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## **CIVIL SOCIETY AND UNCIVIL GOVERNMENT**

*The Treatment Action Campaign (TAC) versus Thabo Mbeki, 1998- 2008*

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### INTRODUCTION: CIVIL SOCIETY UNDER MBEKI

This chapter examines the experience of one of South Africa's foremost pro-poor civil society movements, the Treatment Action Campaign (TAC), and uses it to reflect on the role that was played by social justice organisations during Mbeki's presidency (1999-2008). It juxtaposes the attitude of Mbeki's two governments to civil society organisations with the constitutional vision of active citizenship. It shows how, under Mbeki, organisations of civil society that were independent of the African National Congress (ANC) were frequently denigrated by senior ANC leaders. When, on issues such as HIV/AIDS and poverty, they persisted with campaigns that ran contrary to the party line, concerted efforts were made to label and hence to delegitimise them. In the process, Mbeki sanctioned the erosion of key principles of constitutional governance and a contempt for principles of the rule of law.

Under apartheid the law was used to build the architecture of inequality and deprivation and to render the citizenry largely powerless over government policy and conduct. After 1994 law was put to a diametrically opposite purpose: apartheid law was replaced with a Constitution that seeks to foster social equality. Law now empowers, in no small part by providing people with a range of instruments they can use to exercise and advance their rights, as government goes about its daily business.

At the opening of the Constitutional Court building in 2004 Mbeki described the Constitution as 'a vital compact at the core of our national life'. But, as TAC's story reveals, the practice of government during the Mbeki years was often contrary to the spirit of this compact.

Mbeki-sponsored AIDS denialism ought not to have been possible under the new legal order. Denialism is essentially a subjective state of mind. Maintaining it

requires closing one's mind to reason, evidence and better judgement. However, in South Africa the president's embrace of AIDS denialism did not remain an individual matter. It came to infect the government and ANC as a whole. One powerful man's obsessions gave rise to an unofficial 'anti-policy' on AIDS that continued despite almost universal condemnation. It survived despite the legal requirement that the executive, with the president at its head, is supposed to work within a constitutional order based on co-operation between the different spheres of government and between government and non-governmental organisations. HIV/AIDS demonstrated that where this compact breaks down or is denied an individual as powerful as the president can catalyse decay throughout the body politic at an enormous social cost.

Mbeki may be gone. But a thorough and honest assessment of AIDS denialism has not been made. Calls for a new truth commission have been parried. So, what can South African democracy learn from this experience?

## PART I: THE CONSTITUTIONAL THEORY OF POWER

### *The place of constitutional law in the new South Africa: Legalising active citizenship*

In 1993 three years of fraught political negotiations among the ANC, NP and others finally led to an agreement about a set of constitutional principles and the adoption of an interim Constitution (Act 200 of 1993). Over the next two years a broad and deep consultative process took place to decide the content of the final Constitution. This culminated with its certification by the Constitutional Court in 1996.

Throughout the constitution-making process large parts of the Constitution were contested. Compromises were made on all sides (Klug 2000: 114). Despite this, the final Constitution included a far-reaching Bill of Rights. Importantly, the Constitution embeds in our supreme law a direct link between the conduct of government and the realisation of social justice. Individual civil and political rights are combined with explicit state duties to improve progressively and continuously the conditions of and opportunities for the poor – the so-called 'socio-economic rights'. Certain fundamental rights were immediately applicable, such as rights to dignity and freedom of association. Others, such as access to health-care services and housing, were made a duty on government to realise progressively over time.<sup>1</sup>

The Constitution is the high-water mark of the ideals and aspirations for a better society that swept away apartheid. However, in the aftermath of apartheid and in the context of inherited deep poverty and inequality it could not prescribe how these rights would actually be achieved. It could only set up the framework. In recognition of this Cyril Ramaphosa (2009: v) has written that, the ‘Bill of Rights ... changed the character of the battle for justice rather than ending it’.

What is this framework?

In the Constitution’s architecture political parties that win ‘free, fair and regular’ elections are trusted with responsibility for constitutionally determined systems of government at local, provincial and national level.

But as well as empowering political parties the Constitution simultaneously gives to all people in South Africa a legal entitlement to, and instruments for, ongoing democratic civic action (what we call ‘participatory democracy’). Political parties may be placed at the centre of the electoral system but people – now with a host of rights that must be respected and protected by government (and thus political parties) – were placed at the centre of all government. According to the Constitution, government has legal duties towards each individual citizen or resident of South Africa, regardless of party prerogatives.

Not only does the constitution state (in s 3(2)) that

All citizens are –

- (a) equally entitled to the rights, privileges and benefits of citizenship; and
- (b) equally subject to the duties and responsibilities of citizenship

it also envisages and encourages an active civil society by providing for equality (s 9), freedom of religion, belief and opinion (s 15), freedom of expression (s 16), freedom of assembly, demonstration, picket and petition (s 17), freedom of association (s 18) and political rights (s 19) (including in s 19(1)(c) the right ‘to campaign for a political party *or cause*’ [emphasis added]) and access to courts (s34). These rights are more than abstract principles. They are given life by an explicit duty on the State to ‘respect, protect, promote and fulfil [such] rights’ (s 7(2)) and by the creation of a legal system that includes not only courts, but a range of statutory institutions given

the task of ‘supporting constitutional democracy’ (Chapter 9). The importance of the independence of these institutions will become clear later.

### *Political Parties versus Political People*

The Constitution recognises that political parties and formations of civil society (of all hues) will play different roles in a democracy. As explained above, it gives each citizen rights, including a right to vote and ‘to stand for public office and, if elected, to hold office’ (s 19(3)(b)).

It is necessary to comment on this. Rights inhere in people, not in political parties. They are a manifestation of the right to freedom of expression and political activity. They are not the end of democracy but a part of it. A tension between people and political parties is a feature of every democracy and, theoretically, the support of people for political parties requires their accountability. Unintentionally, however, (at least at the outset of the constitutional project) the electoral system adopted by South Africa<sup>2</sup> placed the elected representatives of political parties at a remove from day-to-day contact with and accountability to ordinary people.

The electoral system operating at provincial and national levels does not give the people direct choice of the individual representing a constituency but places this in the hands of the party. Distancing nationally elected officials (members of Parliament – MPs) from direct accountability to citizens within a constituency and from a day-to-day appreciation of their concerns and needs carries a risk of cementing party power (and party politics) over people power.

