

Genealogies of Justice: Law, Rights and the South African HIV/AIDS Movement

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As South Africa marks two decades of democratic rule, an HIV/AIDS epidemic that once appeared insurmountable has begun its descent. Access to HIV/AIDS treatment has risen and life expectancy has followed suit. While Southern Africa maintains its position as the epicenter of the global epidemic, there is now hope of turning the tide on the epidemic. The African National Congress (ANC) has been quick to seize on these trends as evidence of the ruling party’s commitment to confronting the epidemic. However, this has not always been the case. Rather, the process through which treatment access was negotiated in South Africa involved a decade-long campaign by the Treatment Action Campaign (TAC) –led South African HIV/AIDS movement against a dissident faction of the ANC led by former President Thabo Mbeki. The political struggle mobilized transnational networks of activism and cultivated alliances with moderate elements within the tripartite ruling alliance to transform national health institutions to expand access to treatment.

A critical element in the politics of HIV/AIDS was the socio-economic rights guaranteed in South Africa’s constitution. The HIV/AIDS movement utilized the right to health provision to pressure the South African government into providing HIV/AIDS treatment at public health institutions. However, the ability of HIV/AIDS activists to utilize this clause was supported by an earlier wave of health activism in South Africa. More specifically, the work of first wave¹ HIV/AIDS activists during the negotiated political transition proved to be critical in the adoption of a rights-based approach to the epidemic (Walker 1992, Humm 1995). Despite the existence of constitutional protections for health, the South African HIV/AIDS movement encountered significant obstacles to ensuring these rights. The success of the South African HIV/AIDS movement lay in its strategy of fostering alliances with organizations and/or factions within the ruling coalition that were sympathetic to their goals. Such an approach enabled the broad social

¹ The nomenclature of ‘first wave’ and ‘second wave’ in this paper has been adapted from feminist theory analyzing the different phases of the American feminist movement.

mobilization led by the TAC to harness the power of state institutions in the struggle over treatment access in South Africa.

It will be argued here a formal juridical approach to understanding the impact of socio-economic rights on post-apartheid South African society may be incomplete. Rather, the influence of social justice movements in the negotiation of law and policy must be considered in the assessment of how South Africa's constitution impacts upon the lives of the country's citizens today. In order to provide depth to this argument, a historical overview of HIV/AIDS politics during the late apartheid, political transition and post-apartheid era will be carried out. Next, the political and legal strategies of the TAC – the leading organization of the South African HIV/AIDS movement during the post-apartheid era – will be analyzed through a series of case studies. The argument will conclude with insights regarding the relationship between law and social change. Throughout the forthcoming narrative, an emphasis will be placed on the interpersonal connections that formed the South African HIV/AIDS movement. As will be analyzed below, *genealogies of justice* deeply informed TAC strategies, HIV/AIDS politics, and continue to influence social justice initiatives today.

I. The Ties that Bind: Tracing the Roots of Constitutional Law and HIV/AIDS Activism

The early 1980s saw the emergence of HIV in South Africa and the internal anti-apartheid campaign shift into a new phase. As HIV emerged on the mines, the National Party intensified the security apparatus of the apartheid state and ignored the potential threat of HIV/AIDS. Dismissed as a white homosexual disease, the apartheid state paid little heed to the growing numbers of infected miners. Building on the 1976 youth uprising in Soweto, the mass democratic movement organized townships and drew strength from the growth of trade union solidarity. Amidst the social upheaval and various states of emergency, the HIV/AIDS epidemic took root in South Africa. As the internal and external campaigns to end apartheid gained momentum, a pathogen that would indelibly mark the post-apartheid denouement had staked its claim to the freedom long fought for by Black South Africans.

The HIV/AIDS epidemic unfolded in a dynamic and challenging social, political and economic situation. This has led some to characterize it as an 'epidemic waiting to happen' (Marks 2002). Labor migration, violence and high levels of social inequality are certainly important factors to consider when assessing the spread of disease. However the emergence of

the epidemic alongside the mass mobilization and solidarity actions associated with the anti-apartheid movement is an important and understudied aspect of this history. The development of critical legal institutions and progressive health organizations proved to be critical in establishing a rights-based approach to HIV/AIDS in South Africa. Legal activists associated with these institutions also played a central role in the establishment of the liberal post-apartheid constitutional order and the growth of the South African HIV/AIDS movement.

1.1 A Rising Tide: Health and Human Rights Activists during Late Apartheid

The period of increased political activity leading up to the negotiated political transition is incredibly important in understanding how and why particular outcomes emerged in the field of constitutional law and health policy. International condemnation of the apartheid government for its brutal response to the Soweto youth uprising was accompanied by an internal political shift in South Africa. Leading figures in the South African private sector began negotiating directly with the ANC, sensing the inevitability of apartheid's demise. An array of progressive legal and academic initiatives emerged within the country as well. The focus here will be on the founding of three organizations that proved to be particularly important relative to the emergence of constitutional law and HIV/AIDS activism: the Legal Resources Centre, the Centre for Applied Legal Studies and the National Progressive Primary Healthcare Network.

The development of critical legal institutions in the aftermath of Soweto 1976 reflected a shift towards a human rights approach in the legal realm. The Legal Resources Centre (LRC) was founded in 1979 and focused on providing legal protection to vulnerable and marginalized South Africans (LRC 2014). Framed as a human rights institution based on democratic principles, the LRC has been home to several leading figures in South African law. These include the late Arthur Chaskalson, a guiding force in the development of the post-apartheid constitution who also served as Chief Justice in South Africa. Former staff of the LRC have played an important role in the post-apartheid legal order, with previous members filling roles in institutions including the Constitutional Court, the Truth and Reconciliation Commission and the Land Court (Klug 2001: 265). However the LRC continues to play an important role in supporting the legal efforts of social movements today. As will be discussed below, this includes the HIV/AIDS movement and other emerging social movements in South Africa.

