the majority of the Canadian Supreme Court brushed aside concerns of judicial deference on grounds of institutional competency and its capacity to evaluate complex and conflicting social science evidence. And its remedy, initially left unclear, could have had (and may still have) sweeping implications. Prudence is not always forthcoming, and the stakes are high in socially complex situations.

Incrementalism

Incrementalism provides a convincing answer to why *Rogers*, *Treatment Action Campaign*, and *Chaoulli* were either right or wrong, as well as a useful programme for the judicial management of social complexity. Incrementalism was an approach first developed in political science and organization theory to deal with the problem of limited knowledge in the face of social complexity. It was advocated by Charles E. Lindblom in a paper called 'The Science of Muddling Through' (1959). He demonstrates the advantages of incrementalism, the method of 'successive limited comparison', over what he called 'rational-comprehensive models'.

This approach highlights the fact that the identification of means and ends in decision making – of goals and methods for achieving them – are not in fact as distinct as a rational comprehensive model might suggest. The Legislature does not set the social policies, with the Executive implementing them. The policymaking process is not a 'transmission belt' in this sense. The identification of goals must be adjusted as the effectiveness of means, and information about problems, is brought further to light. Thus the Executive is often in fact the key nuts-and-bolts policymaker in complex areas such as regulation and social welfare. It is difficult to plan a comprehensive strategy from the outset. One must try solutions to see if they work, and readjust the approach to put energies into those that work best, hence the use of small steps and feedback. It is a constantly iterative process. Incrementalism has been particularly influential in the area of budgeting, for example in the work of the political scientist Aaron Wildafsky. It also happens to explain how judges decide cases quite well. They mostly follow precedent and extend rules often by analogical reasoning. Higher courts listen, to varying degrees, to the feedback of commentators and lawyers when considering whether to make a legal change in the common law system.

The *Rogers* judgment was incrementalist because the holding about the exceptionality policy in fact gave substantial freedom to the PCT to adapt its policy on the availability of Herceptin. In the *Treatment Action*

Campaign case, too, the judgment essentially required the government not to *restrict* the availability of the drug as it had then been doing. While it was required to 'make available' the drug, it was at no significant cost and under conditions where the Court highlighted the government's power to alter its approach if different circumstances called for it. In both cases, therefore, the courts essentially took small steps and left a substantial margin of latitude to the public authorities to adapt to future circumstances. That, in a nutshell, is the essence of the incrementalist approach. *Chaoulli*, by contrast, involved a direct assault on the integrity and legality of a key national institution: the opposite of incrementalism.

The incrementalist method: dynamic, democratic, and down-to-earth

It is important here that we go beyond nutshell descriptions in elaborating what is meant by incrementalism in judging. I will side-step in the interests of brevity the weaknesses and limitations of incrementalism, because although they present important considerations, they ultimately do not undermine the case for judicial incrementalism. I will rather highlight what I take to be three important features of the incrementalist approach.

Dynamic and experimental

Incrementalism is not necessarily conservative, or what some scholars might call 'path-dependent'. In public law, judges constrain the behaviour of other public authorities. Therefore, judicial deference may be tantamount to giving the green light to another public decision maker. In this respect, a key criticism of incrementalism in public administration (that it is inertial) simply does not apply to judicial incrementalism. If judges don't do it, in this scenario, some other public figure may.

More importantly, however, is that incrementalism is not meant to be inert and static, but rather dynamic, searching, and experimental. Without this dynamic energy at its core, the idea would become an apology for inaction and must be rejected. The very idea of incrementalism as a strategy for decision depends on this dynamic and experimental energy because the *learning process* it prizes would not exist without it. It is not judicial minimalism, therefore, which is a preference for the narrowest grounds of decision (Sunstein 2001). It is a preference for small steps, but also an admonishment to seek out by way of trial and error.

In adjudication, this driving dynamic energy is the judicial awareness that courts provide an important mechanism of public accountability even in areas of social complexity. Rights and fairness are not abandoned when the complexity flag is raised. But a clear awareness of epistemic limitations – what judges can know – is fully compatible with this sense of judicial responsibility, and the two can live in harmony. This is precisely the approach of the courts in the *Rogers* and *Treatment Action Campaign* cases, and the problem with *Chaoulli*.

Institutional collaboration

Judicial incrementalism promotes the view that judges play but one institutional role among others in socially complex decision making. By emphasizing small steps and humility, the court preserves the capacity of other institutions to remain the key drivers of the overall decision-making process. In the case of rationing, for example, the scope of review foreseen in both *Rogers* and *Treatment Action Campaign* essentially recognizes that the process is immensely complicated and requires the flexible working methods and expertise of the government bureaucracy. This approach promotes democracy because it emphasizes the limited and supplementary role played by judges in such situations.