Ironically, in certain contexts, the choice of electoral system to give expression to democracy might itself become a threat to that very democracy. In South Africa it seems possible that for several decades the overwhelming majority of people will vote for the ANC because of its contribution to their political liberation from racial oppression and may do so despite its failure to bring about social betterment. This support will automatically be reflected in the party’s majority in Parliament. The combination of ANC dominance and the electoral system ensures that for a long while to come a majority of South Africa’s parliamentarians will remain beholden to the ANC leadership, irrespective of whether the latter is carrying out the mandate granted to it by the electorate. In this electoral schema the views and needs of citizens need only be seriously considered at election time.

Such a system at such a time in our history offers advantages to the ANC. To some degree it insulates it from the slings and arrows of an angry and frustrated people. It is thus unsurprising that in 2003 Mbeki's Cabinet overlooked the recommendations of the majority report of a Cabinet-appointed electoral task team (ETT), which had proposed the introduction of a stronger constituency element into the proportional representation system.<sup>3</sup>

In the first heady days of freedom such issues may not have seemed important. Most people assumed that every publicly elected representative would be ethical, honest and independent. However, under Mbeki MPs became increasingly detached from accountability to anything other than their party.

But how, many might ask, could there be a divergence between the ANC's party political interests and its constitutional duties? Why did the Mbeki-led ANC end up policing its members, rather than its members policing the party? And how does this relate to AIDS? That is the next question to look at.

#### *'Ready to Govern' in a Constitutional State?*

In 2009, 15 years after his party won South Africa's first democratic election, former ANC Cabinet Minister Mac Maharaj (2009) wrote that he still felt:

... far ... from understanding the implications of living in a constitutional state. I have to keep asking myself how far we are in internalising the implications. There is a lot of sloganeering about the Constitution, about how advanced it is, about threats to it and loud proclamations about the need to defend it, but there is hardly any discussion about it.

This confession helps us to understand why, in the battle over AIDS policy, Mbeki and certain other ANC leaders conducted themselves in a particular way in relation to the state, the law and civil society.

As we try to understand their behaviour it becomes relevant to recall that many of Mbeki's generation of ANC leaders grew up in a very different geo-political context. In the lonely cocoon of exile or prison many leaders came to believe the ANC's own propaganda that the party was vested 'with a unique historical mission' to

change society. Since 1994 this view has influenced their conduct in power. Some still see the ANC as the custodian of development and there is a quasi-religious belief in its 'historical mission' to complete 'the National Democratic Revolution' and lead Africa into its renaissance.

World politics changed profoundly in the 1990s, causing influential ANC leaders such as Joe Slovo to guide the movement away from some of its traditional beliefs about social change. But the perversions of 'Marxist-Leninist thought' that gained ground under Stalin left many ANC leaders with the conviction that it has a preternatural responsibility to determine the contours of progressive change. In the post-apartheid period this outlook was reinforced by a belief that ANC leaders had acquired special rights as a result of the years sacrificed in struggle and of staring down apartheid brutality.

These factors have influenced the way the ANC has conducted itself in government. Such deeply held convictions limit the role for progressive civil society and Mbeki is the epitome of such a belief-set. Johnson (2002: 228) points out that his 'understanding of the role of leadership and the vanguard ruling party ... leaves no room for popular political participation outside the state or the ruling party'.

In a 1997 address to the Forum of Black Journalists (FBJ), Mbeki set out his views on civil society. He stated that 'a well-organised, integrated and vibrant civil society is one of the pre-conditions for the success of the struggle for the broadening and deepening of political, social and economic democratisation of our country'. But he warned that 'we believe that it is wrong to see the chief virtue of democratic organs of civil society as an organised counter-weight to the democratic state'. Then, showing his deep-seated mistrust he cautioned that:

... we should appreciate the fact that if organs of civil society can be utilised to oppose Apartheid and colonial rule, they can by the same token, wittingly or unwittingly, be manipulated or positioned in such a way that the ultimate effect of their operation serves to frustrate the people's march towards the total emancipation of our society.

On these grounds he called on civil society to 'define their place and role in relation to the task of emancipating our people'. Such an outlook leaves little room for an

autonomous civil society, except perhaps as a vehicle to deliver messages and services from the beneficent party/state.

For reasons explained above Mbeki's views do not seem to admit the possibility that the ANC itself could be 'manipulated or positioned' (as indeed has happened), or that it could make serious policy errors. It does not allow that pro-poor civil society<sup>4</sup> might both mobilise to support the ANC government when it adopts pro-poor policies and protest against it should it act arbitrarily, irrationally or against the interests of the poor.

Successive large electoral victories compounded these beliefs after 1994. At times ANC leaders, exemplified by former health minister Manto Tshabalala-Msimang, betrayed their misunderstanding of what mass popular support permits the ANC to do in government. The belief that they always articulated the majority interest translated into a repudiation of expert opinion and civil society. Tshabalala-Msimang, prefaced her response to arguments made by TAC and others at hearings on the right to health held by the South African Human Rights Commission (SAHRC) by saying that:

I am always concerned that what we term public hearings, tend to be and large to be hearings from a few expert groups, who though they may have all the analytical tools to enable them to speak eloquently on these matters, nevertheless cannot in all honesty claim to be speaking for the majority of the people who are affected by the experiences of either realisation or violations of their human rights.

Mbeki's speech to the FBJ was delivered in 1997, two years before he became president. But it reveals that the view of the ANC as leader and civil society as follower was entrenched in his make-up prior to his becoming president. The animosity towards civil society that it could give rise to was evident only occasionally. However, once he was installed as president it became more and more apparent, especially in the growing conflict over AIDS policy.

## PART II: THE PRACTICE OF POWER UNDER MBEKI

*1994-1999: Post-apartheid and pre-Mbeki*

The combination of a national and provincial electoral system based solely on nation- or province-wide party lists and some ANC leaders' view of their 'vanguard role' could become a threat to participatory democracy in South Africa. This reinforces the need for organised civil society, as well as for constitutional institutions, checks and balances designed to prevent the abuse of majority power and ensure that the government acts to satisfy tangible social and economic needs.

During the presidency of Nelson Mandela (1994-1999) these dangers were not apparent. Mandela's government undertook the mammoth task of reorganising the mechanics, laws and institutions of government. Inspired by Mandela's leadership, and in the warm afterglow of a relatively peaceful political transition, his government was treated with a high degree of trust by pro-poor civil society. Indeed, in order to enhance the ANC's capacity to govern effectively, many respected civic, trade union and NGO leaders were included on the ANC's Parliamentary lists or deployed into the upper echelons of the public service. This weakened the capacity for leadership of independent pro-poor civil society.

