

Introduction

No easy walk to constitutional governance: the small matter of a health system

By Mark Heywood

In our previous 18-month review, the AIDS Law Project (ALP) struck a relatively positive note in an introduction entitled “The End of Politics?”. At that point, Cabinet had just adopted the national *HIV & AIDS and STI Strategic Plan, 2007-2011* (NSP) and the South African National AIDS Council (SANAC) was in the process of being reinvigorated.

Government as a whole had struck a new tone about how it would respond to the epidemic, particularly under the leadership of then Deputy President Phumzile Mlambo-Ngcuka and then Deputy Minister of Health Nozizwe Madlala-Routledge. We committed ourselves to “work[ing] to ensure that Cabinet acts swiftly in taking the policy decisions identified in the NSP as ‘necessary requirements for an effective response’.”

Writing in early 2009, it is clear that we were premature in our optimism. As this review shows, the ALP – ordinarily working in close collaboration with its ally, the TAC – accomplished a great deal in the last 18 months: ensuring the implementation of key aspects of the NSP; building SANAC and its structures; and promoting constitutional governance of the health system.

But ultimately it was to be the exigencies of party politics rather than its constitutional duties that often determined the course of the government’s response to HIV and AIDS. As a result, it was primarily the unrelenting pressure of health activists, continuing to demand respect for and the protection, promotion and fulfilment of human rights, that brought results – particularly the increasing numbers of people benefiting from access to antiretroviral (ARV) treatment.

In this introduction I therefore examine a number of the issues – as well as the conclusions that flow from them – that dominated the ALP’s work from July 2007 until the end of 2008.

But ultimately it was to be the exigencies of party politics rather than its constitutional duties that often determined the course of the government’s response to HIV and AIDS.

Implementing the NSP and building SANAC

In June 2007, former Minister of Health Manto Tshabalala-Msimang hastily returned to office after a lengthy period of sick leave and a successful liver transplant, just in time for her department's annual budget vote in Parliament. Her absence had created the space for more urgency and partnership in tackling the country's crisis in health.

But her return immediately coloured the optimism that had emerged during the drafting of the NSP and the revival of SANAC, very soon leading to the renewal of tensions. Reports from senior officials within the Department of Health (DoH) indicated that Tshabalala-Msimang disapproved of the NSP, and refused to have anything to do with it. Similarly the collaborative efforts to respond appropriately to the extensively drug resistant (XDR) tuberculosis (TB) crisis, which began under Jeff Radebe's watch as acting Minister, came to a rapid end.

The ALP, TAC and our allies in civil society resolved not to be distracted by the former Minister.

Instead, we concentrated on building on the policy foundations that had been established in her absence. In particular, the ALP began to invest time, resources and imagination into strengthening and using SANAC as a forum to develop an official and open discourse on the implementation of the NSP, bringing to it disputes and hopefully resolving them under its aegis. It has done – and continues to do – this in a number of ways.

First, the ALP coordinated SANAC's Law and Human Rights (L&HR) Sector, which has become a valuable forum for better and wider collaboration on the human rights issues that have traditionally been the ALP's bread and butter. Today many more bodies are conscious of and are providing legal

services to assist people in challenging HIV-related unfair discrimination.

This is done, for example, by a number of private law firms working effectively through the pioneering public interest clearing house ProBono.Org. In addition, the ALP established a joint training programme with the Legal Aid Board (LAB) and the South African Human Rights Commission (SAHRC) aimed at building capacity within Justice Centres and SAHRC offices in Mpumalanga and Limpopo to handle cases of HIV-related unfair discrimination. A report on this training and its outcomes is contained in chapter 4 of this review.

Second, in carrying out my responsibilities and duties as the deputy chairperson of SANAC, I have been able to pay attention to and facilitate the overall development of the institution and its structures, ensuring that it both maintained momentum and acquired definition. For example, one of the long-standing issues identified by the civil society sectors of SANAC was the need to build capacity in and professionalise the SANAC secretariat to ensure the efficient organisation of its committees and follow through on its recommendations.

