Supplement 4: Constitutional Court Cases Handout - Working Group Meeting 2

How Constitutional Court Cases can inform development of the Ethics Framework

"*The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [the right to have access to health care services].*"

- The Constitution of the Republic of South Africa, §27

Principle	Relevant Constitutional Court Cases
Effectiveness Relates to whether the intervention will result in the desired and expected health benefits. Also, may include frequency and severity of any known side effects	• MoH v TAC: Dispute concerning limited pilot of only 2 sites provide Nevirapine (ART) for prevention of mother-to-child transmission (PMTCT) about whether the government was obligated to provide Nevirapine nationwide o Gov't had concerns about the **effectiveness** of Nevirapine absent a more comprehensive PMTCT package; possible drug resistance if rolled out in non-ideal circumstances; and side-effects/safety concerns o Court decided that, even absent other benefits (e.g. breastmilk substitutes), Nevirapine would be sufficiently effective; determined the benefit of providing effective PMTCT far outweighed concerns of resistance; assessed the side-effects to be irrelevant since they arise with long-term use and the planned use here was for shorter-term PMTCT ➢ ***Supports inclusion of gathering evidence and assessing effectiveness and side-effects to inform coverage decisions; supports comparing risks-benefits based on context***
Equity Encompasses considerations related to fairness and justice. May include: treating those with similar needs the same, reducing unjust inequalities in health, giving extra priority to those with greater need and addressing unfair differences in health status	• RSA v Grootboom; MoH v TAC; Johannesburg v Blue Moonlight: all support a ***requirement to respond to the needs of "those most desperate" or "those whose needs are the most urgent.***" These populations were defined in cases as: o "the old, disabled or otherwise deserving" *(Grootboom)* o "children, elderly people, people with disability, or women-headed households" *(Blue Moonlight)* • MoH v TAC: emphasizes that certain public health problems (like HIV) should receive greater priority. Decision noted that HIV/AIDS is "the greatest threat to public health" in South Africa and that "the nature of the problem is such that it demands urgent attention." Also felt it was inequitable that many who were medically indicated for Nevirapine were excluded (*not treating like cases the same*) ➢ ***Raises questions about how the framework could or should give greater weight to interventions addressing certain types of conditions or public health problems*** • RSA v Grootboom; MoH v New Clicks: ***In some circumstances, equity considerations ought to receive greater weight than effectiveness and affordability considerations***

Principle	Relevant Constitutional Court Cases
	• Khosa v MoSD; Mahlaule v MoSD: Court determined that non-citizen permanent residents should also be eligible for social benefits under section 27, particularly vulnerable groups, as a matter of equal treatment of members of society and to avoid unfair discrimination. Morever, because both citizens and permanent residence contribute to the welfare system through the payment of taxes, it would not only be an unfair distribution of benefits and burdens of the system, but would also create an impression that non-residents were somehow inferior/undeserving.
Efficiency Relates to how health care resources are allocated and used to optimise or maximise value	• Soobramoney v MoH: Case about a patient with kidney failure who appealed to the State to cover renal dialysis based on right to health and access to emergency medical treatment under Section 27(3) and right to life (Section 11) o Court reviewed claims under Section 27 (1) and (2) – felt dialysis did not qualify as emergency care under 27(3) – then applied State's general obligation of providing health care *within its available resources* o Noted dialysis would not cure the Claimant's chronic renal failure, and that current dialysis guidelines allocated limited machines to patients with acute kidney disease who could be cured – achieving more benefit overall o Court said the State must "***manage its limited resources to address all these claims***"; State nor hospital had funds to cover the costs of additional dialysis (for this patient and others like him) while still covering other health and basic needs as required by Section 27 ➢ ***Supports attention to opportunity costs and maximising health, all else being equal; raises questions about how to consider treatment/cure v non-curative interventions***
Affordability Some interventions may be very expensive, but because they only target a small number of people, they are still affordable. Other interventions may be relatively cheap but because they are needed by most of the population, would have a large impact on the overall budget.	• Soobramoney v MoH: covers considerations about what is affordable within existing government resources. Assessed what it would cost to cover renal dialysis for all those with chronic kidney failure and the impact this would have on the budget to deliver other kinds of services across the population ➢ ***In many cases, the "within available resources" constraint in Section 27 is used to assess what is and is not a reasonable obligation for the State to provide***

Principle	Relevant Constitutional Court Cases
Appropriateness Relates to health care services being delivered at appropriate levels of care, through innovative service delivery models, and being tailored to local needs.	• MoH v TAC: One main argument of the government for why neviripine was only initially available in the pilot sites first was related to concerns about the capacity of the public health system to provide a comprehensive PMTCT package throughout the country. The pilots were meant to provide information about operational challenges and real-world effectiveness to inform broader scale-up of nevirapine. o The Court dismissed this argument, saying that long-term or large-scale capacity challenges facing the health system (*e.g.* a lack of trained personnel or adequate facilities) should not bear on decisions to cover an intervention that can be effectively delivered in a specific setting or for a specific population given current resources ➢ ***Suggests that while appropriateness and health system capacity are important considerations for coverage decisions, lack of capacity or infrastructure may not be sufficient justifications for not covering interventions for those in need. Instead suggests a positive obligation of the government to explore how to improve capacity for effective delivery over the long term and ensure near-term delivery whenever interventions can be effectively delivered to populations in need***
Social Solidarity and Cohesion Relates to how the coverage decision or provision of the intervention may promote or harm social relations	• Soobramoney v MoH: "*The special attention given by section 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any person, anywhere and at any time. The values protected by section 27(3) would, accordingly, be undermined rather than reinforced by any unwarranted conflation of emergency and non-emergency treatment such as that argued for by the appellant.*" (concurring opinion)