However, during the Mandela government, the idea that there might be a need for independent campaigns to challenge the ANC, or the notion that the ANC could adopt bad or even anti-poor policies, was anathema. For these reasons, even important initiatives such as the 1998 'Poverty Hearings' conducted by the South African NGO Coalition (SANGOCO), the SAHRC and the Commission on Gender Equality (CGE) focused on trying to advise government how to mitigate poverty rather than to pressure or compel it to adopt particular policies and programmes. During this period civil society organisations working on HIV/AIDS, such as the AIDS Law Project (ALP) and AIDS Consortium, invested a large part of their effort in 'friendly' research and advocacy aimed at assisting a reasonably open and receptive Parliament and the Department of Health.

Disputes over AIDS policy, however, were a harbinger of future conflicts. In 1997, for example, the Cabinet and the ANC publicly announced that they had endorsed a substance called Virodene as a 'cure' for AIDS. Soon after this 'discovery' Virodene was rubbished by scientists and civil society organisations (Myburgh 2009). The Medicines Control Council (MCC), a statutory institution with a legal duty to independently evaluate medicines, refused to endorse Virodene (Myburgh 2009: 4-5).

It is significant that this first skirmish over AIDS treatment was directly linked to Mbeki, whose response to criticism revealed the fault lines in his democratic sensibility. Further, in the conflict with academics and activists, the line between the positions of the government and the ANC was blurred. In a manner that would become characteristic of his presidency, criticism of the policy was often distorted by the ANC. Opponents of Virodene were turned into enemies when Mbeki declared in an ANC publication that ‘The cruel games of those who do not care should not be allowed to set the national agenda’ (Myburgh 2009: 6). Senior officials at the MCC, including its chairperson, were removed and replaced with people thought to be more sympathetic to the government (Myburgh 2009: 6,7) – commencing a long period of decline of the MCC that has yet to be reversed (Geffen 2010).

Nonetheless, between 1994 and 1999, on the whole, the ANC had little cause to distrust pro-poor civil society and pro-poor civil society little reason to defensively invoke the Constitution. This changed under Mbeki, with two initial catalysts: the policy on treatment for people with AIDS, which led to the formation of TAC, and the (then) R30-billion arms deal, which led many in civil society to question, initially quietly, whether government had its priorities right. Both issues came to dominate politics (and, not surprisingly also found their way into jurisprudence) for the duration of Mbeki’s government.

#### *1999- 2005: Opposing AIDS denialism and reigniting civil society*

In the early 1990s the ANC had participated in the development of a far-sighted National AIDS Plan (National Aids Co-ordinating Committee of South Africa – NACOSA 1994) which, in July 1994, the Government of National Unity quickly adopted as its policy. The NACOSA plan did not provide for access to anti-retroviral (ARV) treatment because its medical efficacy was only confirmed in 1996. But during the later 1990s ARVs rapidly began to reduce AIDS-related mortality in rich countries – gains that, unfortunately, were not shared equitably across the world. In poor countries, including South Africa, ARVs were too expensive and considered ‘too complex’ for under resourced or dilapidated health systems.

Ironically, Mbeki in his capacity as deputy president was made Mandela’s point person on AIDS. In this capacity, in October 1998, he launched a new initiative

intended to establish a multi-sectoral response to combating the epidemic, known as the 'Partnership Against AIDS'. At the launch of the partnership Mbeki (1998) stated:

'There is still no cure for HIV and AIDS. Nothing can prevent infection except our own behaviour. We shall work together to support medical institutions to search for a vaccine and a cure.'

At the time this statement was an innocent one, even if only half true. Cure there might not have been but – as a result of the advent of ARV treatment – increasingly effective treatment there was.

By the late 1990s HIV was beginning to be the cause of rising mortality in South Africa. As a result, the inequity between the life-saving treatment that could be purchased privately by those who could afford to pay for it and the absence of a policy on treatment in the public health service became more apparent. For this reason, in December 1998 TAC was launched. TAC believed that reducing the price of ARVs would make them sufficiently affordable for government to purchase them for use in the public sector.

At the outset, TAC's mission had been to mobilise support for the government and the ANC in its fight against pharmaceutical company profiteering from essential medicines, including ARVs. In 1999 TAC had cordial meetings with the then Minister of Health, Dr Nkosazana Zuma, who encouraged the campaign to reduce the price of treatment azidothymidine (AZT). Similarly, in early 2001 the government did not oppose TAC's request to be admitted as an *amicus curiae* (friend of the court) in the legal action brought by 42 multinational pharmaceutical companies to resist amendments to the Medicines Act that were intended to make essential medicines more affordable (Heywood 2001: 143).

But during this period, initially unbeknown to most people, an unanticipated chapter in South Africa's response to AIDS opened. In mid-1999 Mbeki was introduced to a group of scientists and pseudo-scientists who insisted that the AIDS epidemic was grossly exaggerated and that HIV either did not exist or that it did not cause AIDS – for this reason they have become known as AIDS denialists (Geffen & Cameron 2009:7).

Many consider Mbeki's dalliance with denialism to be inexplicable and out of character. Multiple theories are posited to try and explain it. In reality, as Cameron and Geffen argue, it seems to have been informed by a combination of personal and

political factors. On a personal level, the AIDS denialist arguments that theories about AIDS were party to a racist discourse that depicts Africans as people unable to control their behaviour, particularly their sexual needs, may have resonated with Mbeki's own ruminations and personal demons about sex and race. But, as Judge Edwin Cameron (2005: 118) points out:

The object of those casting doubt on the conventional causal theory of AIDS may have been to save Africans from the supposedly stigmatising effect of a Western disease model that seemed to imply that African's sexual conduct led to distinctive disease patterns on this continent. Yet the effect of their dissident stance was to re-stigmatise the disease. Paradoxically, it was those advancing denialist dogma in South Africa who re-moralised and re-stigmatised the disease, through their preoccupation with the sexual transmission of HIV and by suggesting that scientific epidemiology implied a moral rebuke to Africans' sexual conduct.

On a political level Mbeki's paranoia about imperialist machinations and capitalist rapacity probably made plausible in his mind denialist claims that ARVs were poisonous drugs for which multinational companies sought new markets. A personal experience of deaths and illness in several ANC leaders who reportedly took ARVs and suffered side effects may have reinforced his susceptibility to this view.