Ultimately, this led to an agreement between the Deputy President – in her capacity as the chairperson of SANAC – and the new Minister of Health that the secretariat be re-constituted at the Development Bank of Southern Africa (DBSA) for a transitional period of two years, and that senior appointments – including a Chief Executive Officer – be made. This process is currently underway.

Third, SANAC has been an important forum both to advance important policy issues (such as voluntary medical male circumcision and improved prevention of mother-to-child HIV transmission (PMTCT) and ARV treatment protocols), as well as to report on and create wider awareness of human rights violations (such as HIV-related unfair discrimination in the South African National Defence Force (SANDF) and the victimisation of public sector doctors dedicated to providing the best available medical care). These issues are discussed in greater detail in chapters 1 and 2 below.

Until Tshabalala-Msimang's departure from office in September 2008, maintaining forward movement through SANAC involved a silent war of attrition and working around her with other Ministers

Until Tshabalala-Msimang's departure from office in September 2008, maintaining forward movement through SANAC involved a silent war of attrition and working around her with other Ministers and officials, particularly the former Deputy President.



Swearing in of President Motlanthe's Cabinet: Barbara Hogan replaces Manto Tshabalala-Msimang as Minister of Health (Photo: Robert Botha)

and officials, particularly the former Deputy President. The former Minister often sought to bypass SANAC and to cloud, question and confuse its actual proceedings. But behind the scenes, the former Deputy President valiantly attempted to keep her under control and insist that she abide by the principles and “key messages on HIV prevention and treatment” that were adopted by both SANAC and government in late 2006.

Tshabalala-Msimang's removal from office in September 2008, coupled with the appointment of Barbara Hogan (as the new Minister of Health) and Dr. Molefi Sefularo (to fill the vacant position of her deputy), led to a dramatic change in official attitude towards SANAC. This also led to the opening up of opportunities for SANAC to provide leadership in the country's response to the epidemic.

This was evident towards the end of 2008 when SANAC was tasked with organising World AIDS Day events that promoted a different tone and set of messages and signalled to the world a new determination on HIV prevention. Parallel to this, Hogan requested SANAC to develop a social mobilisation plan aimed at improving the uptake and outcomes of the PMTCT programme. This plan was developed in late 2008 and presented to SANAC in early 2009.

Reviving the health system

One of the resolutions taken by the African National Congress (ANC) at its 52nd National Congress in December 2007 described education and health as “core elements of social transformation” that would be prioritised by government. A few weeks later, in its annual January 8th anniversary statement, the ANC reflected as follows:

We must acknowledge that much is wrong in our public health care system. Though progress has been made, the country is still faced with significant challenges with respect to the quality

of care provided; the physical infrastructure, maintenance and management of public health facilities; the working conditions and remuneration of doctors, nurses and other health care workers; and the inequitable distribution of health care resources.

The ANC's sudden appreciation of the health crisis provided us with an opportunity to develop and apply arguments about health and human rights to policy development, an integral part of our work since 2004 when we began to prioritise research and advocacy on the state's duties in relation to health care services.

In part, this work has been based on the understanding that unless the systemic faults in the health system are fixed, the long-term sustainability of programmes – such as the ARV treatment programme – will be at risk. In addition, the ALP believes that government's obligations flowing from section 27 of the Constitution should not be left in abstract, but instead turned into tangible guidelines for policy-making and its implementation.

In early 2008, the ALP participated in two separate – albeit linked – ANC processes: Adila Hassim was invited to be a member of an internal ANC committee set up to investigate and make recommendations on the introduction of a system of National Health Insurance (NHI); and the ALP participated as an organisation in a more public process – hosted by the DBSA – to develop a “road-map” for health reform for the next government. These processes, and their uncertain outcomes, are summarised in the chapter on health sector reform in this review.

In early 2009, our Board of Directors agreed that the ALP should intensify its focus on health and human rights. This is necessary because our experience thus far reveals that few people responsible for the management of health service provision, whether in the public or private sector, understand the reach of the Constitution and its impact on their work – how it defines the contours for the management of the health system and particularly the duty to plan and oversee budgets appropriately.