The Centre for Applied Legal Studies offers another important example of prominent legal scholars engaging in more direct forms of support for socio-economic rights in South Africa. Housed within the University of the Witwatersrand, the Centre for Applied Legal Studies (CALS) was founded by John Dugard in 1978. Dugard went on to play a prominent role in the development of the South African bill of rights and in the negotiations over the South African constitution (Du Plessis 2007). Since its foundation the CALS has been home to other leading legal scholars, including current Constitutional Court justice Edwin Cameron. In addition to this formal legal role, Cameron emerged as an ardent gay rights activist during the political transition. Along with ANC activist Simon Nkoli, Cameron is widely credited with having put the issue of sexual equality on the ANC's transitional agenda. He also figured prominently in the development of the core principles of the new constitution, a process that began in London in the late 1980s. Cameron participated the debates with Chaskalson and others over the legal principles that would guide a democratic South Africa. While at the CALS, Cameron would foster the growth of a new generation of gay rights and HIV/AIDS activists.

Following the Soweto uprising and Steve Biko's death while in custody, health activists initiated the National Progressive Primary Healthcare Network (NPPHCN). Formed in 1977, the NPPHCN built upon the principles of primary healthcare for all embodied in the Alma Ata declaration. The organization was built upon the work of doctor-activists who set up clinics in urban townships throughout South Africa. In addition to provided services, the NPPHCN also drafted policy proposals for the development of primary care in South Africa (NPPHCN 1986). A notable figure in the NPPHCN was Dr. Ivan Toms², who established a primary care clinic and trained community health workers in the informal settlement of Crossroads. The clinic treated a population of nearly 60,000 (Bateman 2008: 340). Notably, Toms also refused mandatory military service and co-founded the End Conscription Campaign (*ibid*). Toms was brought to trial for refusing conscription and defended by Edwin Cameron, then based at the CALS. Also gay rights activist, Toms co-founded the organization Lesbians and Gays against Oppression. During the negotiated political transition, Toms was named national coordinator of the

² Toms passed away due to meningitis in 2008, after having risen to the role of Director of Health for the City of Cape Town.

NNPHCN³. In 1996, Toms joined the health department for the city of Cape Town and played a leading role in the development of HIV/AIDS prevention and treatment programs.

While the urban civics movement mobilized Black South Africans to render the country ‘ungovernable’ and end apartheid rule, activists in the areas of human rights, gay rights and health emerged to support their campaign. Many of these activists were white, professional and joined ranks with the Mass Democratic Movement based upon the principles of human rights and social justice. The non-governmental organization started by such activists played a critical role in provided legal and health services to Black South Africans subjected to state violence during the late apartheid era. Organizations such as the LRC, CALS and the NPPHCN not only provided mechanisms to support the internal anti-apartheid struggle, but they also created institutions that carried forward the traditions and knowledge created by the campaign to end apartheid. For the LRC, Chaskalson carried forward the human rights focus into the development of the South African constitution. Cameron and the CALS were to play a critical role in supporting the next generation of social justice activists in the areas of gay rights and HIV/AIDS.

1.2 The Negotiated Political Transition and the Rise of the South African HIV/AIDS Movement

The four years between Mandela’s release and the formal commencement of the democratic era saw the rise of the first wave of the HIV/AIDS movement in South Africa. Drawing strength from the ranks of human rights activists, gay rights activists, health activists and the broader anti-apartheid movement, the early manifestation of the HIV/AIDS movement embraced a human rights approach to the epidemic that would set the foundation for future activism. The ANC and the Congress of South African Trade Unions (Cosatu) were important sources of support for the first wave of HIV/AIDS activism. However the key developments for the South African HIV/AIDS movement during this period grew out of the creation of two new organizations at the CALS: The AIDS Consortium and the Aids Law Project. These organizations helped concretize a human rights approach to HIV/AIDS and set the foundations for the second wave of HIV/AIDS activism in South Africa.

Upon the party’s unbanning in South Africa, the ANC took a progressive stance on HIV/AIDS. A series of conferences in 1990 highlight the central role played by the future ruling

³ During this period Toms also established the Students' Health and Welfare Centres Organisation, which provided mobile health services to residents of the Cape townships.

party in pushing the epidemic to the center of the national agenda. In April 1990, ANC and United Democratic Front (UDF) representatives attend the Fourth International Conference on Health in Southern Africa. Critically, the ANC backed the results of this meeting: the Maputo Statement on HIV/AIDS in Southern Africa, which recognized the rights of people with HIV (Heywood and Cornell 1998: 61-2). After a conference on the epidemic in Lusaka the following month, the ANC pushed the transitional government to initiate a national AIDS task force (Heywood and Cornell 1998: 62). Building on this momentum, the NPPHCN led the organization of non-governmental groups in the development of a national HIV/AIDS plan (Heywood and Cornell 1998: 62). The alliance between the ANC and NGOs led by the NPPHCN became known as the National AIDS Conference of South Africa (Nacosa). The policy document drafted by this group – known as the Nacosa Plan – served as the blueprint for South Africa’s first comprehensive HIV/AIDS policy – the National Aids Plan (1994).

The labor movement also became increasingly active in addressing the emerging HIV/AIDS epidemic during the negotiated political transition. The shift within Cosatu to address the epidemic began in 1989 when a resolution was passed for campaign addressing HIV/AIDS (Heywood and Cornell 1998: 62). Despite the central role of Cosatu in negotiations, the labor movement called a 1991 conference to discuss HIV/AIDS in the workplace (*ibid*). These efforts culminated in an agreement between Chamber of Mines and National Union of Mineworkers on nondiscrimination for HIV positive workers in 1993 (*ibid*). As would be the case during the second wave of HIV/AIDS activism, the South African labor movement was an important source of pressure in securing support for a non-discriminatory, rights-based approach to the epidemic.

