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**The "Transformative Constitution": Treatment Action Campaign and the Politics of Social Rights in South Africa**

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In South Africa, the HIV/AIDS pandemic is sometimes called the New Apartheid, marking another great collective struggle and a divisive contest deeply shaped by the past. The unequal distribution of suffering and death, the bitter, racially charged conflicts over “AIDS denialism,” and the remarkable social movement and human rights campaign led by South Africa’s Treatment Action Campaign (TAC) demanding responsible action on the part of international pharmaceutical companies and the South African government: all these have roots in Apartheid and the Anti-Apartheid struggles.

I’m completing one account of that campaign with the president of Treatment Action Campaign, Zackie Achmat and TAC’s constitutional lawyer, Geoff Budlender. That one is concerned with strategies of advocacy and institution-building, and I’m just beginning work on a second more deeply historical account that aims to use the “TAC case” as an occasion to explore (a) the unfolding of “transformative constitutionalism” in South Africa; (b) the politics of social and economic rights in South Africa as these have played out in the courts and polity and (c) particularly, the relations among the nation’s Constitutional Court, its social movements and civil-society-based rights claimants and their leaders and advocates, and the South African state and party elites. In the background will be some comparative questions about the politics of rights in U.S.

experience, along with some attention to the role of U.S. actors, institutions, and legal and political outlooks in the story at hand.

It's well-known that U.S. foundations, U.S. public interest law outfits (particularly, the NAACP), leading cause lawyers (like Jack Greenberg) and legal academics (like Karl Klare and Frank Michelman) – as well, of course, as U.S. government officials and corporations and U.S. dominated international institutions like the World Bank and IMF – all have figured in disparate ways in the history of South Africa's Anti-Apartheid movement, its politics of "transition to democracy," its constitution-making, and its jurisprudential debates. Without detracting from the importance of U.S. moral and material support for the Anti-Apartheid movement, I am more intrigued by the constraints that American government and international institutions imposed on South Africa's transition – and how different South African actors have reckoned with them. And I also am struck by the ways that South African constitutional developments have diverged from U.S. models and confound U.S. scholarship, both juris-skeptic and juris-optimist. So far, as you'll see, I have found that U.S. experience and U.S. theory serve most usefully as contrasts and counterpoints, not guides.

*What follows is a very rough and provisional sketch of the story as it's begun to take shape, in hopes of gleaning your criticisms and suggestions before I take off for a few weeks this summer to do research in South Africa. Since the narrative line remains uncertain, let me set out the (tentative) theses at the outset, to make clear where I think it's all going.*

(a) The meaning of a "transformative constitution" itself was transformed during the period of constitutional negotiations. Some of the central ANC goals remained intact in

the final constitutional settlement – e.g., a “non-racial” liberal democracy; but the ANC’s longstanding social-democratic notions of strong state direction of the economy and strong redistributive commitments, embodied in the ANC’s early draft constitutions and bills of rights, gave way in the final Constitution to ringing commitments to social justice, an end to class inequality and guarantees of social and economic rights sitting alongside private property rights, an independent central bank, and other constitutional facets of the neoliberal Washington consensus. Meanwhile, in economic summits, the ANC leadership made an important set of binding commitments to the IMF, the World Bank and the largest SA corporations. Thus, in terms of constitutional political economy, the final settlement was Janus-faced, looking in several competing directions.

(b) In the event, Mandela and Mbeki hewed to the neoliberal commitments more than to the social democratic ones, but the neoliberal promise of “redistribution through growth” did not pay off. Foreign investment declined; jobs in the formal economy dwindled; and inequality actually grew between 1990 and today. More than half of black South Africa remains unemployed and mired in poverty.

(c) This has led to substantial discontent with ANC policies, but not to political desertion. The ANC continues to command roughly 70% of the vote. Proportional representation, therefore, has not produced a plethora of party rivalries. Nor has South African politics drifted toward bitter ethnic or “tribal” antagonisms. In this respect, the constitutional design combined with the ANC’s longstanding commitment to diversity and “non-racialism,” so far, have proved strong and successful.

(d) What’s gone amiss, in terms of constitutional design, is the drift toward a “one-party state” – an authoritarian party structure combined with a lack of institutional

mechanisms to support “back bench” opposition in Parliament and to prevent the Executive’s severely punitive and repressive posture toward Parliamentary hearings or reports on the part of Parliamentary standing committees in respect of Executive policymaking and implementation. The constitutionally-envisioned open, responsive, deliberative and participatory democratic state and party institutions (see Sec. 1, SA CON) are not to be found within the Executive and Legislative branches or in the party political apparatus. It has fallen to the press, civil society organizations and the Judiciary to challenge these failures.

