

If NHI fails, it won't be because of the constitution

THE United States recently made an attempt at nationalised health insurance. It had an amazing opportunity - but it missed the chance. The relevant bill, which came to be known as Obamacare, didn't even include a public health insurance option when it was finally passed. The "compromise" it does include is simply a requirement that all people buy health insurance. Opponents of the requirement now argue that the government cannot constitutionally require individuals to buy health insurance, and the US Supreme Court will decide this issue early next year. This has led some in SA to ask whether National Health Insurance (NHI) will face a similar fate here. The answer is that it won't. The Supreme Court must answer a complicated question, but one that is unique to the US constitution. SA's courts can happily ignore it. If the NHI fails in SA, SA's constitution won't be to blame. The US constitution was drafted in 1787. Because of its age, it is not always attuned to the demands of the modern world. Yet Americans are bound by it. It bears the weight of more than 200 years' worth of analysis and interpretation through which courts attempt to define what the constitution means in a world it could never have predicted. In some areas, the courts have built a logic that curves and kinks like a Dr Suessian city. For example, the part of the constitution relevant to National Health Insurance in the US is a sentence that stymies constitutional scholars and the courts; they call it the "commerce clause". In the US, the central government can do only things the constitution empowers it to do. The rest is left to individual states. The commerce clause tells us Congress has the power to regulate commerce "among the several states", also known as "interstate commerce". Thus, Congress's power to pass laws that bind the states is often determined by whether or not it is regulating "commerce ... among the several states". What type of regulation is a valid regulation in terms of the commerce clause? The Supreme Court has determined that Congress can regulate the following things in terms of the commerce clause: interstate steamboat navigation, train fare for travel within Texas, growing wheat for strictly personal use, meat-packing and growing marijuana for consumption in California. Curiously, the Supreme Court has also, over the years, determined that Congress cannot regulate the following things in terms of the commerce clause: child labour, minimum wage laws, mining, production, manufacturing, ownership of a gun on school property, and violence against women. This line of rulings appears bizarre and confusing because it is. The point is not whether these decisions are right or wrong. The point is that the US constitution requires courts to ask odd questions, such as: is violence against women commerce? The strange experiment with the commerce clause continues and, in essence, this is the question that will lurch and twist its haggard way to the Supreme Court early next year: is requiring all people to purchase health insurance a regulation of "commerce ... among the several states"? SA's constitution, in contrast, is well suited to tackle the issues modern society faces. Part of the constitutional context for the NHI is this breathtaking provision from section 27: "Everyone has the right to have access to healthcare services.... The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of (this right)." It is not hard to see that it is a much straighter shot from section 27 to the NHI than it is from the commerce clause to Obamacare. It's not that things are simple in SA. They aren't. SA may face many pitfalls on its path toward facilitating affordable and equitable access to quality healthcare for all. For example, private interests could dig in their heels, politics could stagnate or the legislation could be clumsily drafted. But SA won't miss its chance because of the constitution. There are, of course, other ways in which SA is different from the US. Each country has a unique history, economy and social context. But both countries share a desperate need to address the inequities in their healthcare systems. South Africans should recognise, and embrace, the fact that their constitution enables action that the US constitution may not. And, in this case, the benefits of SA's constitution for health are yet untold.

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