Whatever the explanation, Mbeki seems to have been persuaded by these arguments and soon set his course against introducing access to ARV treatment in the public health sector (Myburgh 2009: 12).<sup>5</sup> Thereafter TAC too was forced to change tack. Between 1999 and 2001 TAC's campaigns against profiteering from essential drugs had already begun to develop it into a vibrant mass-based organisation. However, after 2001 its campaigns now had to contest the effect of AIDS denialism on public policy. Rather than being government's tame handmaiden, a path followed by the National Association of People Living with HIV and AIDS (NAPWA), it grew into a social movement focused primarily on forcing a rational ARV treatment policy out of the government and the ANC. As the dispute intensified it became one of Mbeki's enemies and a target for his wrath.

Today it is almost as hard to find an adherent of AIDS denialism in the ANC as it is to find a former supporter of apartheid in the Democratic Alliance. But in truth many ANC leaders, including Ngoako Ramathlodi, Essop Pahad, Alec Erwin and even, at times, Jacob Zuma, as well as organisations such as the ANC Youth League, became cheerleaders for Mbeki's new passion and worked hard to spread denialist confusion and vitriol. For example, the anonymous 2002 document *Castro Hlongwane, Caravans, Cats, Geese, Foot and Mouth and Statistics* was circulated widely throughout ANC branches 'for discussion'. Although denying sole authorship (it was according to Mbeki written by a 'collective' of ANC leaders) Mbeki still identified himself with its arguments as late as June 2007 (Gevisser 2007: 735-736).

The document mixed the facts about the AIDS epidemic, particularly its high prevalence in South Africa, into a confusing but emotive broth about racial and class conspiracies against Africa and Africans. For example it claimed that: '... the HIV/AIDS thesis ... is also informed by deeply entrenched and centuries-old white racist beliefs and concepts about Africans and black people [and] ... makes a powerful contribution to the further entrenchment and popularisation of racism' (2001: Preface).

At the time the document was written Mbeki and TAC were already embroiled in conflict. Of concern to Mbeki and the ANC was the fact that TAC was successfully mobilising the ANC's constituency to campaign for access to ARV treatment. To try and counter this, Mbeki tried to stigmatise TAC claiming that: '... driven by fear of their destruction as a people because of an allegedly unstoppable plague, Africans and black people themselves have been persuaded to join and support a campaign whose result is further to entrench their dehumanisation' (2001: Preface).

This was by no means the only underhand volley. At other times Mbeki and the ANC accused TAC of being a foreign-funded agent of imperialism; a front and flag-carrier for pharmaceutical companies (Govender 2007: 215); a feint for a new political party; and a Trojan Horse being used to infiltrate trade unions (Heywood 2004: 106). In response to litigation against the government, he claimed TAC and the AIDS Law Project had 'an academic desire to test the limits of our constitution and the law in general in pursuit of their subjective goals as lobby groups' (Mbeki 2004).

Mbeki also allowed his supporters to abuse issues of race to sow doubts about TAC among the ANC-supporting populace. Ministers such as Tshabalala-Msimang tried to cast doubt on the integrity of white and coloured TAC leaders, claiming they

were manipulating ‘our people’ for the purpose of undermining the government (Deane 2003).

*Weakening pillars of constitutional democracy ....*

In early 2009 Mbeki (Pahad, 2009: 11) claimed that, ‘The issues we raised never impacted on the implementation of the government programme which, then as now, was based in part on the thesis that HIV causes AIDS.’

Researchers believe differently: measured scientifically, Mbeki’s views actually had an enormous cost in life. In December 2008 the *Journal of Acquired Immune Deficiency Syndromes (JAIDS)* published an article (Chigwedere, Seage, Gruskin, Lee & Essex 2008) that estimated that the delay in announcing a national treatment plan for HIV (the result of Mbeki’s AIDS denialism) had led to more than 330 000 preventable deaths.<sup>6</sup>

This chapter is not about politics, therefore it does not relate how, in order to advance the claims of AIDS denialism, Mbeki and his allies repudiated the best scientific advice, abused the law and transgressed a range of constitutional rights. Nor does it relate how, for many years, he turned a blind eye to the frequent unethical and unprofessional conduct of his Minister of Health, Dr Manto Tshabalala-Msimang, unflinchingly defending her despite evidence of the huge cost to health and life of her mimicry of his AIDS denialism (TAC 2006; Mbeki 2007b).

Therefore a question we must answer is how this happened in a constitutional democracy that has explicit checks on executive and presidential power?

Mbeki came to power at the end of a decade which had witnessed the collapse of one-party states and the implosion of the ‘nationalised’ economies that underpinned them. Dramatic revolts against authoritarianism in Eastern Europe, China and the USSR had led to a temporary strengthening of the USA as the global power and short-lived notions about the advent of a unipolar world. For much of the 1990s the USA took advantage of the revulsion with authoritarianism and used its economic power to try to globalise its models of human rights and democracy. In particular, the notion of the ‘rule of law’, as interpreted by the USA, was deified to be a universal standard.<sup>7</sup>

It goes without saying that this process was contradictory, often hypocritical and self-interested. Some of the countries that are the loudest promoters of human rights also sanctioned their grossest violations. However, the new global reality was that evidence of a country's respect for human rights and the rule of law influenced decisions about foreign aid and capital investment.

Mbeki sought both investment and reputation. Consequently he bestrode the stage of world politics in a suit of democratic constitutionalism. Hiding behind his finely tuned speeches, however, he sanctioned behaviour by his ministers and some of their officials that covertly flouted both the spirit and the letter of the Constitution.

It is in this respect that the conflict with TAC over AIDS treatment reveals Mbeki's willingness both to both take advantage of the state and to blunt some of its 'independent' institutions in order to weaken persistent opposition. His penchant for manipulating state institutions in order to undermine his political enemies is now well documented in the leadership conflict with Jacob Zuma but is not widely understood to have been carried over into other areas of political life.

AIDS denialism was never official government or ANC policy, it was a privately held conviction of the country's president. However, Mbeki did not keep his belief private but appears to have campaigned in the ANC and the government to promote it. In so doing he arguably ignored the spirit of the constitutional injunction (found in s 96(2)(b)) that Cabinet members may not 'act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests'.

To be sure, Mbeki had no material interest in AIDS denialism, although it has been reported that the ANC had a financial interest in Virodene (Myburgh 2009: 9). But his failure to respect and promote the official policy on AIDS meant that he elevated his private views above the public interest. The promotion of his personal convictions led to unlawful conduct whereby governmental power was deployed to deny people life-saving medicines. Winning what he considered an ideological battle over AIDS policy appears to have become an intense preoccupation and one on which he believed 'History' would judge him to have been right.<sup>8</sup> But history never unfolds without individual agency: in this case, Mbeki's historical vindication necessitated a campaign. In the course of this campaign there comes a point at which Mbeki, like Macbeth, became 'in blood stepp'd in so far that, should I wade no more, returning were as tedious as go o'er'.