(e) By all accounts, the most severe discontent among the ANC’s mass constituency of poor black citizens lies with the lack of more robust redistributive policies, the crabbed, procrastinating implementation of many policies formally adopted, the closed and arrogant style of administration. To an extent no one imagined, the Constitution’s social and economic rights provisions have become a locus of constitutional-political opposition and demands for accountability.

(f) And by the tragic coincidence of the HIV/AIDS pandemic coming on the heels of the Anti-Apartheid struggle – and the ANC government’s most glaring failure of social provision proving to be its persistent refusal to implement any HIV/AIDS treatment or prevention programs in the public health sector, many of the most seasoned and sophisticated organizers, activists and advocates of the Anti-Apartheid era (almost all of them with strong ANC links) have joined the movement for the right to health care for HIV/AIDS sufferers. TAC has become the ANC leadership’s most vexatious, astute and highly visible “loyal [but militant] opposition”; and TAC, we’ll see, casts its case for the right to health care in broad social-democratic and participatory-and-deliberative-

democratic *constitutional* terms – combining a broad politico-constitutional case with a narrowly crafted legal-constitutional strategy, in ways we’ll explore.

(g) Indeed, I’ll suggest, the courts and the public sphere of social rights advocacy may *have become* the institutional and constitutional space for accountability via opposition politics and participatory and deliberative policy-making. These are hardly substitutes for robust democratic processes in state and party, but, as we’ll see, they’ve managed to keep that constitutional ideal alive by bringing to earth something of its actuality:

Executive accountability, participatory- and deliberative-democratic policy-making and administration, and institutionalized vindication of social rights – in an iterative cycle which may enable persistently broader social rights claims and broader forms of institutionalization.

(h) In this process, the very features of “social rights” which vex many constitutional theorists prove critical virtues. Because “social rights” are not formally realizable, but expressly open-ended and substantive, or, in the language of the SA Constitution, borrowed from the ICESCR, “progressively realized...within available resources”; because – unlike civil or political rights – social rights are not typically understood as “possessed” or “not possessed” but instead are defined in terms of degrees of “access to,” they present fewer risks of what court-critics have diagnosed as “juridification” and fewer risks of what rights-critics have condemned as “reification” (social movements gaining abstract and formal vindication of their “rights” and suffering substantive denial of needs and aspirations). Also, because social rights are assigned by the SA Constitution to all branches of government, they lend themselves to vigorous public-political as well as judicial advocacy.

(i) This has encouraged and enabled the Constitutional Court (CC) to cast its role in respect of social rights as one of prodding and monitoring government along both procedural and substantive lines. Thus, the CC and the High Courts have condemned and forced changes in the government's social-policy-making processes in service of greater transparency and participation and greater attention to the needs and demands of the nation's poorest citizens; and they also have condemned and forced changes in the substantive content of those policies, in service of the Constitution's command that government take reasonable steps to realize citizens' social rights. As far as substantive interventions are concerned, the CC has insisted upon a cautious, deeply contextualized, case-by-case approach. It has given searching scrutiny to government social policy but resisted repeated arguments from social rights advocates (although not Budlender) that the Court should follow the lead of U.N. commissions on social rights by hammering out the content of a "minimum core" of social rights.

(j) For this caution and resistance, the CC has met with much academic criticism for judicial timidity and failure of political nerve. My take is different. The CC's members do not seem a timid lot; several risked life and limb (one lost a limb and an eye, another spent his adolescence in prison) during the Anti-Apartheid struggle. Several are on record deeming radical redistributive policies to be constitutional essentials. The caution and resistance to sweeping judicial interventions may spring partly from fears of an Executive backlash against the Court, but I think they flow mostly from a different source: the desire to balance commitment to social justice and social rights with commitment to fostering democratic reform within the Executive and Legislative branches; the desire to avoid "juristocracy," and to cultivate instead the kind of iterative

cycles I'm about to describe of (i) broad politico-constitutional activism, mass protest and popular and elite coalition-building around demands for programmatic SER reform followed by (ii) narrow legal-constitutional, judicial interventions to prod government and assist reformers inside party and state apparatus to implement and institutionalize these programmatic SER reforms, and to use the Court's moral authority to re-legitimize militant SER advocacy when it has gotten "too radical" in eyes of significant sectors of the state elite and the public.