The alliance between anti-apartheid activists, labor and the ANC provided an important base from which the first wave of the South African HIV/AIDS movement drew strength. The first wave of HIV/AIDS activism involved legal activists, anti-apartheid activists and gay rights activists. The CALS served as the incubator for the Charter for Rights on AIDS and HIV (1991). Building on a network of health professionals, gay men and human rights lawyers, Edwin Cameron and others drafted the Charter in response ongoing reports of HIV-related human rights abuses in South Africa (Heywood and Cornell 1998: 65). The Charter served as the founding document for the AIDS Consortium, an NGO co-founded by Cameron. The AIDS Consortium had 225 member organizations at its founding and continues to push for “a non-discriminatory response to HIV and AIDS based on people’s basic human rights (AIDS Consortium 2014).”

The political transition saw another important organization for the HIV/AIDS movement established at the CALS. The Aids Law Project (ALP) was formed in 1993 to use legal mechanisms to protect people living with HIV/AIDS from discrimination (Oppenheimer and Bayer 2007: 170). Co-founded by Cameron, the ALP was the base from which the second wave of the South African HIV/AIDS movement would launch. The organization's second director was Zackie Achmat, an openly gay former anti-apartheid activist living with HIV/AIDS⁴. At the ALP, Achmat worked closely with Edwin Cameron, who had made his status as a gay rights activist public at South Africa's first Gay Pride march in 1990. After serving as ALP director in 1994, Achmat left the organization to found the National Coalition for Gay and Lesbian Equality. Led by Achmat, the organization successfully lobbied for the inclusion of a non-discrimination clause on the basis of sexual orientation in the new constitution⁵. Achmat, along with other future Treatment Action Campaign activists, also participated in a NPPHCN clinic in the Bellville area of Cape Town (Grebe 2011: 854). Achmat's repertoire as an activist expanded from a background in anti-apartheid and gay rights activism into the realms of health, HIV/AIDS and legal activism during the political transition.

Fellow anti-apartheid activist Mark Heywood was hired by Achmat to join the ALP in 1994 (Grebe 2011: 859). Like Achmat, Heywood had been a member of the Marxist Worker's Tendency (MWT), a Trotskyist anti-apartheid organization aligned with the ANC internally and in exile (Grebe 2011: 854). Heywood would go on to take up the position as ALP director in 1997 and co-found the Treatment Action Campaign with Achmat in 1998. Heywood's trajectory as an activist began with a focus on supporting a socialist transition out of apartheid⁶ and moved to an emphasis on HIV/AIDS and law. Notably, both Achmat and Heywood maintained political ties with the ANC during this period despite the sidelining of many MWT activists within the party. Returning South African Communist Party (SACP) exiles – Stalinist in their political orientation – assured that MWT activists played a peripheral role in political negotiations. This

⁴ Politicized by the 1976 Soweto youth uprising, Achmat went on to serve time in prison as a teenager for his activism before joining the ANC as an anti-apartheid activist during the 1980s.

⁵ The National Coalition for Gay and Lesbian Equality and Achmat also led the charge to have an apartheid-era sodomy law repealed and for the extension of financial benefits to same-sex partners.

⁶ Rather than envisage a two-stage revolution as with the leaders of the SACP, those associated with the MWT argued for a direct transition from apartheid to socialism in South Africa.

strategic positioning as within the party while also critical of particular decisions, would play an important role in Achmat and Heywood's subsequent project: the TAC.

The transition period in South Africa played an important role in setting the foundations for future HIV/AIDS activism. The rise of critical legal institutions during late apartheid served as incubators for the development of a human rights approach to HIV/AIDS during this time. Critically for the analysis here, the CALS and ALP served to bring together different strands of activism from within the broad-based anti-apartheid movement. In the figures of Cameron, Achmat and Heywood, the legacies of human rights activism, gay rights activism and health activism came together with an emphasis on the creation of a more equal and just society. While these points of political convergence were to play a central role in the campaign for access to HIV/AIDS treatment, the immediate post-apartheid period brought with it significant challenges.

1.3 Post-Apartheid Fiscal Austerity and the Demise of Consensus on HIV/AIDS

South Africa's first elections and the onset of democratic rule created an air of optimism and solidified the country's status as the 'rainbow nation'. The narrative of a broad-based democratic movement overcoming apartheid was heightened by Nelson Mandela's message of forgiveness and reconciliation. Despite the great promise of this period, the ANC's turn towards fiscally austere socio-economic policy, a series of scandals in the National Department of Health and government inattention to a growing epidemic strained the broad social coalition on HIV/AIDS that had emerged during the negotiated political transition. The ruling party's inaction on the epidemic galvanized activists and led to a second wave of HIV/AIDS activism in South Africa.

The 1994-1999 period in South Africa saw the promise of the political transition fade as the ANC adopted neoliberal socio-economic policies and the AIDS epidemic continued its exponential rise. From a prevalence rate of less than 1% in 1990, HIV prevalence in South Africa grew to 23% by 1999 (Gilbert and Walker 2002). The political management of the epidemic fell to the wayside amidst the various commitments that the ANC faced upon coming to power (Schneider and Stein 1997). The mass mobilization that led to the adoption of the National AIDS Plan (1994) was not followed up with implementation of the policy by government. Perhaps given the scope of the political projects involved – that of creating a new constitution, a novel system of government and the replacement of state administrators – the relative inattention to the epidemic is comprehensible. While all of the aforementioned issues were significant obstacles to

creating an effective response, a series of decisions on HIV/AIDS and socio-economic policy by the ruling party exacerbated the epidemic's exponential rise in South Africa.

Two political scandals emanating from the National Department of Health stoked tensions within the ANC-AIDS movement alliance that had prevailed since the late 1980s. For the 1995/6 financial year, 20% of the total national HIV/AIDS budget was allocated to support the development of a play entitled *Sarafina II* (Fassin 2007: 37). Health professionals and HIV/AIDS activists questioned this allocation of funds amidst the ineffectual implementation of the National AIDS plan (1994) (Schneider 2002). The Virodene scandal (1997) arose when a medical technician claimed to have discovered a drug that counteracted the spread of HIV in the body (Nattrass 2007). Despite having been invited to present the research findings to the South African cabinet, the 'researcher' was later found to have faked her credentials, carried out a human subjects-based clinical trial without approval, bringing into question the veracity of the research findings (*ibid*). The relationship between the ANC and the South African HIV/AIDS movement grew increasingly antagonistic as questionable policy decisions by the ruling party mounted.

