NATIONAL HEALTH INSURANCE FUND: TOWARDS UNIVERSAL ACCESS

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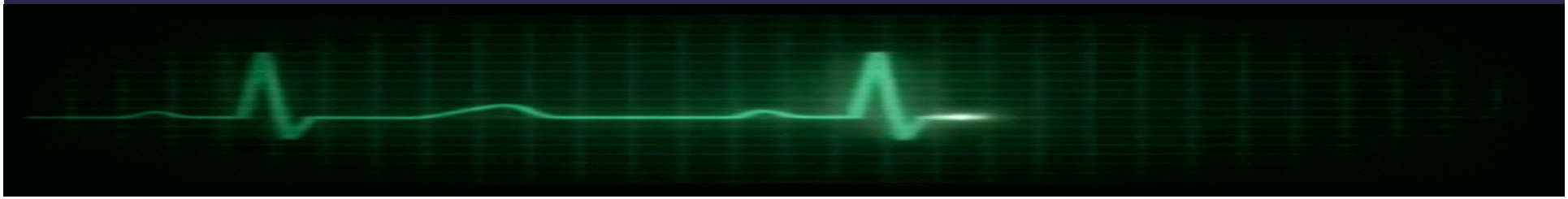
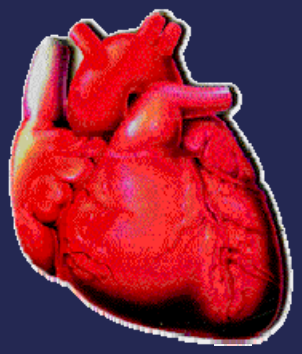


Two key questions

1. **Is the creation and implementation of a system of National Health Insurance in South Africa a *constitutional imperative*?**

2. **Would a model of centralised funding in the form of a National Health Insurance Fund require *constitutional amendment*?**



Constitutional imperatives

Preamble: “the need to improve the quality of life of all citizens and to free the potential of each person”.

Section 7 (1): the Bill of Rights is a “cornerstone of democracy in South Africa.

Section 7 (2): the state must “respect, protect, promote and fulfil” the rights in the Bill of Rights.

Section 8(1): The Bill of Rights “applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”

Socio-economic rights

The Bill of Rights includes *justiciable socio-economic* rights, one of which is the right of access to health care for all.

Section 27(1)(a): everyone has the right to have access to health care services, including reproductive health care.

Section 27(2): the state must take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the right of access to health care services

Section 27(3): no one may be refused emergency medical treatment.

International and regional law

The right to health first expressed as a fundamental human right in the Universal *Declaration of Human Rights (1948). Article 25 provides for the right in a broad sense that includes food, clothing, housing, medical care and necessary social services.*

The preamble to the Constitution of the WHO (1948):

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

UNICESR

South Africa ratified The International Covenant of Economic, Social and Cultural Rights (ICESCR) on 18 January 2015. The ICESCR's right to health emphasises equal access to health care and minimum guarantees of health care.

CESR (1966):

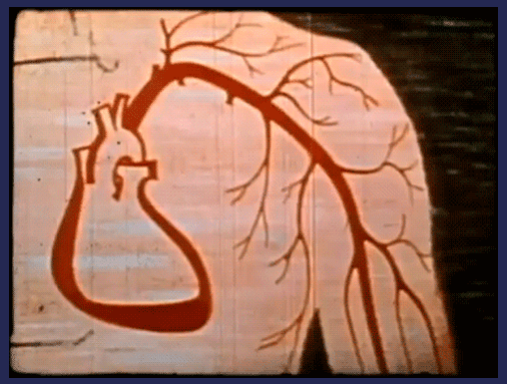
"Each state party to the present Covenant undertakes to take steps, individually and through international assistance and

co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

UNICESR cont.

General Comment 3 of UNICESR:

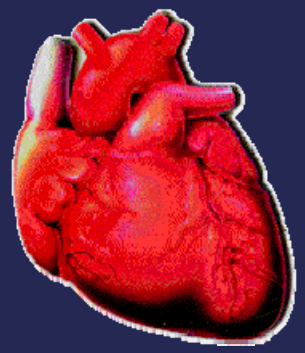
"it thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".



African Charter

The primary regional instrument for South Africa relevant to economic, social and cultural rights is the African Charter on Human and Peoples' Rights (1981).

Section 16 of the African Charter includes the "right to enjoy the best attainable state of physical and mental health".



Policy environment

The NDP (2011): by 2030 there should have been a significant shift in equity, efficiency, effectiveness and quality of health care provision and that universal coverage is available. Goal 8:

- **Everyone must have access to an equal standard of care, regardless of their income.**
- **A common fund should enable equitable access to health care, regardless of what people can afford or how frequently they need to use a service.**

NHI contributes directly to achieving the government outcome that calls for “a long and healthy life for all South Africans” (Outcome 2).