(k) ANC's AIDS denialism: a lethal and lunatic fusion of (i.) government resistance toward the vast costs and complexity of undertaking HIV/AIDS treatment and prevention in the face of exigent demands for anti-poverty and infrastructure spending and an austere social budget; and (ii.) Africanist/anti-imperial/anti-Apartheid-inspired loathing and mistrust toward big pharma's "white capitalist schemes" and the "white Western medical and public health establishment's" longstanding, sometimes murderous and often contemptuous racist treatment of Africans – including recent experience of public health administration under Apartheid.

(l) Just as government's AIDS denialism and the terrifying spread of AIDS along decades-old circuits of migrant labor and poverty-laden sexual economies are legacies of SA's Apartheid past, so too: TAC's many-sided grass roots, social-movement building, its key grassroots constituency in the townships among young, secondary-school educated, unemployed blacks (mostly women), its grammar of protest and its repertoire of cultural forms – songs, chants, dances, iconic posters and t-shirts, as well as its cross-class and inter-racial membership, its international human rights organizational

networks, its strong ANC ties, its sophisticated legal strategies and intimate familiarity with the Constitutional Court's personnel, outlook and concerns – all grounded in collective memory and shared experience of Anti-Apartheid. None possible had HIV/AIDS emerged a generation later.

(m) HIV/AIDS in 1980s-'90s – generally seen in popular black culture as shameful, linked to drugs and homosexuality, an individual problem, met with social stigma, exclusion and isolation. TAC had to combat popular and elite denialism and to reframe HIV/AIDS as public issue, a shared common plight, demanding collective response, and recasting HIV positive people and people with AIDS in public discourse as members of national community across race/gender/class lines, and in own subjectivities, as worthy, rights-bearing citizens. Partly via building new social identities as rights-bearers (and activists) among patients via Treatment Literacy Campaign (whose restored health helps animate new identities) combined with local, provincial and national organizations, and public gatherings, meetings, and mass protests. Partly via public education campaigns about HIV/AIDS medical science. Taking “HIV/AIDS literacy” into churches and trade unions – all seeing their memberships hard hit by HIV/AIDS. Extensive media campaigns against government denialism via allies in public health and medical establishment and in press. Upshot by 2002 is transformation of much of elite and a fair portion of popular public opinion in favor of roll-out of anti-retroviral treatment in public health sector and against government's intransigence.

(n) TAC's rights advocacy: mirror opposite of classic NAACP civil rights strategy; also deeply at odds with standard international human rights/social and economic rights advocacy model.

(o) *Classic U.S. civil rights model*: litigation/judicial strategy is out ahead of social movement/political strategy; central focus is on making new constitutional law, elicit judicial condemnation of segregation and other rights deprivations under Fourteenth Amendment, on behalf of “discrete and insular” disenfranchised minority, heavy dependence on judicial remedies, often lacking significant allies in political branches. “Impact litigation” as vehicle for institutional reform.

(p) *International human rights/social and economic rights (SER) model*: linking “local” and “global”; key actors are local and international N.G.O.s, international foundations, international organizations and national human rights commissions; emphasis on decentralized, local, community-based “empowerment” programs funded and supported by international organizations; pro-market, anti-statist, avoids “politics” and hostile to state and party institutions and national political organizations. SER advocacy is the kind and gentle, social reform side of neoliberal “globalization” outlook.

(q) *TAC/South African model of social and economic rights (SER) advocacy*: both social movement and public-political rights-claiming strategies out ahead of litigation; no need to make new constitutional law; constitutional text treats SER as affirmative duties and as justiciable, and government acknowledges, in legislation and policy documents, affirmative obligations to undertake broad and democratic provision of social goods, including health care, within available means. Advocacy and litigation aimed instead at prodding government to open up deliberative and policy-making process; to fashion and implement robust programs of social provision, and to do so in democratic-participatory and experimentalist fashion. Not a counter-majoritarian strategy or political imaginary for a disenfranchised minority; rather, a model of SER-rights advocacy for an

enfranchised but poor and “dispossessed” “more than half of the nation.” SER mobilization and litigation against unresponsive state policies and state and party elites, but not anti-state or anti-politics; promoting public political-economic and administrative innovation to actualize SER, not standard SER NGO anti-poverty outlook: substituting private local and international initiatives for state action.