The ANC's decision to adopt a fiscally austere macroeconomic policy did little to contribute to the state's meager response to the epidemic. The adoption of the Growth, Employment and Redistribution (GEAR) macroeconomic policy cut government spending in real terms, particularly for education, health and social services. The policy was designed to reduce the level of apartheid-era debt that the ANC had inherited by limiting social spending and attract foreign investment. Implemented in 1998, GEAR liberalized capital flows, lowered the corporate tax rate and led to the privatization of social services such as water and electricity. Given the levels of social inequality produced by colonialism and apartheid, the ANC's decision to self-impose structural adjustment was one that the labor movement and many health activists rejected. The ANC, led by Mandela, nonetheless forged ahead with the policy with the message of 'take it or leave' to its alliance partners Cosatu and the SACP. National spending on health would only increase in real terms in 2006/07, highlighting the impact of this policy on the development of the public health system and the response to the HIV/AIDS epidemic.

As the broad coalition that had driven the first wave of the South African HIV/AIDS movement fractured, the second wave of the movement began with the formation of the Treatment Action Campaign (TAC). Achmat, Heywood and other former MWT activists

founded the TAC on World AIDS Day in 1998 on the steps of St. George's Cathedral in Cape Town. The announcement came at the funeral of ANC activist Simon Nkoli, who had died from complications arising from AIDS. Critically, Nkoli had not been able to access treatment. Originally envisaged as a campaign within the National Association of People Living with AIDS (Napwa), the TAC later broke with the organization due to its emphasis on prevention and a tendency to be less than critical towards the insufficient state response to the epidemic. Relative to the first wave HIV/AIDS activism, the TAC expanded the base of the South African HIV/AIDS movement by organizing those most infected and affected by the epidemic: poor and working class Black South Africans. The TAC's break with Napwa would mark its turn towards the tactics of direct action towards the ANC-led South African government.

As the end of Mandela's first term in office approached, the optimism surrounding the ANC's rise to power had begun to wane. The first wave of the South African HIV/AIDS movement had built upon the legacy of the internal human rights movement to establish a rights-based approach to the epidemic. In addition, a new constitution had also been adopted during this time that protected socio-economic rights and included the right to health. Critical to note is the role of the first wave in creating the institutional and legal conditions that would enable future successes by HIV/AIDS activists. The organizations that were to guide the next phase of HIV/AIDS activism – the ALP and TAC – had been established and were guided by the tradition of human rights activism associated with Cameron, Chaskalson and others. However the first cracks in the broad coalition on HIV/AIDS forged during the political transition had begun to show. The stage was set for a second wave of HIV/AIDS activism, but none could have foreseen the duration and intensity of the political conflict that was to follow.

2. The Second Wave of HIV/AIDS Activism and the Campaign for Treatment Access

The struggle for secure access to HIV/AIDS treatment lasted for the duration of President Thabo Mbeki's time in office. From 1999 to 2008, the South African HIV/AIDS movement, led by the TAC and ALP, mounted a series of campaigns to secure the right to health for people living with HIV/AIDS in South Africa. During the course of this extended campaign, the South African HIV/AIDS movement drew on international networks of HIV/AIDS activists and medical professionals, cultivated ties with moderate elements within the ruling party and mobilized a

wide array of NGOs and professional organizations to isolate the ANC's AIDS dissident faction and transform national institutions towards delivering HIV/AIDS treatment.

The socio-economic rights guaranteed in the constitution – particularly the right to health clause – proved to be critical in the success of this extended campaign. However the constitutional right to health in South Africa was insufficient to ensure that South Africans living with HIV/AIDS had access to treatment. Rather, the activation of these legal protections necessitated a civil disobedience campaign and the eventual restructuring of the South African state. Taken in this light, the socio-economic rights guaranteed in the constitution were a necessary but insufficient condition for the realization of the right to health in South Africa. The campaign for treatment access instead points to the need for broad social mobilization to pressure the state into changing policy *and* a transformation of the state itself. In sum, the South African HIV/AIDS movement had to transform the state from the inside out to realize the right to health in South Africa.

2.1 Engaging Global Markets: the Medicines Act and the 'Name and Shame Campaign'

The TAC initiated the second phase of the HIV/AIDS movement in South Africa by allying with the ruling party on international pricing for pharmaceutical drugs. In 1997 the ANC had passed the Medicines Act, which enabled South Africa to access generic pharmaceutical drugs. The Medicines Act was an attempt to access treatment at below market rates. This was particularly important during this time due to the downward pressure on public spending imposed by GEAR. As Mbali (2013) has discussed at length, Northern pharmaceutical corporations and the US government actively pressured the South African government to abandon the law. Court cases were filed against the South African government by 'big pharma' and the threat of US sanctions was broached as the US interpreted the Act as contravening the 'trade-related aspects of intellectual property and services' clause of the World Trade Organization.

Initially, the ANC worked with the TAC as it embarked on an international campaign to decrease the cost of access to treatment. In this campaign the TAC focused on AZT, an ARV that was used to prevent mother-to-child transmission (PMTCT) of HIV. Despite international pressure, the ANC supported the TAC's proposal of a campaign to 'name and shame' global pharmaceutical companies in an effort to lower the cost of access to treatment. The TAC-led campaign was targeted at Glaxo the American pharmaceutical corporation that produced AZT.

Activating transnational networks of HIV/AIDS activists, the TAC allied with American HIV/AIDS activists in ACT-UP and Health-GAP, who actively protested at key events in the United States. Despite the efforts of activists in the US and South Africa, the ANC ceded to pressure from U.S. government and corporations and dropped the Medicines Act. The TAC continued its campaign, and eventually won a 50% drop in the cost of AZT in the South African market in 2000 (Power 2003). This was a significant initial victory in the prolonged struggle for access to treatment in South Africa.