Compounding this problem is the fact that across the political spectrum, from the privately owned health sector to the trade unions, an ideological approach to health exists and is vigorously defended. This type of approach seeks to bend the facts about the failings of health service delivery into a pre-determined framework, ignoring complexity and avoiding nuance. Instead of seeking practical solutions to difficult problems, policy reform advocates from both the left and the right look for quick fixes and easy-blames.

But where we differ with the ideologues is in how we reach that goal – we focus on formulating a pragmatic approach that seeks to build consensus wherever possible and harness the resources and capacity that reside within both public and private sectors to advance the public interest.

For example, the growing inequality between the public and private health sectors has led to calls for the abolition of medical schemes, as if by doing so it will be easier to solve the underlying causes of the public health system's decay. But while an NHI system might appear equalising and thus politically radical, in and of itself it provides no substitute for ensuring effective management, accountability, transparency and appropriate resource allocation and oversight in both the public and private sectors.

The ALP has been consistent in its full support for the principle of health equity, which is based upon constitutional entitlements and the resultant duties imposed upon all funders and providers to ensure that there is universal access to quality health care services regardless of ability to pay. But where we differ with the ideologues is in how we reach that goal – we focus on formulating a pragmatic approach that seeks to build consensus wherever possible and harness the resources and capacity that reside within both public and private sectors to advance the public interest.

The politics of AIDS: undying denialism

In our previous review we heralded the adoption of the NSP and the end of AIDS denialism. In particular, we saluted Nozizwe Madlala-Routledge – at that time the Deputy Minister of Health – for her outspoken attempts to break with denialist mantras: by volunteering for a public HIV test; by talking about the epidemic as a crisis; by working openly with the TAC; and by promoting access to ARV treatment. However, soon after the former Minister's return to office in June 2007, Madlala-Routledge was ordered to stop speaking publicly on HIV and AIDS and to lower her profile.

For a few months, the conflict between the former Minister and her deputy simmered behind the scenes. But in July 2007, it broke to the surface following Madlala-Routledge's "unauthorised" visit to Frere Hospital in the Eastern Cape and her description of conditions at the hospital as a "national emergency". This led to senior officials in the DoH colluding in the manufacturing of charges against her for travelling to an international AIDS vaccine conference without presidential consent. On 8 August 2007, the eve of National Women's Day, former President Mbeki dismissed her after she had turned down his request that she resign.

The public controversy surrounding her dismissal marked a turning point in the politics of South Africa and the ANC. For the first time, a senior ANC official disputed the official denial of the health crisis, and stood her ground against the President – citing her duties of principle, truth and respect for the Constitution. On 12 August 2007, the former Deputy Minister told her side of the story in a press conference broadcast live on radio. In explaining her views of her constitutional duties, Madlala-Routledge exposed the lies of former President Mbeki and his Minister of Health.

Despite the earlier rapprochement with the government, the context demanded that the ALP and TAC speak out publicly in defence of the former Deputy Minister – pointing out that the former President had fired the wrong person and that his actions violated the spirit, if not the letter, of his constitutional powers to hire and fire members of his Cabinet. The ALP and others set up a special campaign fund to assist Madlala-Routledge with legal and other costs arising from her dismissal. But despite the furore surrounding the firing, former President Mbeki's position in the ANC – at that point – seemed secure: a special edition of his notorious weekly online letter in *ANC Today* was dedicated to justifying his actions.

With her nemesis now out of the picture, Tshabalala-Msimang attempted to reconsolidate her strength. However, because of the active role of the former Deputy President as chairperson of SANAC and leader of government's response to HIV and AIDS, the former Minister had to be more circumspect in public. But behind the scenes, she continued to act to undermine the NSP. Under her watch, the residue of AIDS denialism continued to be seen and felt throughout the country:



- German vitamin salesman Matthias Rath, whose arrival on South Africa's shores had been facilitated by AIDS denialists holding senior positions in government, continued to engage in his damaging activities. The TAC – with assistance from the ALP – challenged Rath on a number of fronts. Most importantly, the Legal Resources Centre (LRC) – acting on behalf of TAC – filed an application in the Cape High Court that aimed to stop Rath and get the DoH properly to enforce the Medicines and Related Substances Act 101 of 1965 against him.
- In a groundbreaking judgment handed down on 13 June 2008,² Justice Zondi prohibited Rath and his cronies from carrying out clinical trials without Medicines Control Council approval, as well from making false statements in respect of his products. In addition, he found that the state had failed to enforce its own legislation, despite the positive obligations the Constitution places on it. Interestingly, government chose not to appeal. As Rath did not prosecute his appeal timeously, it lapsed.
- In late 2007, the ALP and TAC continued to campaign for the PMTCT protocol to be brought in line with international good practice. Despite the Constitutional Court's 2002 decision in the TAC case clearly permitting such a development, Tshabalala-Msimang continued with her disingenuous claim that the judgment proscribed such a change. In accordance with SANAC's earlier recommendations, the revised protocol was eventually approved in late January 2008. It was reported that the former Minister cast the only dissenting vote at the National Health Council (NHC).
- The issue of PMTCT – in particular implementation of the revised protocol – was also raised by TAC at its meeting in March 2008 with the ANC's newly elected Deputy President and Secretary-General. At this meeting, the two senior ANC leaders spoke frankly of the obstacle represented by Tshabalala-Msimang. But despite this and the ANC's public disavowal of AIDS denialism, as well as strong statements about its commitment to tackle HIV made at its 52nd National Conference in Polokwane in December 2007, state-sponsored denialism was neither rooted out nor condemned. At times it seems as if party ties are more important than party policies, with the Constitution being the last thing on anyone's mind.
- Peggy Nkonyeni, the Member of the Executive Council (MEC) for Health in KwaZulu-Natal (KZN) and one of Tshabalala-Msimang's strongest provincial allies, colluded with her department in early 2008 in instituting disciplinary proceedings against Dr. Colin Pfaff on trumped-up charges of misconduct. As a doctor at Manguzi Hospital in KZN's rural north, Pfaff was "guilty" of using donor funds to implement an improved PMTCT protocol before the NHC had officially approved the changes.

Nkonyeni's fight with Pfaff – and later with his colleague Dr. Mark Blaylock – was drawn out through much of 2008. The ALP's role in providing Pfaff and Blaylock with legal advice and support is detailed in chapter 2 of this review. The combination of ALP interventions, TAC advocacy and investigative reporting by bodies such as the Health-e News Service eventually caused the MEC to back off. But by then, much irreparable damage had already been done – both to the doctors' careers and their patients' rights of access to health care services. Pfaff and Blaylock no longer work at Manguzi Hospital.

2. *Treatment Action Campaign and Another v Rath and Others* (12156/05) [2008] ZAWCHC 34; [2008] 4 All SA 360 (C) (13 June 2008)

In attacking Pfaff and Blaylock, Nkonyeni not only abused her position by issuing unlawful instructions to provincial health officials, but also wasted limited health department resources by commissioning an official – but unexplained – enquiry into the doctors’ conduct. This was despite the fact that Pfaff and Blaylock had been forthright in declaring the source of their funds and the life-saving services they were providing to pregnant women and their children. According to one of the doctors, a member of the investigating team made it plain that the enquiry was not interested in whether their actions had saved lives or were in accordance with good medical practice, but only with whether they had broken unspecified “rules” by accepting a donation of medicines. Predictably, and despite requests made by the ALP, the results of the enquiry were never made public.

Tragically, Nkonyeni’s denialist-inspired attacks on public sector doctors were nothing new. In May 2008, a similar case regarding political intimidation and abuse of power by another senior ANC politician went to trial. At issue was the 2001 dismissal of Dr. Malcolm Naude because of his support for an NGO that had been providing ARV drugs – post-exposure prophylaxis (PEP) – to rape survivors in the Nelspruit area. In its decision in *Naude v MEC for Health, Mpumalanga*,³ the Labour Court found that Naude’s dismissal was directly related to the exercise of his freedom of conscience and was therefore automatically unfair.