Goal 3 of the UN SDGs (2015) aims to "ensure healthy lives and promote well-being for all at all ages". Target 3.8 specifically aims to "achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines.”

“Progressive realisation within available resources”

Three main arguments in terms of understanding progressive realisation (Chenwi):

1. There must be immediate and tangible progress towards the realisation of rights. The fact that progressive realisation introduces a flexibility to the enforcement of socio-economic rights does not imply that states can drag their feet.

2. States cannot pursue deliberate *retrogressive* measures. However, Liebenberg states that such measures may be justifiable where, for example, a state can show that the retrogressive measures are necessary to achieve equity in the realisation of the right or a more sustainable basis for adequate realisation of the rights.

3. Progressive realisation requires that special measures for vulnerable and disadvantaged groups need to be put in place. The obligation on the state is to take *positive action* to reduce structural inequality.

Allocation of resources

What “pie” of resources gets taken into account to assess whether government is doing all that is reasonably possible? A State must make sure that it correctly prioritises its budget and other resources to enable it to fulfil its constitutional commitments. It cannot claim that it lacks “available resources” when its budgetary and financial policies clearly favour privileged groups in society at the expense of disadvantaged groups.

The CESCR has considered how states have allocated resources. In doing so, the Committee analyses macro-budget information relating to the national budget allocated to a specific sector, paying particular attention to the adequacy/sufficiency of the budget, government’s priorities in terms of resource allocation, lack of clear strategic lines in the budget in relation to the vulnerable and marginalised, regressive patterns of social spending and mismanagement of international cooperation aid.

“Reasonableness”

(a) Any measure must rationally and logically lead to increased access to healthcare and increased access to social security.

(b) The courts will not interfere with rational, *bona fide* budgets set to meet constitutional obligations.

(c) The realisation of these rights does not only fall on the state – private citizens and private institutions may also have to play a role.

(d) Provision always has to be made for the most vulnerable, and consideration must be had as to how this will be done.

(e) A ‘reasonable programme’ clearly allocates responsibilities and tasks, and ensures the appropriate resource allocation. A reasonable programme is also flexible and responsive.

(f) The court will not second-guess whether the specific measure(s) is the most appropriate or the most favourable, as long as it reasonably and rationally leads to increased access to healthcare services and increased social security.

Grootboom case

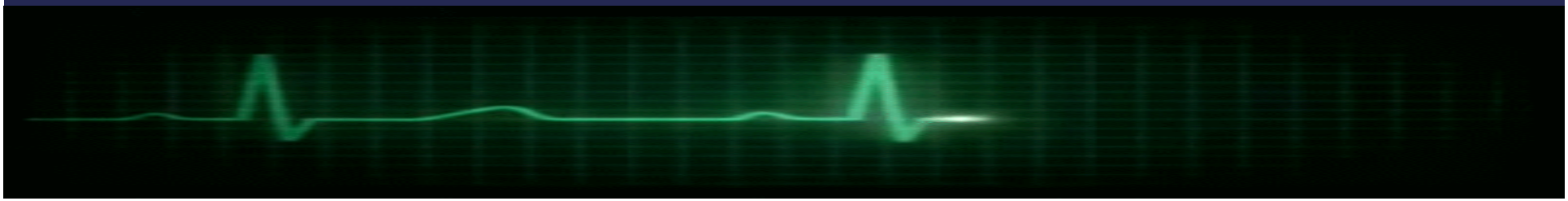
To be “reasonable”, a programme must:

- Clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available;
- Be coherent and coordinated;
- Be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs; and
- Meet the needs of those whose needs are most urgent and must not exclude a significant section of society.

Mazibuko case

The issue of "reasonableness of government action" in the *Mazibuko* case:

- **What research and investigation was carried out?**
- **What alternatives were considered?**
- **What are the reasons for the selection of the option underlying the policy?**



"New Clicks" case

Sachs J noted that "a major element informing the reasonableness of the work of the Pricing Committee was section 27 of the Constitution":

"The importance of this objective cannot be overestimated. Though illness strikes the rich and the poor alike, its impact on the poor is aggravated by harsh living conditions and what is frequently the extreme difficulty of getting access to health care and medication. Hence the duty on the state to take special measures to assist those who are the most vulnerable to disease and, simultaneously the most lacking in resources. The question, however, is not simply whether the objective of the regulation is worthy, which it clearly is, but whether it is reasonable. Put another way, the mere fact that it serves a rational purpose in pursuing a legitimate government aim, would not in itself be enough. It would have to pass the test of being reasonable." **(para 651)**

Road Accident Fund case

Moseneke states that:

"It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad." **(para 35)**

Other rights

The right to equality: **Section 9 of the Constitution has been interpreted by the CC to encompass a substantive interpretation of equality. This is difference from formal equality, where likes are treated alike. Substantive equality takes context into account.**

Freedom of trade, occupation and profession: **Although the Constitution provides that "every citizen has the right to choose their trade, occupation or profession freely" (s22), it also states that "the practice of a trade, occupation or profession may be regulated by law". This matter has been settled in law (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005]**

Political and civil rights do not trump socio-economic rights. In fact, the CC has been explicitly pro-poor in its jurisprudence since 1995.