The alliance that emerged between the TAC, ANC and transnational networks of HIV/AIDS activists on the Medicines Act was short lived. But the TAC continued to work with HIV/AIDS activists, scientists and health professionals from across the world in its subsequent campaigns. Here one can see strong continuities with the anti-apartheid campaign and its mobilization of international networks of solidarity. The alliance between the ANC's leadership and the TAC was in many ways a reanimation of the broad coalition that had emerged towards the epidemic during the negotiated political transition. In this case, the target was not the constitutional architecture of the post-apartheid state but the transnational pricing system for pharmaceutical drugs. However the emergence of the AIDS dissident faction within the ruling party brought the alliance between ANC leaders and the TAC to an abrupt end.

2.2 The Campaign within the State to Isolate the ANC's AIDS Dissident Faction

The controversy over the science linking HIV to AIDS grew out of the target of TAC's first campaign: AZT. During the course of the TAC-led campaign to lower the price of AZT, President Thabo Mbeki discovered the work of 'AIDS dissident' American scientists who questioned the link between HIV and AIDS while claiming that AZT was poisonous. Up until this point, the ANC had questioned the affordability of HIV/AIDS treatment but not the science behind it. Adopting the AIDS dissident view of the epidemic and treatment, Mbeki couched the struggle against the epidemic as one against the profiteering of global pharmaceutical corporations and linked the epidemic to neo-colonial depictions of Africans as diseased, over-sexualized and unable to govern themselves (Nattrass 2004, Fassin 2007, Comaroff 2007, Gevisser 2007, Susser 2009). The pairing of African nationalism, dissident views on HIV/AIDS, the language of the anti-apartheid struggle and the concept of an 'African Renaissance' set the

basis for Mbeki to question the orthodox science on HIV/AIDS treatment and call for an ‘African solution to African problems.’

The South African HIV/AIDS movement did not warmly receive the public expression of AIDS dissidence by the President. The problem was compounded by the fact that Mbeki’s controversial views on the epidemic were shared by Minister of Health Manto Tshabalala-Msimang, Director General of Health Thami Mseleku and other senior ANC officials. At this point, first wave HIV/AIDS activist and now Constitutional Court justice Edwin Cameron intervened with President Mbeki, with whom he had a personal relationship from his time in London. Cameron sent a personal letter to Mbeki, querying his public statements. The response only reinforced the fears of the HIV/AIDS movement: that senior ANC figures in government now held dissident views on HIV/AIDS. The campaign to secure access to treatment had taken an unexpected turn; during the fight to lower prices for HIV/AIDS treatment a powerful segment of the ruling party emerged as an obstacle.

The rise of the ANC’s AIDS dissident faction led to a series of campaigns to raise international awareness of the South African government’s position on the epidemic. The campaign to confront AIDS dissidence began in earnest at the 2000 International AIDS Conference, held in the South African city of Durban. At this conference, Mbeki used the podium to share his dissident views on the epidemic with the international scientific and activist community. Building on the tactics of the US HIV/AIDS movement, the TAC organized a protest march at the conference that included HIV/AIDS activists, scientists and medical professionals from across the world. With the number of participants reaching up to 20,000, the march also had the support of Cosatu. The protest against AIDS dissidence also produced the ‘Durban Declaration’, a statement published in the esteemed academic journal *Nature* signed by over 5,000 doctors and scientists that affirmed the scientific link between HIV and AIDS.

Despite international condemnation of the AIDS dissident position, Mbeki and his supporters in government continued to promulgate their views. In 2000, Mbeki had convened a ‘Presidential AIDS Advisory Panel’ that included esteemed HIV/AIDS researchers and scientists who held orthodox views on the epidemic. The same year, the Inter-Ministerial Committee on HIV/AIDS expanded to include non-governmental representation and was renamed the South African National AIDS Council (SANAC). Critically, no HIV/AIDS activists or scientists were included in the expanded Council. The creation or transformation of state institutions to reflect

the views of the AIDS dissidence highlighted the source of power for this faction of the ruling party.

The public campaign against the ANC's AIDS dissident faction continued until 2003, when the South African cabinet passed a resolution stating that HIV caused AIDS. This event was the culmination of a long campaign that sought to isolate the AIDS dissident faction within the ANC and the tripartite alliance. Around this time, Achmat claimed that 'over half' of the South African cabinet supported the TAC's campaign for access to treatment (Friedman and Mottiar 2005). Certainly, the 'cabinet revolt' provides evidence to back this claim. Following this decision, Mbeki 'withdrew from public debate' on HIV/AIDS but never disavowed his views. Despite their political isolation, the ANC's AIDS dissident faction's control over state health institutions was to remain a significant hurdle until Mbeki was forced out of office in 2008. The delay in adopting orthodox HIV/AIDS treatment during this time is estimated to have shortened the lives of approximately 330,000 South Africans living with HIV/AIDS (Chigwedere *et al.* 2008).

During the course of the campaign to isolate Mbeki and the dissident faction, the TAC built upon the tactics of the anti-apartheid movement. International networks of solidarity were activated and direct action was taken towards the ruling party. However a new strategy emerged during the course of this campaign: to cultivate networks of support within the state to secure formal endorsement of the positions adopted by HIV/AIDS activists. The TAC cultivated ties with moderate members of the ruling party, building on its ties with Cosatu and the support of the SACP. On this point, the strategy to maintain political allegiance to the ANC proved to be critical. Unlike the other new social movements that emerged during this time, the ANC was receptive to the critical interventions of the South African HIV/AIDS movement. This tactical approach would also later enable leading HIV/AIDS activists to play an important role within government itself.