### *Denying access to information*

Promoting AIDS denialism first of all required victory in a battle between fiction and fact. To perpetuate a fiction, Mbeki and his allies needed to withhold and dispute evidence about the impact of AIDS on the South African population. In the early 2000-and-noughties this took the form of denying access to information and interfering with and delaying the publication of scientific reports on adult mortality. Throughout his presidency important reports on causes of death, maternal mortality and HIV prevalence were delayed and sometimes doctored (Nattrass 2007: 92-93).

His government also sought to deny civil society access to policy documents and government plans that would ordinarily be in the public domain. Fortunately this was sometimes frustrated by civil servants who leaked these documents to TAC (and other civil society organisations). In July 2003, for example, slides were leaked to TAC of a presentation of the government's own costing of an ARV treatment plan which showed it to be affordable. The presentation had been made five months previously to the Minister of Health. Given that government was withholding this information, TAC decided to release it itself.

However, receiving vital information from unofficial sources is not something a campaign can or need rely upon, particularly when section 32 of the Constitution gives people the right of access to 'any information held by the state'. As a result TAC again turned to the courts to enforce its rights against Mbeki. The best example of this occurred in 2004 when, after forcing government to concede to the introduction of ARV treatment the year before, it found itself unable to get a copy of the implementation plan (known as Annexure A) – a plan Cabinet had endorsed in late 2003. Litigation commenced to force the Department of Health to make Annexure A public. Ironically, and not for the last time, the Department of Health used the Promotion of Access to Information Act (PAIA – a law intended to facilitate access to information) to obstruct access to the report. Then when it was eventually required to respond to TAC's legal papers it simply denied the existence of 'Annexure A', the document TAC sought.

In his judgement Acting Judge Ranchod noted that there had been 11 specific occasions on which the Department of Health could have notified TAC that the document did not exist and that the 'failure in their duty to indicate the true nature and

status of the annexures and to explain the reasons for their failure to disclose these documents' had been the fundamental cause of the litigation. (For the judgement in this case see *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (T).)

Such tactics were normal under Mbeki's government and Cabinet members who deployed them suffered no sanction. Fortunately, in early 2009, in a judgement ordering that TAC be given the Judicial Inspectorate of Prisons (JIOP) report into the death of a prisoner, this conduct was roundly condemned by a judge of the Pretoria High Court. Judge Brian Southwood described it as 'not only inconsistent with the Constitution and PAIA but ... reprehensible. It forces the applicant to litigate at considerable expense and is a waste of public funds' (*Treatment Action Campaign v Minister of Correctional Services* 2009).

It is estimated that in the 2001-2002 TAC case over a policy on prevention of mother-to-child transmission the Minister of Health authorised the expenditure of more than R5-million on fees for the state's counsel.<sup>9</sup> In this context, Judge Southwood's reference to the disadvantage the poor face when trying to litigate against the almost limitless resources of the state draws attention to another issue. It is arguable that Mbeki's executive undermined the constitutional right of 'access to courts' (s 34) by the manner in which it helped itself freely to the state's financial resources in order to fight TAC in a succession of court cases, all of which it lost.

### *Undermining the independence of Parliament*

The conduct described above was against a social movement that was independent of the ANC. However, to perpetuate the AIDS denialist fiction, Mbeki also had to neuter a range of other forces, including his opponents within the ANC and institutions that have a statutory obligation to defend the Constitution.

The National Assembly is one of the three institutions whose separate and independent powers define our constitutional schema (the others being the judiciary and the executive). According to Deputy Chief Justice Dikgang Moseneke (2008: 348) the operating principle is that 'each organ of state authority be entrusted with special powers designed to keep a check on the exercise of the functions of others'. In debates about the separation of powers members of the Mbeki-led executive complained darkly from time to time, particularly during the TAC case, about an

alleged usurpation of its powers by the judiciary. But it kept silent on its usurpation of the powers of Parliament.

TAC leader Zackie Achmat points out that during the Mandela presidency MPs were more independent and assertive in relation to the executive and played a meaningful part in drafting legislation, as well as in holding the executive to account through the National Assembly's portfolio and special committees. But, according to Achmat, TAC's experience was that 'Under Mbeki Parliament became a toothless choir for the Cabinet with some corrupt, and mainly incompetent, uncaring ANC MPs' (Achmat 2009). So, for example, in the late 1990s and early 2000s parliamentary committees published a number of reports, including a report on the impact of HIV and AIDS on women and girls (Parliament 2001). This report in particular met with derision from some members of the executive, because its recommendations ran counter to the AIDS denialist mantra.

A minority of ANC MPs who opposed the AIDS denialists found internal party democracy to be thinner than expected.

AIDS denialism contributed to a slow strangulation of parliamentary independence. Within the ANC even Nelson Mandela was humiliated by Mbeki for publicly calling for the provision of ARVs to pregnant women (Feinstein 2007: 139-140; Gevisser 2007: 755; Gumede 2005: 170). In Parliament party discipline was exercised primarily through executive pressure on the ANC parliamentary caucus.

Former ANC MP Pregs Govender (2007: 199) was the chairperson of a parliamentary committee on the improvement of quality of life and status of women. In her autobiography she recalls how, in 2001, Mbeki addressed the ANC parliamentary caucus before the vote on the defence budget to approve the arms deal. Directing his comments at Govender, '[h]e said that we were elected by the ANC. We gained and lost our chairs of committees through the ANC. Chairpersons like me were given a clear message.'<sup>10</sup> In similar vein Feinstein (2007: 86) reflected that, 'As the Executive tends to comprise most of the senior members of the party, the unworkable reality is a group of junior politicians trying to hold their superiors to account.'

MPs who failed to kowtow fell victim. In January 2001 Andrew Feinstein was removed as the chair of the ANC Study Group on the Standing Committee on Public Accounts (SCOPA). In time other constitutionally-minded ANC MPs were dislodged from office. Nozizwe Madlala-Routledge, Deputy Minister of Health from 2004 to 2007, was apparently dismissed because she admitted publicly that there was a crisis

at Frere hospital in the Eastern Cape. Her dismissal was ostensibly linked to unauthorised foreign travel. But Mbeki also complained of her 'lone ranger behaviour' and reported that she was not prepared to be 'part of the collective' (*ANC Today* 2007a). Both Govender (2007: 249) and Feinstein (2007: 206-207) cited intolerance of mainstream views on AIDS as among their reasons for resigning from Parliament.