What about the Provinces?

The Green and White Papers recommend revised funding flows. All funding for PHC will flow through the NHIF. Treasury will allocate general tax revenue for personal healthcare services and the payroll-linked mandatory contribution to NHI in consultation with the Minister of Health and the NHIF. There are, however, challenges with this approach from an IGR perspective.

The Constitution ostensibly makes healthcare a so-called 'federal' matter. This means that, within the broad fiscal allocation to each province, the province itself decides how to realise healthcare rights and how to allocate resources. The only exception to this is the allocation of monies to provinces in conditional grants.

Section 227:

(1) Local government and each province is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform *the functions allocated to it.*

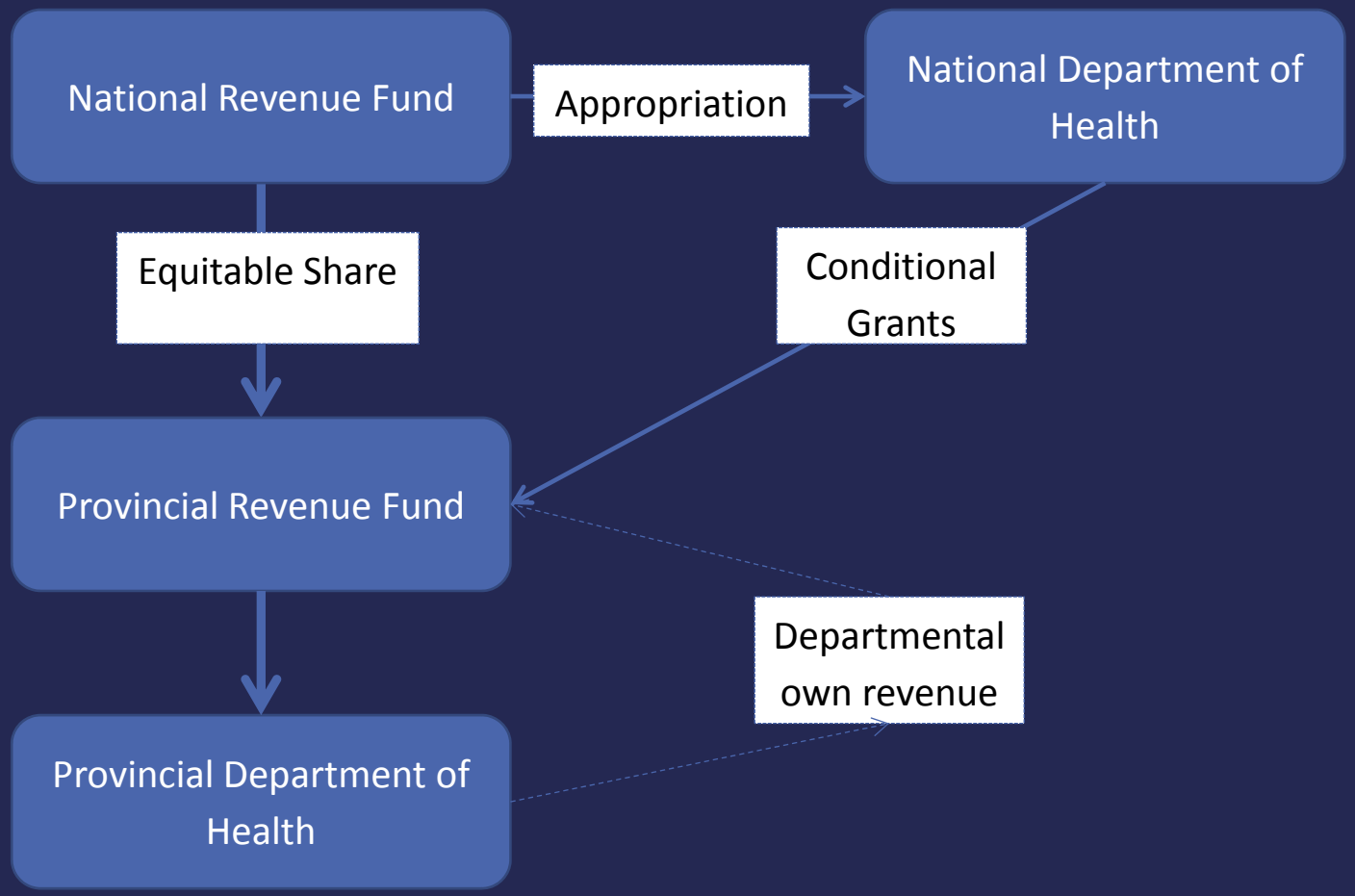


Figure 1: Current Flow of funds to provincial departments of health (Stephen Harrison,2016)