2.3 The Legal Case for Nevirapine and the Civil Disobedience Campaign: Achieving Rollout

Alongside the campaign against the ANC's dissident faction, the South African HIV/AIDS movement worked to expand access to antiretroviral (ARV) -based PMTCT. Despite the successful efforts of the TAC and others to lower the price of AZT in South Africa, the dissident faction did not cede the fight on the basis of affordability. Rather, the goalposts were shifted to

the question of toxicity. Despite clinical trials that had confirmed AZT's safety for PMTCT in the early and mid 1990s, the Minister of Health argued that it was first necessary to confirm the safety of AZT in African patients. Given the length of clinical trials, the South African HIV/AIDS movement shifted gears in its campaign for access for treatment. The campaign to secure access to the ARV Nevirapine was the first to utilize the socio-economic rights enshrined in the South African constitution.

Led by the TAC, the campaign for access to ARV-based PMTCT shifted its focus to the drug Nevirapine. The reason for this shift was that Nevirapine had proven to be nearly 50% more effective than AZT in preventing mother-to-child transmission in a clinical study (Guay *et al.* 1999). The clinical trial was carried out in Uganda, thus removing any potential rationale for delaying the introduction of this life-saving drug to the South African public health sector. Perhaps influenced by the "name and shame" campaign led against Glaxo, the producer of the drug – Boehringer Engelheim – had decided in late 2000 to offer the drug for patients in 'developing' countries free for a period of five years (Boehringer Engelheim 2008). In shifting the focus of the PMTCT campaign from AZT to Nevirapine, the TAC tactically outmaneuvered the ANC's AIDS dissidence faction.

The ANC's response to the campaign for Nevirapine from the South African HIV/AIDS movement was to set up a pilot program to test the drug in South Africa. Shortly after the World Health Organization had approved Nevirapine for PMTCT, the South African government initiated a study of the drug at two pilot sites in each province (Annas 2003: 751). The eighteen pilot sites across the country were established to test the safety and efficacy of the drug. The TAC and ALP responded by filing a court case arguing that limiting the availability of Nevirapine in the public health sector violated the right to health for children.

The ensuing case was heard in the Constitutional Court, which included first wave HIV/AIDS activist Justice Edwin Cameron. At this trial the South African HIV/AIDS movement represented by Geoff Budlender, an attorney working in the constitutional litigation unit of the LRC. The TAC-led campaign proved to be successful. The Constitutional Court ruled that the government, by not administering Nevirapine nationally, did not take reasonable efforts to protect the rights of children born to HIV-positive mothers. Perhaps seeing that this outcome was inevitable, the ANC-led government had relented prior to the final ruling and made Nevirapine available in the public health sector in April 2002.

The victory of the TAC-led HIV/AIDS movement concretized the right to health via legal judgment in South Africa's highest court. However the TAC did not achieve this outcome without the solidarity of other organizations and activists. The LRC played an important role in the litigation process. Activist academic Nicoli Natrass also played a key role in the case⁷. Along with TAC activist Nathan Geffen, Natrass carried out research that proved that PMTCT would save money rather than create a cost burden for the South African state (Natrass, Geffen and Raubenheimer 2003). This was an important intervention, as the right to health in South Africa is only guaranteed within 'available means'. With the cost question out of the way, the case for Nevirapine could focus on whether government policy met the criteria of 'reasonableness' for protecting the rights of children. Given the sharp fiscal limits imposed by GEAR, the question of affordability was an important obstacle to overcome.

The Nevirapine case led to a fundamental change in national policy towards the epidemic, but this did not lead to immediate changes on the ground. The control of national health institutions by the ANC's AIDS dissident faction proved to be an obstacle that the law could not address. The TAC-led South African HIV/AIDS movement attempted to build on the success of the Nevirapine case through different channels. Leading activists leveraged the support of Cosatu to negotiate for a comprehensive HIV/AIDS treatment plan within the National Economic Development and Labour Council (NEDLAC). Despite hopes that a deal had been reached, the ANC backed out of a draft agreement called the 'NEDLAC plan' and business leaders followed suit in late 2002. A legal victory had been won, but access to treatment was not moving forward and attempts to create a national treatment plan had run aground.

In order to pressure government into implementing the Constitutional Court ruling, the TAC embarked on a civil disobedience campaign in February 2003. At the opening of parliament, the TAC held the 'Stand Up for our Lives' march that included former President Nelson Mandela and included trade unions Cosatu and the Federation of Unions of South Africa. The protest numbered between 10,000 and 15,000 people (Geffen 2010: 63). At the conclusion of the protest event, Cosatu and the TAC demanded that government re-initiate the policy negotiations that had been derailed in NEDLAC by the end of the month. When the deadline

⁷ As part of the legal case supporting access to Nevirapine, Natrass signed an affidavit regarding her research on affordability. The affidavit can be accessed at: <http://www.tac.org.za/Documents/MTCTCourtCase/affidavit/Natrass.txt>

passed without a response, the TAC began a civil disobedience campaign to pressure the ANC into adopting a comprehensive HIV/AIDS treatment plan.

The civil disobedience campaign consisted of TAC activists going to police stations and calling for the arrest of leading ANC officials, such as the Minister of Health, on charges of culpable homicide. During the course of the civil disobedience campaign, Cosatu withdrew their support for the TAC-led campaign due to a concern with undermining the state (Ranchod 2007: 13). Within the ANC, Deputy President Jacob Zuma promised to restart talks on a national treatment plan if the TAC suspended the civil disobedience campaign (Geffen 2010: 68). Upon the suspension of the campaign, Cosatu began negotiating with the Department of Health to restart talks for a national treatment plan on behalf of the South African HIV/AIDS movement. The model for these talks was the draft NEDLAC plan. The campaign culminated in the adoption of the HIV and AIDS Care, Management and Treatment Plan, or as it is better known the Comprehensive Treatment Plan.

After the false promise of a positive Constitutional Court ruling, the South African HIV/AIDS movement reverted to direct action to ensure the right to health. In order to achieve the first court decision that supported the right of South Africans to HIV/AIDS treatment, the TAC-led second wave HIV/AIDS activists relied on ties of academic solidarity, the support of human rights organizations initiated in the late apartheid era and ties with leading members of the labor movement and the ruling party. However it was the adoption of civil disobedience tactics that turned the tide on treatment availability in South Africa. The strategy was reminiscent of the campaign to make the townships 'ungovernable' by the internal Mass Democratic Movement during the 1980s. Here again, the various strands of activism that came together in the early 1990s are highlighted by the strategic vision put into motion by the TAC-led second wave of HIV/AIDS activism.

