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PUBLIC POLICY **Rudolf Klein**

Does the NHS really need a constitution?

The best hope is that ministers will resist the temptation to introduce instant solutions to problems that are rooted in the nature of the NHS as a tax funded service that rations scarce resources

The junior health minister Ara Darzi proposed it. The prime minister endorsed it. The BMA supported it. The secretary of state for health is busy working on it. The notion that the NHS should celebrate its approaching 60th anniversary by unveiling a constitution now has a seemingly irresistible momentum. Who can argue against an NHS constitution that would, in Lord Darzi's words, "enshrine the values of the NHS," "increase local accountability to patients and public," and "define the rights and responsibilities of patients?"

The rhetoric is seductive. But once we start thinking about how we might translate it into practice, the arguments begin. Let's start with the rights and responsibilities of patients. How are these to be defined? Will the rights be restatements of existing policies about waiting times between referral and treatment or in accident and emergency departments? Or will they define entitlements to a specific package of NHS treatments? And will responsibilities be defined in terms of conduct only while people are NHS patients, such as turning up for appointments, or will they extend to defining healthy behaviour?

The questions multiply when we move on to consider how any rights and responsibilities might be enforced. If "enshrined" in legislation, they would of course be enforceable at law; so, for example, Germany has special social courts that determine the interpretation of rights and responsibilities. But no government is likely to adopt a policy whose chief beneficiaries would be the legal profession and where international experience suggests that defined packages of care have an inexorable tendency to expand over time. So we are left with incantations about the duty to exercise or the occasional knuckle rapping sanction; maybe patients who don't turn up for their

appointments will, as health secretary Alan Johnson has suggested, drop down the waiting list. (And who is to decide what is to count as a reasonable excuse for not turning up?)

More complex issues still crop up when we turn to the other main theme in constitutional rhetoric: a clear definition of the respective roles of the Department of Health and of local providers and commissioners. Again, this has instinctive appeal. Ministers may be eloquent in proclaiming their conversion to the principle of greater local autonomy in decision making, but past history and recurring instances of backsliding suggest that there is no stability or guarantee for the future in the present situation.

In fact, the roles and functions of all NHS organisations are already set out in statute: the NHS Act 2006. Critically, though, the act gives the secretary of state the power to override strategic health authorities, primary care trusts, and others. In short, it enshrines the principle that while specific responsibilities may be allocated to different organisational levels of the NHS, ultimate accountability is to the centre. So the real issue is whether we should aim to create better protected space for local decision making.

In talking about this we must guard against humbug. We tend to assume that local decision making is a self evidently "good thing"; in contrast, breathing down the neck of the frontline troops is self evidently undesirable. But we also get indignant about postcode rationing, the failure of particular hospitals to achieve national standards of cleanliness, and revelations of poor quality of care. In short, there is confusion about what the limits of local discretion should be. What deviations from national norms are acceptable? And what risks (say, in maternity units) are justified in the name of local autonomy? When we celebrate the NHS's 60th birthday



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we shall also be marking 60 years of failure to debate these points.

There is of course a further twist to this argument: this is that local deviations and risk taking would be more acceptable if accountability to the centre were accompanied by accountability to local populations. Might local decisions be seen as more legitimate if, say, primary care trusts were remodelled as foundation trusts: that is, if they had boards of governors elected by members. Here the experience of foundation trusts carries a warning. Recruiting members is relatively easy, but getting those members actively involved is a different matter. Some recently launched foundation trusts have not even been able to fill their quota of governors because of a lack of candidates, while others have recorded dismally low voter turnouts. The result is a parody of democracy. Nor would drafting in a few local councillors do the trick. The fact that local authorities are elected has not stopped ministers from systematically reducing the scope and autonomy of local government over the past few decades. Accountability, to reiterate, follows money, and as taxpayers we would be up in arms if it did not.

Politically, it's inevitable that we will have something that can be presented as an NHS constitution. The best hope is that ministers will resist the temptation to introduce instant solutions to problems that are rooted in the nature of the NHS as a tax funded service that rations scarce resources. For once, let's just have some spirit uplifting rhetoric to which we can all nod assent without worrying too much about precisely what is meant.

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