In the *Rogers* case, there was a noticeable deference paid to the expertise of the PCT's clinical priorities committee, and the decision to quash was based more on concerns of fairness in administrative decision making rather than priorities in rationing. But in *Chaoulli*, by contrast, the Court rubbished the government's own extremely careful investigation of this issue. The *Treatment Action Campaign* case presents an interesting middle ground, however. It is

a case in which the government's good faith could legitimately be called into question due to the manifestly unreasonable position it advanced. In that case, the remedy chosen was more intrusive than what was found in *Rogers.* Nonetheless, the emphasis at the remedial stage on the government's responsibilities to roll out the programme, and its emphasis on the right of governmental adaptation, draw a sharp line between the incrementalist nature of the *Treatment Action Campaign* judgment and the more invasive result in *Chaoulli.*

The techniques of incrementalism

Though judicial decision making is in many ways obviously incremental in nature, it is still helpful to set out some of the specific strategies judges can employ to respect this idea. I call these the techniques of incrementalism, and their advantage is that they are concrete, no-nonsense indications of what a court might do.

The first is *particularization.* Judges can decide cases on narrow grounds, and emphasize the distinct features of their case when giving judgment.

The second is the use of *vague legal standards* like 'reasonable' or 'fair' or 'in good faith' or 'with all deliberate speed' etc. These types of standards are common in public law, labour law, and competition law, and they ordinarily serve to give judges the power of review but also to preserve leeway for the primary decision maker.

A third technique is the use of *procedural remedies.* Such remedies might range from a right for a person to be given reasons, to a right to be heard, to a right to have such representations taken seriously into account, to a right to good faith negotiations. Courts can increasingly turn to procedural remedies when the number of affected persons has become particularly large.

Yet another technique is that of *revisitation.* If a court makes a holding that turns out to be dysfunctional, it should revisit its findings and restate the applicable legal standard, and both government and courts should welcome invitations to revisit the law under such circumstances. (There are a number of such examples in recent comparative law, so a plea for a strong version of the doctrine of precedent is misplaced here).

Fifthly and finally, there is the technique of preferring nonconstitutional remedies (typically those under statutes or in administrative law) over constitutional ones. Such a preference provides more latitude for adjustment in the future, whether by administrative decision makers or legislators.

In my view, these three elements demonstrate the virtues of the incrementalist approach. It is dynamic and experimental without being unduly imposing. It respects the democratic legitimacy of other institutions by promoting a collaborative view of the judicial role. And it can be implemented with a range of rather straightforward techniques.

Policy implications: the relevance for lawmakers

Judicial incrementalism has very clear implications for how judges decide cases, and that is of no small importance. But equally or more importantly, the possibility of judges employing an incrementalist approach means that a broader range of subjects can be put before them without fear that they will dominate what was previously a political matter. This could be of importance in a range of matters for policymakers, such as whether judges can undertake a role foreseen in European Community law, in managing a novel statutory function in tax law (such as the enforcement of a General Anti-Avoidance Principle), or a more robust role in the field of consumer protection.

It is also a strikingly relevant issue in constitutional law, particularly at the moment. The Labour government has only recently launched a Green Paper on the content of a national bill of rights (Ministry of Justice 2009). The government takes the view that though economic and social rights may form an important component of a new bill of rights and responsibilities for the United Kingdom, there should be no role for judicial enforcement because such a role would lack democratic legitimacy and

there would be a deficit of judicial expertise (ibid.: paras 3.52 and 4.27).

These are the two familiar problems with the adjudication of complexity. The government's position – the 'no-go area' approach – lacks consistency. The problem of democratic legitimacy extends to the adjudication of all rights under any proposed bill of rights, as well as to the current arrangements under the Human Rights Act 1998. There are many complex policy-based issues arising under the Human Rights Act 1998, such as whether headscarves can be worn in schools, whether the planning of homelessness regimes are fair absent more searching judicial control, whether the Home Secretary's power to set the term of imprisonment violates the rule of law, what sorts of police stop-and-search routines are permissible, as well as the form and duration of detention without trial.

The potentially legitimate fear that one suspects underlies the government's concern is that under a bill of social rights, the ambit of this type of decision making could expand exponentially and thus amount to a difference of kind and not degree. Incrementalism provides a square answer to this concern. Courts would take small steps, respecting both the democratic authority of other institutions and their own epistemic limitations. This attitude would allow the government to maintain a consistent position while addressing its valid concerns over the courts and complexity.

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