Critically, the legal institutions of the state were insufficient to guarantee the implementation of their decision in state health institutions. The continued presence of the ANC's AIDS dissident faction in the state health apparatus was the key stumbling block on this point. It was only through a campaign of direct action and the cultivation of a network of support within the tripartite alliance that the TAC-led HIV/AIDS movement was able to pressure government into the provision of ARV-based HIV/AIDS treatment in South Africa. The adoption of the Comprehensive Treatment Plan was an important achievement in the protracted

negotiations over treatment availability in South Africa. However it did not mark the end of institutional intransigence by the ANC's dissident faction. Rather, the cycle of intransigence and direct action had to repeat itself again on the international stage for the provision of treatment to reach requisite levels of need in South Africa.

2.4 Overcoming Institutional Intransigence: SANAC and the Transformation of the State

Rather than herald the end of the campaign for treatment access, the Comprehensive Treatment Plan marked another stage of institutional intransigence on the part of the ANC's AIDS dissident faction. Despite adopting the policy in 2003, by the end of 2004 only 15,000 patients were on treatment nationally (Wouters et al. 2010: 178). With government falling behind delivery targets, the TAC threatened legal action to speed up the 'rollout' of treatment (Geffen 2010: 69). In order to coordinate the oversight of the slow rollout the South African HIV/AIDS movement formed the Joint Civil Society Monitoring Forum on the Operation Plan for HIV/AIDS Care, Management and Treatment (JCSMF). Made up of NGOs from across the country, member organizations of the JCSMF checked on the progress of site accreditation, purportedly the key factor slowing down the 'rollout' of treatment (Geffen 2010: 70). Despite these steps, dissident control of national health institutions led to less than one-third of projected patients in need receiving treatment by 2006 (Susser 2009: 167). Once more, the existence of law and adoption of policy were insufficient conditions for the right to health to be realized in South Africa.

The next major step in the campaign for treatment access occurred at the 16th International AIDS Conference held in the city of Toronto in August 2006. Rather than a mass protest in the vein of the TAC's Durban campaign, the protest here was a reaction to the South African government delegation's display of garlic, beetroot and lemon as HIV/AIDS treatment. TAC activists led a series of protests at the conference, which included activists shouting down the Minister of Health during her address and demands for her immediate removal from office. In a parallel civil disobedience action, 44 TAC activists in Cape Town occupied the offices of the Provincial Department of Health, leading to their arrest (MacClennan 2006). The Conference closed with UN Special Envoy on AIDS to Africa Stephen Lewis offering an eviscerating critique of the ANC's management of the epidemic, stating, "They can never achieve redemption."

The international furor that ensued from the Toronto International AIDS Conference led to a shift in strategy for the ruling party. As with the response to the previous civil disobedience campaign, a moderate faction of the ANC emerged to support orthodox HIV/AIDS treatment within government. Following the Toronto conference, Deputy President Phumzile Mlambo-Ngcuka began to work closely with HIV/AIDS activists and Deputy Minister of Health Nozizwe Madlala-Routledge in drafting a new national HIV/AIDS plan. Noted AIDS dissident and Minister of Health Manto Tshabalala-Msimang was sidelined during these negotiations and eventually left office on sick leave in February 2007. The Minister's absence created a window of opportunity for the South African HIV/AIDS movement to transform the state's response to the epidemic from within.

Led by TAC and ALP activist Mark Heywood, the South African HIV/AIDS movement worked with moderate ANC leaders to restructure national institutions and develop a new national HIV/AIDS policy. SANAC was transformed into a hybrid state-civil society institution to oversee the National Department of Health. SANAC delegates now included the doctors, medical professionals, activists and NGOs that made up the South African HIV/AIDS movement. The restructured SANAC rapidly assembled a new national policy, the National Strategic Plan for HIV/AIDS and STIs (NSP). While biomedical expertise retained its dominance within the institution, activists and representatives from community-based organizations had substantive input into the development of new national norms on an updated PMTCT policy (Powers 2013b). The restructuring of SANAC was carried out to limit the impact of the AIDS dissident faction on national policy. However the Minister of Health's return from sick leave marked a reappearance of institutional intransigence (Powers 2012). It was not until Mbeki was removed from office in September 2008 that the last vestiges of dissident control were removed from the state. At this point, the South African HIV/AIDS movement worked within and through SANAC to scale up treatment.

Genealogies of Justice: Analyzing the Overlapping Waves of Activism in South Africa

While significant challenges remain in curtailing the spread of HIV/AIDS, South Africa reached the goal of universal treatment in 2010 and now has the largest treatment program in the world (UNAIDS 2013:61). While the South African government has been quick to lay claim to this achievement, it was the South African HIV/AIDS movement that played the leading role in

securing this outcome. The success of the second wave of HIV/AIDS activism was contingent upon several factors. These include the right to health clause in the post-apartheid constitution and consultative policy development mechanisms. However it is critical to note that these institutions were the product of earlier waves of activism (Powers 2013a). Further, human rights organizations formed during late apartheid and those initiated by first wave HIV/AIDS activists played important roles in the success of the second wave of HIV/AIDS activists. Given the overlapping dynamics described here, the relationship between different waves of activism in South Africa is worth further consideration.

Over the course of nearly a decade, the second wave of HIV/AIDS activism engaged with the dissident faction of the ruling party in order to expand treatment access in South Africa. The TAC-led HIV/AIDS movement employed tactics that drew from the anti-apartheid campaign, the gay rights campaign, the internal push for human rights and the first wave of HIV/AIDS activism in the extended campaign for treatment access. However the relation between earlier social justice movements and the second wave of the HIV/AIDS movement extend beyond considerations of tactics or support. Key figures such as Edwin Cameron epitomize the various roles that individuals played in several spheres of social activism. Cameron can be categorized as a human rights activist, anti-apartheid activist, gay rights activist, HIV/AIDS activist and now, Constitutional Court justice. A similar description could be offered for Zackie Achmat's trajectory as an activist, but without the final designation. However as a method, categorization might obscure more than it reveals.

