

Is the NHI constitutional

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South Africa is a consultative democracy

- Core value to be protected.
- The National Assembly and NCOP must facilitate public involvement in the legislative process (ss 59 and 72)
- The public must be afforded “a meaningful chance of participating in the legislative process” (*Land Access Movement* case: Constitutional Court)
- This requires a “reasonable opportunity to have an adequate say”
- Twenty-eight matters for possible regulations including:
 - Legal relationships
 - Payment mechanisms
 - Formulary
 - Accreditation

Section 27

- “Everyone has the right to have access to healthcare services”
- State must take reasonable legislative measures, within its available resources to achieve progressive realisation of this right
- Began in 1994. First White Paper March 1998.
- Asylum seekers only entitled to emergency medical services for a notifiable condition : does not fulfil the obligations under s 27 to “everyone”
- The Bill is:
 - not “progressive realisation” because no “health systems strengthening interventions”
 - there are no “available resources” relied on in the Bill
- The problem is not health issues but money issues

Concurrent legislative competence

- Health is a functional area of concurrent national and provincial legislative competence under Schedule 4 of the Constitution
- National Assembly has the power to pass the law:
 - If the matter can only be regulated effectively by national legislation; or
 - If the matter requires uniformity across the nation (s 146(2))
- NCOP can pass the national law or amend it or reject it. If rejected it goes before the Mediation Committee. Currently likely to be passed by NCOP
- NHI Bill unlikely to create “uniformity across the nation” if introduced in stages

Money Bill required

- Present constitutionality assessment by State Law Adviser based on fiction that NHI bill is not a Money Bill
- NHI Bill requires a Money Bill because it appropriates money, imposes national taxes, levies, duties or surcharges, or authorises direct charges against the National Revenue Fund (s 77(1))
- Only Minister of Finance can introduce a Money Bill (s 73(2)). Haven't heard from the Minister yet

Appropriation of national revenue

- NHI Bill prevails over all laws except the Constitution and the Public Finance Management Act (s 3(3))
- Chief source of income in Bill is money appropriated annually by parliament.
- Money will be appropriated unconstitutionally because it includes the “shifting of funds from the provincial equitable share”

Appropriation Bill

- All money received by government must be paid into the National Revenue Fund
- May only be used if an Appropriation Act of parliament or a direct charge by an act of parliament (s 213(2))
- Every year the Appropriation Act provides for the equitable division of revenue raised nationally among national, provincial and local spheres of government (s 214(1)(a)) and among departments
- Last Appropriation Act: allocation to provinces was over R500 billion

“Shifting” of provinces funds

- Not, possible for Schedule 4 piece of national legislation to take away the provinces equitable share for a different purpose
- Section 57(2)(a) starts with the obligation to “continue with the implementation of health systems strengthening initiatives”. Weakening the provincial health services will not fulfil that requirement
- That it is a retrogressive, not progressive realisation under s 27

Source of funds

- The money collected “must be appropriated’ from money collected in accordance with social solidarity” (s 49(2))(a))
- NHI Bill wants to ‘reallocate’ the current medical scheme tax credits that medical schemes members currently enjoy to NHI
 - Nowhere else have we seen appropriation of specific tax money to a single fund
- NHI Bill proposes a payroll tax (employer and employee) which would need the authority of the Minister of Finance
- NHI Bill uniquely proposes a surcharge (not a ‘levy’ as suggested) on personal income tax for a specific purpose
- What about police, education, provinces, drought, etc?
- Fund will allegedly be entitled to any fines imposed – fines must go to National Revenue Fund
- All this after a ‘mandatory prepayment in accordance with income levels’ (ss 1 & 2)

Treatment denied

- Despite the s 27 requirement, treatment can be refused if (s 7(4)):
 - No medical necessity according to practitioner
 - No cost-effective intervention according to “a health technology assessment”
 - The product or treatment is not included in the Formulary
- Or pay for your own if:
 - Not entitled to services
 - You don't comply with ‘referral pathways’

Registration of practitioners not compulsory

- Healthcare service providers are not obliged to register
- Section 22 of Bill of Rights guarantees the right of every citizen to “choose their trade, occupation or profession freely”



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