Ironically, in December 2006, Govender was appointed by Parliament as chairperson of an independent panel set up to assess its performance. In October 2007 the AIDS Law Project and TAC made a submission to this panel setting out their experiences of Parliament (ALP 2007). The panel's report was published in January 2009. In underplayed language it noted that 'significant challenges remain for Parliament to realise its vision of becoming a people's Parliament' (Parliament 2009: 7) and – as pointed out above – 'the party-list system tends to promote accountability of Members of Parliament to their political parties rather than to the electorate' (Parliament 2009: 8).

#### *Undermining the independence of the SA Human Rights Commission (SAHRC)*

Chapter 9 of the Constitution establishes six 'State Institutions Supporting Constitutional Democracy' whose *raison d'être* is to 'strengthen constitutional democracy' (s 181(1)). Three of these institutions, the SAHRC, the CGE and the Public Protector, are given the explicit task of protecting and advancing rights. Because these institutions are impartial, 'independent, and subject only to the Constitution and the law' (s 181(2)), they may be vital to civil society's ability to hold government to account. Their powers to monitor, investigate, secure appropriate redress and even litigate are relevant to social movements such as TAC. While they must often be persuaded that the issues raised by civil society merit action (sometimes due to indolence, sometimes due to an anticipation of executive wrath), according to the Constitution when they do act (and even before) they should do so 'without fear, favour or prejudice'. The robustness of these constitutional injunctions was, however, once again put to the test by HIV/AIDS.

The experience of the SAHRC is a case in point. Its muted criticism of the government's response to AIDS became a lightning rod that drew executive ire. The Constitution states that 'No person or organ of state may interfere with the

functioning of these institutions' (s 181(4)). But in 2001, TAC alleged, the government interfered with the SAHRC after it sought to be admitted as an *amicus curiae* in the legal case brought by TAC against the policy on mother-to-child transmission (PMTCT). Newspaper reports that Marumo Moerane SC, counsel for the government, and Mojanku Gumbi, the president's legal adviser, contacted members of the SAHRC, including its chairperson, were not denied by the Presidency (Heywood 2003: 299-300). Whatever the reason, the SAHRC informed the court that it had changed its mind about joining the case.

The SAHRC's annual reports on socio-economic rights also attracted executive ire. In its fourth such report, covering the period April 2000-March 2002, for example, the SAHRC (2003: 133) recommended that:

The Constitutional Court's ruling regarding the treatment of HIV positive mothers and their newly born infants must be implemented immediately. A National Action Plan for the universal access to ARVs should be government's top priority and it is highly recommended that the National Budget reflect this.

The findings of this report were reported in *The Star* on 23 April 2003 under the headline 'Government Failing the Poor'. According to former SAHRC Chairperson Jody Kollapen, this led to the SAHRC being berated at a meeting with the Government Communication and Information System (GCIS) and the Presidency. At this meeting, Gumede (2005: 299) tells us, the SAHRC were 'reminded that "the government holds the purse strings"'.

The executive could not publicly defy or repudiate the 'Chapter 9 institutions', but it can be argued that Mbeki attacked them covertly by underfunding and understaffing them and ignoring their recommendations.

It is thus probable that the SAHRC's independent conduct contributed to the executive gradual whittling away its capacity. This was possible because, although independent in law, in real life the SAHRC is dependent on the executive for both its budget and the appointment of commissioners.

This conclusion is borne out in a report by Kader Asmal, who was appointed by the National Assembly in September 2006 to chair a multiparty committee to review the 'Chapter 9 institutions'. The committee's report was issued in July 2007.

Among its many findings and recommendations the committee concluded that the SAHRC had been given a budget that was insufficient to perform its functions; that government departments had failed in their constitutional obligation to ‘provide [it] with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights’ (s 184(3)); and that since 2004 it had functioned with only five of its statutorily required seven to eleven commissioners. Describing as ‘deeply problematic and wholly inadequate’ the non-appointment of commissioners the Asmal committee noted that ‘the Office of the President may have misunderstood the provisions of the Constitution and hence disregarded the National Assembly’s recommendation to appoint eleven commissioners, appointing only five’ (Parliament 2007: 177).

In the foreword to the report the committee states that, ‘A historic duty rests with the National Assembly to address the issues raised in the report’ (Parliament 2007: vi). However, by the time of Mbeki’s resignation more than a year later neither the executive nor Parliament had indicated any intention to act on the report, which, three years after its release, continued to gather dust. In July 2009 Asmal described the failure of Parliament to debate his report as ‘an appalling scandal and an appalling waste of money’ (‘Asmal Takes on Parliament’, *Mail and Guardian* 20-26 July 2009).

In all the above it would seem that the motive of the executive was to render ineffective various alternative sources of pesky citizen power. Further research and analysis is needed to uncover the actions of the Mbeki-led executive in relation to various organs of the state. Looking at AIDS, the arms deal and the struggle against Zuma, however, it does appear that executive lawlessness often followed executive ire. There are clues and prima facie evidence to suggest interference with crucial pillars of the democratic architecture. Generally, the pattern seems to be that where an institution was ineffective because of its own inefficiency – the CGE, for example – it was left alone. Where, however, an institution embarked on a path independent and occasionally critical of the executive, it came under attack.

### PART III: CAN WE SEE THE FUTURE?

*Tying together civil society organisation and the Constitution?*

TAC was not fazed by the executive intimidation described in the foregoing section. Continually invoking the Constitution helped it establish what has been described by several commentators as a ‘moral hegemony’ (Cottle 2004: 117; Friedman 2005). Mbeki’s attempt to vilify TAC failed. In fact, it had the opposite effect – TAC’s combination of political mobilisation, painstaking alliance-building, litigation and advocacy of the human right to ARV treatment put it at the head of a broad social movement around AIDS treatment, whose sheer weight was eventually too much for the ANC and government to bear.

At its peak, this mobilisation actively involved important elements of the old guard of the liberation struggle (the Congress of South African Trade Unions – COSATU – and the South African Council of Churches – SACC), some of the new organisations that had achieved a voice after 1994 (SANGOCO, the South Africa Medical Association – SAMA) and more than 20 000 TAC community volunteers, predominantly impoverished young women and men who had not been involved in struggle before 1994 but who eagerly embraced its vision, traditions and methods.