Schedule 4

Schedule 4 includes "health services": concurrent national and provincial legislative competence. In the event of conflict between national and provincial laws passed on functional areas listed in Schedule 4, the national legislation prevails to the extent that the conditions set out in section 146(2) apply:

- The national legislation deals with a matter that cannot effectively be regulated by legislation enacted by the respective provinces individually.
- The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation.
- The national legislation is necessary for:
  - the maintenance of national security;
  - the maintenance of economic unity;
  - the protection of the common market in respect of the mobility of goods, services, capital and labour;
  - the promotion of economic activities across provincial boundaries;
  - the promotion of equal opportunity or equal access to government services; or the protection of the environment

Section 214(2)

The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account

a) the national interest;

b) any provision that must be made in respect of the national debt and other national obligations;

c) the needs and interests of the national government, determined by objective criteria;

d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

e) the fiscal capacity and efficiency of the provinces and municipalities;

f) developmental and other needs of provinces, local government and municipalities;

g) economic disparities within and among the provinces;

h) obligations of the provinces and municipalities in terms of national legislation;

i) the desirability of stable and predictable allocations of revenue shares; and

j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

Balancing process

- In the second *Certification* case the CC held that in a constitutional scheme such as that embodied in the Constitutional Principles, *the national executive is fully entitled, if not obliged, to do what is necessary to ensure that the Constitution and legislation consistent with the Constitution is adhered to.*

- Provincial autonomy is not absolute and does not exist in isolation. Alongside autonomy is a collective duty for cooperation and interdependence. What the Constitution requires, and in fact demands, is a *balance*: A balance that takes into account the duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights (s 7) and the principles of cooperative governance (sections 40 and 41).

Liquor Bill case

in the Liquor Bill case Cameron J stressed that the first provision of the Constitution constitutes the Republic of South Africa as "one, sovereign, democratic state".

However, he noted that the unitarian emphasis of this provision is not absolute, since it must be read in conjunction with the further provisions of the Constitution, which show that governmental power is not located in national entities alone.

This also requires a balancing process, dependent on circumstances.

What about SASSA?

The Social Assistance Act 13 of 2004 was promulgated due to the fact that a number of provinces had difficulty managing social grants. A single national agency was established in terms the 2004 Act - SASSA.

The Constitutional Court in *Mashavha v President of the Republic of South Africa and Others* (CCT 67/03) [2004] ZACC 6 confirmed a Pretoria High Court ruling that Proclamation R 7, in terms of which the social assistance function was assigned to the provinces, was in fact invalid and allowed Parliament a period of 18 month to pass the necessary legislation to relocate the function to the national sphere.

A National Fund

Preamble to the SASSA Act:

"a national social security economic policy is required to prevent the proliferation of laws and policies relating to social security from prejudicing the beneficiaries of social security, prejudicing the economic interests of the Republic or its provinces or impeding the implementation of such national social security economic policy".

SASSA was established to ensure the efficient and effective management, administration and payment of social grants.

Similar, if not the same, arguments can be raised when proposing NHIF:

- **Efficient and effective management, administration and payment**
- **Health care is a national priority and it is in the national interests to coordinate spending on health care services for all**
- **The provinces are largely failing to ensure that the right to health care is accessible to all citizens and residents, without discrimination and based on the principle of equity and the constitutional rights of life, dignity and equality.**

Equity in distribution

The *Mashavha* case (social security) :

"… Not only were there richer and poorer provinces, but there were "homelands", which by no stretch of the imagination could be seen to have been treated on the same footing as "white" South Africa, as far as resources are concerned. These inequalities also applied to social assistance – an area of governmental responsibility very closely related to human dignity. The history of our country and the need for equality cannot be ignored in the interpretation and application of section 126(3). Equality is not only recognised as a fundamental right in both the interim and 1996 Constitutions, but is also a foundational value. To pay, for example, higher old age pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town, *would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas."(*para 51)

Concluding remarks

The legislation establishing the NHI Fund must reflect the *reasonableness* of the new policy and legislation as well as the history, values and context within which the legislation is crafted. A single pool of funding for health care would have consequences for the Provinces, but this is not *unconstitutional* as long as the provinces have some role to play. Health care services is not defined in Schedule 4.

The relevant amendments to the National Health Act would prevail over conflicting provincial legislation. Thus the principles set out in section 146(2) of the Constitution, relating to conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4, could reasonably serve as the test for whether the reallocation of functions and powers would be constitutionally sound.

THANK YOU