General descriptors for socio-political activity overlook the personal relationships that define the lives of those involved in a given social process. If one interpersonal networks seriously, Cameron's founding of the AIDS Consortium not only influenced the adoption of a rights-based approach to the epidemic in state policy, but it also formed an institution that brought together two key activists for the second wave of the HIV/AIDS movement: Achmat and Heywood. Similar claims could be made for Dugard's founding of the CALS and the activism that was spawned out of this organization, which includes the ALP, Cameron, Achmat, Heywood and others. The question remains as to how best represent the overlapping relationships that characterize the first and second waves of HIV/AIDS activism. Grebe (2011) has used the metaphor of networks in describing the tactics of coalition building utilized by the TAC-led HIV/AIDS movement. The analysis tracks the role of key activists in securing the support of

actors and organizations in different realms, including transnational activist networks, the South African labor movement and the gay rights movement. But the network concept describes a snapshot of relationships at a given moment, rather than a progression over time.

The progression of organizations and activists from the aftermath of the Soweto uprising to the achievement of universal treatment described here lends itself instead to the concept of a genealogy. Here the assumption of consanguinity – or blood descent – is stripped from the concept. Rather, it is proposed that a genealogy might also refer to the passing on of particular modes of knowledge through time. In this case, the knowledge in question relates to tactics and techniques of activism. The analysis above describes some of the *genealogies of justice* in South Africa stretching from the late apartheid era to the present day. By tracing the connections between various strands of activism, it is possible to highlight how the second wave of the HIV/AIDS movement was part of a longer historical process rather than an isolated and unique socio-political formation. The unfolding of this genealogy of justice continues today, with new social justice movements emerging that build on the tactics and approaches refined by the TAC-led second wave of HIV/AIDS activism.

The new wave of social justice-based movements consists of organizations such as Equal Education, the Social Justice Coalition and Ndifuna Ukwazi (Dare to Know). Each of these organizations has direct links to the second wave of the HIV/AIDS movement. HIV/AIDS activists such as Zackie Achmat, Nathan Geffen, Gilaad Isaacs and Gavin Silber have carried with them the strategic approaches honed during the second wave of HIV/AIDS activism. Echoing the role of Edwin Cameron nearly two decades earlier, Zackie Achmat has served as the senior figure fostering a new wave of social activism. Founded by Zackie Achmat in 2011, Ndifuna Ukwazi (NU) is a mentoring organization that promotes the use of “research and strategic litigation” in its support of activists and organizations. Taken in this light, the NU is an organizational extension of the individual role that Achmat has played in fostering the development of social justice activists.

Equal Education and the Social Justice Coalition have carried forward the tactics of the second wave of HIV/AIDS activism, particularly in the use of legal challenges to state inaction. Building on the TAC’s legal approach, Equal Education filed a case against National Education Minister Angie Motshekga to publish National Minimum Norms and Standards for School Infrastructure in the Eastern Cape. The campaign was successful, as the National Education

Minister into the publication of these norms in November 2013. The SJC's key initiative thus far has been the Campaign for Safe Communities. Starting in 2011, the SJC lodged a formal complaint with the Office of the Premier in the Western Cape province. However the SJC and partner organizations including the TAC had to resort to legal means to ensure that a formal investigation was carried out on crime and safety in Khayelitsha. In August 2014, the Commission of Inquiry into Policing in Khayelitsha submitted its final report, which highlighted the plight of communities and inadequate police enforcement of the law. In both cases, the LRC has served an important legal partner in supporting initiatives aimed at achieving social justice in poor and underserved communities. The genealogies of justice continue to unfold in South Africa, with this new wave of activism spreading from its roots in the second wave of the HIV/AIDS movement into the areas of education and community safety.

Conclusion

The focus here has been the various strands of activism that contributed to the development of the socio-economic rights included in the constitution and the success of the South African HIV/AIDS movement in achieving access to treatment. The argument put forward is that both the constitution and the outcomes that the socio-economic rights clauses it includes, must be seen as the product of anti-apartheid activism in the areas of human rights, gay rights, public health, and HIV/AIDS. However, as the analysis above has shown, the legal and institutional conditions created by first wave and anti-apartheid activists were necessary but insufficient conditions for achieving treatment access in South Africa. A broad-based social movement that utilized the tactics of direct action and civil disobedience was necessary to push the ruling party into taking action against the epidemic. However even these political strategies were not sufficient. In the end, the second wave of the HIV/AIDS movement transformed the state from within to guarantee access to treatment in South Africa. The restructuring of SANAC into a hybrid state-civil society institution enabled HIV/AIDS activists to redirect state health institutions towards the dissemination of orthodox HIV/AIDS treatment.

The conclusions that can be drawn from this argument are two-fold. First, the post-apartheid constitution by itself is insufficient to guarantee the rights of South African citizens. The extended political struggle over access to HIV/AIDS treatment highlights that control over particular state institutions is a necessary precondition for protecting socio-economic rights in

South Africa. Second, it is necessary to contextualize the second wave of HIV/AIDS activism in the history of late apartheid, the anti-apartheid movement and the organizations created to achieve political freedom in South Africa.

The approach taken here has been to propose the concept of *genealogies of justice* to understand the interpersonal ties that led to the success of the South African HIV/AIDS movement. Given the different social movements that emerged during the post-apartheid era, such an approach might yet yield interesting insights about the origins of different organizations, tactical approaches and the reasons behind the success or failure of different campaigns for achieving social justice. At the very least, such an approach can assist in contextualizing the emergence of a new wave of social movements emerging in South Africa. Perhaps it may also be useful in understanding the approaches taken by these newest social movements in their campaigns for a more just and equal South Africa.

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