Principle	Relevant Constitutional Court Cases

Respect and Dignity
 	
Respecting the autonomous choices of individuals, eliminating forms of disrespectful treatment and discrimination, reducing forms of stigma, and preserving human dignity
	• Khosa v MoSD; Mahlaule v MoSD: These cases addressed whether Mozambican permanent residents in South Africa should be eligible for state social security under Section 27(1)(c) – which states that "everyone" should have access.
	  ○ The Court determined that permanent residents should be eligible for state benefits, and that exclusion is "stigmatising" and "likely to have a severe impact on the dignity of the persons concerned." Additionally, the Court recognized the negative impacts on dignity and self-respect that could result as those in need of social assistance became dependent on family or community members. The Court found that these negative effects far outweigh the State's financial considerations
	  ➢ ***Supports consideration of the impacts of coverage decisions on experience of stigma/social respect as well as issues of dignity/self-respect and that averting these harms can override certain financial considerations***
	
	• NM v Smith: This decision concerns private medical information which the Court argues is an especially "personal and intimate" type of individual information. The Court notes that respect for private medical information, especially in the case of HIV, is central to avoiding "the potential intolerance and discrimination that result from its disclosure…[and] fear of ostracism and stigmatization." There must be a "pressing social need" for the expectation of privacy to be violated.
	  ➢ ***This case could suggest adding explicit specification of this principle to include privacy considerations***

Impacts on Important Social Relationships People's health status and the health care they receive can affect their relationships with partners, family, friends, and other social groups.	• Khosa v MoSD; Mahlaule v MoSD: recognized that failure to provide social services/State benefits to vulnerable populations could have significant negative effects on important social relationships. "The exclusion… forces them into relationships of dependency upon families, friends and the community in which they live… Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants." ➢ ***Though not specific to health care, this indicates that the Court considers not only the direct impacts of not covering benefits, but also the indirect impacts this may have on those in close relationships with potential beneficiaries as well as a change in the nature of the relationship***

Principle	Relevant Constitutional Court Cases
Impacts on Personal Security Certain interventions can affect people's experience of safety and security. For instance, being screened or treated for a stigmatised illness may make people vulnerable to violence.	[no cases identified in initial search]
Impacts on Personal Financial Situation Financial protection is a core principle for many universal health coverage programmes.	• Soobramoney v MoH: prior to seeking dialysis from the public hospital, the patient received dialysis from private hospitals and doctors, until such a time that he was no longer able to afford the service. The Court states: "*One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with the treatment. But the State's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme*." ○ In this instance, considerations of impact on personal financial situation were not sufficient to override considerations of efficiency, affordability, and equity to deliver services to other renal patients and the population more broadly

Principle	Relevant Constitutional Court Cases
Respect for Clinician Judgement Recognising the value of providers in promoting the best interests of individual patients, NHI coverage decisions may impact clinicians' ability to exercise their best judgment in delivering care to patients	• Soobramoney v MoH: While not the primary reason for the judgment, the decision deferred to the existing clinical guidelines for renal dialysis and cited a specialist physician and nephrologist in the field of renal medicine with 18 years experience and who was the President of the South African Renal Society. o The decision states: "*A court will be slow to interfere with rational decisions taken in good faith by the … medical authorities whose responsibility it is to deal with such matters.*" ➢ ***This case illustrates a position of deferring to medical expert opinions and guidelines*** • MoH v TAC: a key part of the case concerned whether the decision about who should receive nevirapine should reside with the government, or whether it should be based on the "opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, [that nevirapine] is medically indicated..." and with appropriate testing and counselling. o "*…the decision whether nevirapine should or should not be administered to a particular pregnant mother is a decision to be taken by the attending medical practitioner in the circumstances of each particular case and not a sweeping and general decision by the Department of Health at national or provincial level... The precise medication to be prescribed for any individual patient will always be a matter of on-the-spot medical decision-making. The range of medications to be prescribed may, indeed will be, curtailed by broad policy-making, but the final decision in any case will require the exercise of professional judgment by the attending practitioner*." ➢ ***This case highlights the limits of the State to interfere with individual decision-making of physicians who may be better placed to assess comparative risks and benefits for their patients. It may also highlight links between considerations of appropriateness and how much to rely on clinician judgment to determine what would be effective/safe based on the specific circumstances and context***

Principle	Relevant Constitutional Court Cases
Compassion Sometimes there are circumstances in which patients have few options available to them. In these cases, some people think it is worth offering services that would otherwise be low value-for-money as an expression of compassion to the desperately ill.	• Soobramoney v MoH: The patient requesting dialysis had irreversible, chronic renal failure, and due to other health complications, was not eligible for kidney transplant. His case as presented to the Court was to secure dialysis as a life-prolonging intervention when there was no cure under the positive obligations of the State under Section 27(3) to provide "emergency medical treatments," which are not subject to the same constraints of affordability within available resources as other types of health services. o The Court determined that life-prolonging treatments such as dialysis do not qualify as emergency services, and must therefore be determined in accordance with progressive realization within available resources. The judgment states: "…*[such a broad interpretation of "emergency services"] would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening*." ➢ ***This case illustrates an instance when compassion was not sufficient to override competing considerations. There may be other cases and other inventions that would result in a different judgment, but we did not identify any record of constitutional court cases that provide positive examples in which "compassion" overrode efficiency and affordability. It appears that the Court precedent would be to apply the "within available resources" standard to any compassionate interventions.***