Sibongile Manana, the MEC for Health in Mpumalanga at the relevant time, did not testify. Instead, she relied on a range of government officials to present lies and misrepresentations on her behalf. For example, Acting Justice Musi held that Mantwa Mnisi – the former MEC’s legal advisor – was “also a very unreliable witness who tried everything to sugar coat [Manana’s] words and deeds and if needs be at the expense of her own integrity.”⁴

In confirming that a doctor “has a duty to adhere to professional ethical norms” and that “the dismissal of a medical practitioner for acting in accordance with the dictates of his or her professional ethics is ... arbitrary and illegitimate”, Acting Justice Musi held as follows:

Ethical rules of a profession are part of the self-regulatory mechanisms that many professions set for their members. Ethical rules are normally objective moral codes or standards that members of a profession must abide. Those rules must be respected and obeyed. Ethical rules are the religious rules of a profession. Failure to observe those rules normally spells doom for the transgressor. If a member of that particular profession does not abide by those rules he/she risks being declared unfit to be a member of that profession.⁵

In awarding Naude R100 000 in compensation, the judgment described the former MEC as “tyrannical and dictatorial in her management style”, further noting that “[h]er unrelenting opposition to [the NGO] and the supply of ARVs would not even allow her to make a concession for rape survivors who are children.” In short, “[t]hose who opposed [Manana] became victims of her wrath.”⁶ Like Drs. Pfaff and Blaylock, Dr. Naude no longer works for the provincial department that seemed intent on forcing him out of service.

Some might argue that the ALP’s successful use of the law and human rights in these cases is proof of the value of the Constitution and the efficacy of courts as arbiters of disputes. It is true that the ALP and its partners have scored important victories against abuses of public power. But what is

Tragically, Nkonyeni’s denialist-inspired attacks on public sector doctors were nothing new. In May 2008, a similar case regarding political intimidation and abuse of power by another senior ANC politician went to trial.

3. *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (S3331/2004) [2008] ZALC 158 (21 October 2008), which is discussed in further detail in chapter 2 below.

4. At paragraph 90

5. At paragraph 107

6. At paragraph 93

worrying is the pattern of largely unchecked government misconduct that emerges from these cases, casting serious doubt on the executive's respect for the rule of law.

First, as Acting Justice Musi found, government officials seem to have no compunction about lying before courts. Second, the former President and many members of his Cabinet and party seem to attach little value to judicial findings of unconstitutional behaviour (at least on issues such as these). For example, the two villains in the cases described above were both promoted. Nkonyeni was elected provincial treasurer of the ANC in KZN in November 2008. Manana was redeployed to the National Assembly. More recently, she was rewarded for wrecking Mpumalanga's health system by being made a member of the ANC's influential health and education committee.

The impression is that despite senior ANC leaders' frequent claims that they respect the independence of the judiciary, the rule of law and the Constitution, the requirements of constitutional governance have not been internalised into the workings of the ruling party. Instead, another set of rules – patronage and party loyalties – appears to have greater importance. Given the blurring of lines between party and state, this is cause for concern. For as the following section shows, the Constitution and its requirements have also not been internalised by many of the country's governance structures.

Ending 14 years of illegality in the SANDF

On 17 May 2008, a settlement between the South African Security Forces Union (SASFU) and the SANDF sought to bring to an end the latter's practice of mandatory HIV testing and the consequent blanket exclusion from employment, promotion and external deployment of all those who tested positive. This case, which ended when the settlement became an order of court, is described in detail in chapter 1. It brought to a climax 15 years of ALP lobbying, advocacy and litigation to end unfair discrimination in the workplace.

But within two weeks of the High Court's order, the Chief of the Army – Lieutenant-General Solly Shoke – defiantly told a newspaper that the SANDF could not appoint "sickly people": "Soldiers are not ordinary citizens. ... Their discipline and reliability should never come into question." Unfortunately, his comments reflected a broader pattern – ignorance of legal duties arising from the Constitution and obliviousness to sound advice – that started before the litigation commenced, was evident during it, and continues till this day.

The Department of Defence could have established the medical facts about HIV infection and applied them objectively to the real requirements of service in the SANDF, stripping it of the machismo and comic-book exaggerations about military service that accompany defence forces worldwide.