Eventually this led to the defeat of AIDS denialism.<sup>11</sup> It also led to the delivery of significant investment in health and AIDS: in early 2010 the Minister of Finance reported in his Budget speech that more than 900 000 people were receiving ARV treatment through the public health sector and that in the coming year the budget for ARV treatment would be increased by 30%.

### *How did this happen?*

TAC used activist constitutionalism to counter Mbeki’s covert unconstitutionality. Its experience demonstrated the potential that lies within the Constitution and the courts to act as a check on government and, when necessary, as a means to compel the delivery of services. As we live through the early days of government under President Jacob Zuma, and noting that many of the traits we have attributed to Mbeki’s misrule had their genesis in ANC ideology/ies, TAC’s political approach to the Constitution is worth examining.

In the early 2000s the advent of new social movements was heralded as a new socio-political phenomenon full of promise for the poor. Desai (2004: 68), for example, claimed that they had become ‘the cornerstone of the challenge to the neo-liberal turn of the ANC’. A range of organisations, including TAC, the Anti-

Privatisation Forum (APF), the Anti-Eviction Campaign, the Soweto Electricity Crisis Committee (SECC), the Landless People's Movement and the Social Movements Indaba, gave the impression of a new independent radicalism within civil society.

However, although each of these groups fought for different sections of the poor, there was a lack of coherence in the ideas and approaches that underlie their struggles. At one end of the spectrum were people such as Andile Mngxitama (2009), who believes that 'the post-1994 state remains racist in character and serves white racism in the context of promoting accumulation and the reproduction of capitalism'. On the other is TAC, which has approached the state, government and private sector pragmatically, with the conviction that significant social reform and resource reallocation to the poor is possible within the framework of the Constitution.

There is no doubt that control over the post-apartheid state is contested. Holden (2008: 5) has described the way in which governments and corporations positioned themselves close to ANC leaders in the early 1990s in order to secure contracts in the then pending arms deal. But this is not unique. A multiplicity of individuals and entities seek to use the state to advance their personal interests or to protect their (class) privileges. The extent of their success, however, will depend on poor people's engagement with the state through social movements and other civil society organisations. Disengagement leaves the playing field free. The question, therefore, is how civil society should and can engage with the state.

As explained in Part I of this chapter the Constitution sets out clearly what should be the modus operandi and duties of the government. According to its preamble it aims to 'improve the quality of life of all citizens and free the potential of each person'. It defines how the business of government should be conducted, it provides rights of access to information, rights to just administrative action and a duty on the state to provide the poor with access to legal services. On socio-economic rights it offers a yardstick by which to measure the sufficiency of state policy, budgeting and implementation – and a means to keep government continually under pressure to deliver services to the poor.

For these reasons TAC has seen the Constitution as an instrument with which to hold the state accountable. Its different sections are like levers that can be used to compel the delivery of social services. In the context of left critiques such as that of Mngxitama it is interesting to point to a Marxist analysis of the rule and role of law by Fine (1984: 6), in which he points out that Karl Marx:

fought for the democratization of the state, and in so doing applied himself both to *the relation between the different elements of the state itself (law, parliament and the executive or bureaucracy) and to the relation between the state and society*. He was in favour of *maximum possible power for the representative element and the minimum for the bureaucratic; the independence of the judiciary from the executive but not from Parliament ...* He did not see the ‘rule of law’ as a mere hangover [from bourgeois democracy] *but as a crucial inhibition on bureaucracy and as a crucial guarantor of individual liberty* (emphases added).

The ideas that Fine attributes to Marx remain instructive, despite the many changes in the form of the modern state and law that have taken place in the intervening century-and-a-half. In fact, the growth of inequality globally and the long drawn-out life of capitalism (which does not look as if it will come to an end in the foreseeable future) have made engagement with the state even more necessary and, where possible, its oversight and governance by the poor majority essential.

Ironically, as pointed out in a publication by the humanitarian organisation Médecins Sans Frontières (Bouchet-Saulnier 2007: xx), the growing acceptance of universal human rights has reinforced the need for the state because human rights are ‘closely linked to notions of nationality and citizenship. Thus, without a state to protect freedoms and rights and take responsibility for providing its weakest members with social supports, the notion of “human rights” is more vulnerable than ever.’<sup>12</sup>

In keeping with these ideas, TAC engaged continuously with politicians and government officials during Mbeki’s rule. When necessary it used the courts to advance its claims. In 2001, when TAC first announced that it had filed papers in the Pretoria High Court thereby commencing litigation against the Minister of Health, this was understood by many to be a step too far against the ANC. It caused profound unease at both ends of the spectrum of TAC’s allies. Within COSATU some saw it as an attack on the ANC. On the left it was regarded as short-circuiting the struggle and as reformism that would not deliver any benefits.

However, since then, albeit in an uncoordinated fashion, a growing number of pro-poor organisations have used the Constitution and, when necessary, the courts, to

secure pro-poor reforms on AIDS, access to housing, women's rights, access to water, access to information and other issues.<sup>13</sup>

*Wither pro-poor civil society's struggle for social justice?*

This chapter has shown how pro-poor civil society redeveloped partly in reaction to Mbeki-ist denial. But in future it will need to be more than oppositional.

Under Mbeki new progressive civil society organisations such as TAC showed a dependence on the 'old' liberation-struggle formations of civil society, particularly COSATU. In future they will need to exert more influence on them.

Further, although many pro-poor civil society movements conducted ostensibly political campaigns there was an absence of a politics of civil society; a hole existed where there should have been a coherent analysis of the society in which we are living. Consequently there remains a gap in consistent thinking and ideas about how to reform society. The absence of a shared approach on how to conduct campaigns for social justice meant that pro-poor civil society was mostly reactive, responding with protest to problems, rather than advancing an alternative scheme for governance based upon an articulation of the type of democracy that is required by the Constitution.

Nonetheless, one of the lessons that must be learnt from the Mbeki era is that organised civil society has a far greater role to play in politics and governance than previously envisaged. In coming years, with skilful and strategic use of the Constitution, organisations campaigning for social justice have the potential to emerge as a new political force. Given this, the potential role of civil society organisations needs fuller theorisation.

Something over a century ago political parties developed as the main vehicles for advancing a pro-poor agenda and an egalitarian vision of society. However, the global economic and social context of the 21st century is radically different from that when socialist or social democratic political parties were able to mobilise the poor to bring about far-reaching change.