The practice of mandatory HIV testing began before the advent of the Constitution. Indeed, the ALP first drew attention to concerns regarding the constitutionality of the practice in a letter written to Ronnie Kasrils – then the Deputy Minister of Defence – as far back as 1994. Although the SANDF is expressly excluded from the scope of ordinary labour legislation, it must abide by the Constitution and its provisions such as the rights to equality and fair labour practices.

The constitutional concern should have been relatively simple to address. The Department of Defence could have established the medical facts about HIV infection and applied them objectively to the real requirements of service in the SANDF, stripping it of the machismo and comic-book exaggerations about military service that accompany defence forces worldwide. But this did not happen. Instead, the ALP's concerns would take over 14 years to address.

Over these years, the ALP sought to engage the SANDF in various ways – through on/off litigation on behalf of a number of affected individuals (some of whom eventually died or gave up), as well as through officially established processes to examine the policy. The matter was raised with the Minister of Health, the Minister of Defence and the Deputy President. But all this was insufficient to dislodge a policy that ultimately appeared to be rooted in the private views and prejudices of a handful

of senior generals in the South African Military Health Services. Its continuation depended upon their privileged access to the most senior SANDF officials who do not understand HIV infection and disease, and their control over a large part of the military apparatus.

Xenophobia and the rights of refugees and asylum seekers

In any given year the ALP develops a set of activities and objectives. In so doing, however, the organisation knows that many things that will take up its time and energy cannot be planned for in advance. This was particularly the case with the outbreak of murderous xenophobia in April 2008, as well as various related events in the months leading up to the outbreak of violence countrywide.

The ALP's work on these issues began in earnest in January 2008 following a late night police raid on the Central Methodist Church in downtown Johannesburg, home to many refugees and asylum seekers. The police claimed that the raid was carried out as a crime prevention measure. This does not, however, explain why it was conducted at midnight or the degree of police brutality involved. In reality, it was an early manifestation of xenophobia. In response, the ALP rallied together with organisations such as the LRC, Lawyers for Human Rights (LHR) and Médecins Sans Frontières (MSF) to assist the foreign nationals who had been hurt and/or detained in the raid and who needed access to medical care.

In particular, the ALP worked under the leadership of the LRC to secure the detainees' release, to ensure that they were able to access appropriate medical care and to prevent their deportation. After several days, most of the detainees were released. However, the delay in releasing a group of them and the callousness of the magistrate towards their plight led the LRC – with support from LHR, MSF and the ALP – to bring an urgent application in the Johannesburg High Court for their release. In comments made from the bench before granting the order, Acting Justice Sutherland expressed shock at the contents of the founding affidavit, remarking that it reminded him “of grotesque abuses of what legal professionals dealt with 20 years ago.” He continued:

I do recall former President Mandela when he addressed the nation having said that “never again never again” will we have to deal with the characteristics of the apartheid regime. The irony, a decade after democracy is to witness in courts in our country such brutal and cruel treatment of human beings. This really is a shame.

In ordering that a complaint be referred to the Magistrates' Commission, Acting Justice Sutherland apologised to the applicants for the way they had been treated by the magistrate:

It is inconsistent with the functioning of the court to treat humans as pieces of paper. It is inconsistent with the role of the judiciary to have an eye on the clock so at 4pm unprocessed people get slotted into the next day's lot.

As a result of this work, and particularly the demonstrable benefits of the collaboration between different human rights organisations, the ALP decided to establish an informal forum to pursue issues regarding migrants' rights: their right of access to health care services and the duty it places on the state to budget and plan, particularly in the context of the crisis in Zimbabwe and the presence of millions of Zimbabweans in South Africa. A detailed memorandum on these issues was prepared for SANAC and tabled at a plenary meeting on 4 March 2008.⁷

In response, the ALP rallied together with organisations such as the LRC, Lawyers for Human Rights (LHR) and Médecins Sans Frontières (MSF) to assist the foreign nationals who had been hurt and/or detained in the raid and who needed access to medical care.

7. The report, which was also submitted to Parliament, is available online at <http://www.pmg.org.za/files/docs/b80326sanac.pdf>

In addition, the ALP prepared and presented a joint submission with the TAC on the Refugees Amendment Bill [B 11—2008], focusing in particular on ensuring access to health care services for refugees and asylum seekers. This area of work, was interrupted by a more immediate challenge – in May 2008, foreign nationals became the target of vicious attacks in townships across Gauteng. These attacks, which eventually resulted in many deaths, spread to Cape Town within weeks.

In Cape Town, the ALP's Fatima Hassan and the national and Western Cape offices of the TAC were at the heart of coordinating a civil society response that aimed both to stop the attacks and to provide humanitarian relief to survivors. This involved monitoring, ensuring the provision of medical care, putting pressure on UN agencies and the provincial and city governments to respond appropriately, and legal action to compel the authorities to respond. This intervention lasted for nearly six months and placed extreme pressure on both the ALP and the TAC.

Both organisations have been widely commended for their response. For example, in the report of an enquiry into allegations of the inadequacy of the response of the UN High Commissioner for Refugees (UNHCR) to the xenophobia, the UNHCR's Inspector General's office noted as follows:

A few individuals and organisations were very prominent within South Africa society, with a high degree of credibility and respect based on their earlier successes in advocating for the rights of people – including the AIDS Law Project with regard to the rights of people living with HIV/AIDS. The Project has a long tradition of active advocacy, including mass protests and litigation to achieve their aims. As a result of their efforts, and those of others, refugees and asylum seekers now have equal access to anti-retroviral drugs in the country. In the context of the response to the xenophobic violence, these organizations were assessed by the inquiry panel to have played a key role, especially at the very initial stages of the displacement, including the provision of coordination amongst civil society actors in the Western Cape province. This was highly appreciated by all stakeholders, including the displaced.⁸

The politics of law

The outbreak of xenophobic violence had many causes. Social services are strained by the refugee crisis, unemployment is extremely high in the worst affected communities, and the law and the Constitution appear to offer little succour or protection to the poorest of the poor. In the face of social insecurity, communities are prey to criminal and xenophobic elements that exploit and take advantage of desperate people's legitimate fears and concerns.

However, the failure of the Constitution in such circumstances largely reflects a failure of government – and not the possibilities that inhere within it. This introduction has illustrated how a daily disregard of the Constitution already infects many of our government departments. However, another defining characteristic of the 18-month period under review has been the swirling of politics around the law.

Faced with growing social and political challenges, government and the ANC sometimes seem to have only just begun to grapple with what it really means to be accountable under a supreme law. In particular, it seems that politicians and bureaucrats balk at the role that courts must play when they fail to fulfil their responsibilities in terms of the Constitution and the law generally.

Much sound and fury has been catalysed by the travails of ANC President Jacob Zuma. A deliberate strategy exists among his supporters in the tripartite alliance to suggest that law is being manipulated for political ends – by institutions such as the National Prosecuting Authority (NPA) and the judiciary. Those in the ANC who are uncomfortable with this strategy – and there are many – keep quiet.

8. *Report of the Ad Hoc Inquiry into UNHCR's Response to the 2008 Xenophobic Crisis in the Republic of South Africa: Report to the High Commissioner for Refugees*, 14 January 2009, at paragraph 83 (on file with the ALP)

It is quite possible that the law was or is being used against Jacob Zuma for political ends. But the most reasonable and responsible approach that could be taken by the ANC leaders, and Zuma himself, would be to disentangle politics from law and let the “facts” of the allegations against him be subjected to objective processes of law. Acting in this way would be to display trust in the Constitution and the courts.

Instead, whilst casting dangerous aspersions on the law, the ANC and its president have simultaneously used the law to tie the Zuma issue in knots. An ethical approach – and once upon a time the ANC was known for its ethics – would be to admit that the *prima facie* case against Zuma requires his temporary withdrawal from politics and the rapid testing of the allegations in court.

Unfortunately, this has not been the route followed. Instead, the law is being used to wage war on the law, with some judges being pitted against others. Senior ANC leaders have raised questions about the independence of the judiciary, describing certain judges as “counter-revolutionary”. The judiciary is certainly not above reproach. Indeed, the Supreme Court of Appeal has itself expressly recognised that “[t]he judicial cloak is not an impregnable shield providing immunity against criticism or reproach.”⁹ However, as Chief Justice Pius Langa and others have also pointed out, criticism should be fair and tempered. Comments such as those of the ANC overstep the bounds of appropriate criticism of the judiciary.