The experience of the ANC in its first 15 years in government (as well as of parties such as the Workers' Party – Partido dos Trabalhadores – in Brazil) suggests that political parties have been irretrievably captured by powers and economic forces that place them under enormous pressure to maintain the status quo. Thus, while

political parties will remain entrenched at the heart of electoral systems they seem unlikely to be able to bring about social justice unless placed under sustained pressure by social movements that highlight the plight and rights of the poor. In this century profound change will be brought about by activist citizens, educated about their rights, united on a set of common principles and understandings, who can mobilise communities and use law and human rights to demand delivery by governments and the state.

In South Africa this will require that civil society better understand and then take advantage of the leg-up that the Constitution offers in almost every area of state policy and governance. In the Mbeki years important campaigns like the People's Budget Campaign and the Basic Income Grant (BIG) Coalition suffered from a failure to understand this, and thus found themselves with a limited weaponry. The development and deployment of constitutional arguments about state duties relating to social security, budgeting adequately and utilising 'available resources' for social needs could have assisted both campaigns and widened their support.

To argue this is not to relegate the struggle for social justice to legalism and litigation but to argue that constitutionalism should be the bedrock of social mobilisation. This raises the question of what space and role civil society will claim under South Africa's fourth democratic government.

As we consider the future it is worth remembering that Jacob Zuma is cut from the same conservative political cloth as Mbeki. It is improbable that he will revive any of the denialism that characterised Mbeki: that was Mbeki's psyche, not his politics. But ironically, because of the global financial crisis, the Zuma government will find itself more constrained than Mbeki's in delivering social services.

A significant growth in unemployment as a result of the global financial crisis and recession has already worsened living conditions for millions and increased poverty and inequality. In this context, the quantum of 'available resources', how they are used and what is done to ensure continued 'progressive realisation' of rights to health, housing, food, water and social security will become the most hard-fought arena of contest between pro-poor civil society and the ANC. Whether the Zuma government drives towards equity and equality in line with constitutional imperatives or tries to undermine the Constitution in order to wither away the capacity to challenge state failure is the stuff of the future.



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<sup>1</sup> It is important to note that while only 'citizens' are granted the right to vote, in relation to the all other rights the Constitution affords 'everyone' its protection.

<sup>2</sup> Under the 1993 interim Constitution (in ss 40 and 127) a system of proportional representation was introduced for the 1994 founding elections and detailed in Schedule 2 (IEC 1994: 9). In 1996 the final Constitution (see Schedule 6) extended this system to the first elections under this Constitution – that

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is, the national and provincial elections of 1999. Political parties were required to submit lists of their nominees for the National Assembly and provincial legislatures to the Independent Electoral Commission (IEC). Election to a legislature depended upon the proportion of the vote achieved by a particular party measured against an individual's position on the party list.

<sup>3</sup> The provisions of the final Constitution relating to the electoral system did not extend beyond the 1999 elections. Consequently, in March 2002 Cabinet resolved that an electoral task team (ETT) should be established to 'draft the new electoral legislation required by the Constitution' (ETT 2003: 1). The majority report presented by the ETT noted that, 'Although it is common cause within the ETT that an electoral system may encourage, but cannot ensure, accountability, with very few exceptions a lack or perceived lack of accountability was identified as a problem in the current system. This factor was also emphasised by most media representatives whom the ETT subsequently met and also surfaced in many of the submissions by NGOs and other interested parties' (ETT 2003: 17). In August 2006, in answer to a parliamentary question, the Minister of Home Affairs admitted that the Cabinet had still not considered the report.

<sup>4</sup> In this chapter the terms 'pro-poor civil society' and 'progressive civil society' refer to organisations that put the plight of the poor and marginalised at the top of their agenda and which have used protest, media and human rights law to mobilise popular support and political power. A number of quite diverse organisations fit this definition. They include trade unions, foremost among them the Congress of South African Trade Unions, faith based movements, and new issue-based social movements.

<sup>5</sup> Mbeki's introduction to AIDS denialism was facilitated by the Virodene researchers. In order to bolster their own product, in April 1999 they drew his attention to an article by a charlatan and AIDS denialist named Anthony Brink that claimed that AZT was poisonous (Myburgh 2003: 11).

<sup>6</sup> Although it had been published by the time of his interview with Mbeki Pahad (2009) did not ask Mbeki to comment on this research.

<sup>7</sup> Principles of rule of law first emerged in history as a counter to feudal and hereditary power, with champions such as Thomas Paine. However, in modern times it is preferred by capitalism because it offers a degree of certainty and predictability, especially in countries where wealth can dominate politics. But this should not blind campaigners for social justice to its latent radicalness.

<sup>8</sup> The grand terms in which Mbeki saw his engagement are evident in his April 2000 'Letter to world leaders' in which he justifies his 'questions' about the AIDS thesis by reminding them that 'In an earlier period in human history, these would be heretics that would be burnt at the stake!' (Mbeki 2000).

<sup>9</sup> Official reports reveal that during this time several other government departments spent large amounts of taxpayers' money defending claims against people trying to exercise their constitutional rights. For example, in a case where the state opposed a claim for land restitution, the Department of Land Affairs and Alexcor, a state-owned mining company, spent more than R40-million.

<sup>10</sup> Govender (2007: 222-236) details a similar experience in relation to the report on HIV and AIDS (Parliament 2001) by the Committee on Women, which she chaired.

<sup>11</sup> AIDS denialism was finally defeated after TAC demonstrated to protest at the display of garlic and lemons at the official country exhibition at the international AIDS conference in Toronto, Canada, in August 2006. This embarrassed the government, which, soon afterwards, sidelined Tshabalala-Msimang and worked with TAC and others on a new National Strategic Plan on HIV, AIDS and STI[?]<sup>s</sup> (now known as the NSP). Tshabalala-Msimang was removed from office in September 2008, shortly after the removal of Mbeki. But until that point her actions – although greatly circumscribed – continued to be tolerated by government. Upon her death in December 2009 it seemed that most ANC leaders considered her role in AIDS denialism to be only a minor aberration in the otherwise unblemished life of a liberation heroine.

<sup>12</sup> Chanock (2001: 536) makes a similar point: 'Law depends on administrative efficiency, rights upon a strong state, not a weak one. A declining effectiveness of the state's administrative machinery and a growth of corruption at a time in which new rights are being proclaimed would weaken any new legal order.'

<sup>13</sup> This organisations include COSATU, the Abahlali baseMjondolo Movement SA, the Anti-Privatisation Forum, the Coalition Against Water Privatisation and the Rail Commuters Action Group. In addition various groups loosely organised under tenants' organisations, or classes of applicants such as people requiring grants have been represented by organisations such as the Legal Resources Centre, which specialise in social justice litigation.