Legitimate criticism is different from slander, the effect of which is to sow uncertainty and confusion about law amongst millions of people, eroding the foundations that underpin the rule of law, particularly institutions such as the Constitutional Court. One may be forgiven for thinking that this is preparing “the masses” for the day when the ANC overtly or covertly undermines the basic structure and foundational principles of the Constitution.

Despite these dangers, there have also been positives. In July 2008, for example, Deputy Chief Justice Dikgang Moseneke addressed an ALP seminar on health systems reform where he gave an important speech on the right to health. Then in December 2008, Justice Edwin Cameron – the founder of the ALP – was finally appointed to the Constitutional Court. With judges of the calibre of Moseneke and Cameron, all is far from lost, and much will now depend upon what civil society does to deepen social commitment to the Constitution.

It might be asked what relevance this has to health and AIDS? The answer, however, is straightforward.

The work of the ALP – and many similar organizations – is *a priori* based on an acceptance of the Constitution, the separation of powers between Parliament, the executive and the judiciary, and the duties of politicians and civil servants that flow from the Constitution. If this premise proves false, then the possibility of using the Constitution and the independent institutions that it created to advance human rights will fall away.

In such a situation, the testing of reason, evidence and ethics against the notion that people have inherent rights and their governments corresponding duties, will give way to power cliques and intrigue. It is thus perhaps ironic that at the same time as the United States tries to re-discover its democracy, South Africa is in danger of losing its. In such a situation, the possibilities for the work of the ALP will fall away, even whilst the need for human rights will remain or get stronger.

Cyril Ramaphosa has recently written that “[o]ur Bill of Rights has changed the character of the battle for justice rather than ending it.” According to him, “courts remain sites of intense contestation in which the moral and political conflicts of our society continue to be fought out.”¹⁰ With this in

The work of the ALP – and many similar organizations – is a priori based on an acceptance of the Constitution, the separation of powers between Parliament, the executive and the judiciary, and the duties of politicians and civil servants that flow from the Constitution.

9. *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) at paragraph 39

10. *Foreword to Dennis Davis and Michelle le Roux, Precedent & Possibility: the ab(use) of law in South Africa (Double Story Books: Cape Town, 2008)*



Trudie Harrison (Mosamaria AIDS Ministry) and S'khumbuzo Maphumulo (ALP attorney) working to end the Free State ARV treatment moratorium in February 2009 (Reproduced with kind permission Health-e News Service)

mind, the ALP plans to pay attention to these issues in the year ahead. It is hoped that by the time we release our next review our elected leaders will have chosen wisely.

Conclusion

As we look forward, it is not yet clear whether the next period will be one of opportunity or threat or both. The removal of President Mbeki has brought AIDS denialism to an end. A new Minister of Health – with a track record of personal integrity, passion and commitment to constitutionalism – has been appointed. The ALP has largely completed its litigation agenda and established far-reaching jurisprudence regarding non-discrimination, equality and health service delivery.

But on the other side of the scale are burgeoning problems in the health system itself, problems that might accurately be described as the legacy of the Mbeki/Tshabalala-Msimang axis of AIDS denial. These problems will test even the best health minister because they will challenge the capacity and commitment of government to finance the constitutional promise of health care, as well as to mop up the tragedy of AIDS denial by not shirking from its financial cost.

A harbinger of this was the crisis resulting from the moratorium imposed in November 2008 on new patients being initiated onto ARV treatment in the Free State, which is explained in more detail in chapter 3 of this review. This unlawful moratorium was introduced with the ease of a pen's sweep across a page, but probably cost thousands of lives. Not only did it test the DoH, but it also tested whether civil society can remain vigilant, alert and able to deploy its own resources against unconstitutional governance.

So, with these uncertainties in mind, the ALP will intensify the focus of its work on human rights and health sector reform, hoping that the application of the Constitution can deliver for the right of access to health care services generally what it has thus far delivered for the right of access to ARV treatment in particular. It is against this yardstick that our future work will have to be measured.