(r) This model, I’ll argue below, has shaped and been shaped by the SA Constitutional Court’s SER jurisprudence. It fits the Court’s identity as key justices envision it, hoping to keep alive and nurture both socialist and radical democratic constitutional commitments. Also, in contrast to Indian Supreme Court, SA CC justices are deeply concerned that their SER pronouncements and orders actually be obeyed and brought fully to earth. “Constitutional law” must be kept distinct from mere hortatory declarations in eyes of state elites and in public perception. Finally, in keeping with their mix of traditional legal liberal and critical legal values and insights, they seek to maintain an uneasy balance between pragmatic, open-ended, value-laden and historically-contextualized SER jurisprudence and a strong “law” versus “politics” and “policy” distinction.

*Those are my provisional theses, which I hope you’ll bear in mind, as you read what follows – a draft of a lecture, I’ll be giving later this Spring. As far as both the theses and the lecture are concerned, my main hope is that you will have criticisms and suggestions that will help me sharpen and refine the lines of argument and interpretation I’ve sketched and also help me sort out what lines of research to follow in South Africa this summer.*

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The word “transformation” doesn’t appear in the South African Constitution, but it is striking how often the Constitutional Court’s justices refer to the Constitution as one committed to social transformation and to their own task as one of fashioning a transformative jurisprudence. Other constitutions may rest on classical liberal foundations, they often remark. But our Constitution and Bill of Rights compel substantive and not formal interpretations of their equality clauses and their social and economic rights provisions. Constitutional adjudication must contribute to what the Constitution demands from all organs of government: “a transformation of power relations. . . to overcome the inequalities inherited from centuries of racial domination and economic exploitation.”

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How do the history and memory of decades of Anti-Apartheid struggles and the intense years of constitution-making enable and constrain all sides in present contests on the planes of institutional settings and of cultural resources? What “transformative” commitments are faring well and what ones are being shortchanged and what kinds of important constitutional conflicts are unfolding as the ANC has gone from an outlawed revolutionary organization to a constitution-maker to a dominant party in power, enjoying a super-majority of electoral support? Our main interest lies with the conflict around social and economic rights and the institutionalization of social citizenship, but (as I’ve suggested in my “theses,”) this conflict seems to me entangled with another – over the meaning and institutions of democratic citizenship and political accountability.

Let’s begin with South Africa’s constitution-making. Here, I’ll merely highlight what I’ll call the transformation of “transformation” during the years from 1990, when the first

informal constitutional negotiations began, to 1996, when the final Constitution was ratified.

In 1990 “transformation” signified a new racially egalitarian social democratic government and state apparatus designed for and committed to massive redistribution of wealth and economic—as well as political—power. By 1996, “transformation” in its economic dimension meant the inclusion of social democratic promissory notes in the Constitution of a reasonably liberal capitalist democracy. Socialist visions flowed into the new Bill of Rights, but the political economy and authority over economic resources were set in a neo-liberal mold.

The African National Congress (ANC), now the ruling party, was during the constitutional negotiations, and throughout the Anti-Apartheid struggle, the main representative of South Africa’s black majority and the principal bearer and architect of the constitutional vision of South Africa as a “nonracial democracy.” For over half a century, from the mid-1920’s onward, the ANC’s economic outlook had been imbued with socialist notions of how that democracy ought to be organized. Many of the ANC’s top leaders and constitutional lawyers and negotiators were also leaders of the Communist Party; many of those who, like Nelson Mandela, were not Communist Party members shared much the same economic outlook: a mixed economy, large industry and banks nationalized, all of the economy harnessed to strong government direction in service of social goals.

The mass demonstrations of the mid-1980’s, when tens of thousands marched in defiance of the government’s bans, were decked out with red banners. It was no wonder the ANC’s meld of Marxism and equal rights ideology continued to resonate in the late

20th century. The nation was wealthy. It had a large corporate sector, modern mines and mills, and rich lands and resources. When Mandela and other imprisoned leaders were released in 1989 and 1990, they said that much of this would be nationalized, and all of it would be run in the interests of all the people. The land would be shared by those who worked on it. Thus, they spoke of the new South Africa in terms of equal rights on the one hand and economic reconstruction and redistribution on the other. When the ANC and SACP leader and attorney Albie Sachs drafted the ANC's proposed Bill of Rights, its section on the economy had the same contours. It declared that the state would frame the direction of economic development and do so in ways speedily to eradicate the economic and social inequalities produced by Apartheid. Its provision for safeguarding private property spoke strictly to property for personal use and consumption.

Across the table, proposals from the Nationalist Party and other white parties gave strong social and economic as well as political guarantees to the oppressors, what Sachs described as constitutional "means of defending the present privations of the [white] minority, surpassing the legitimate bounds of legal irony by making a Bill of Rights that perpetuated injustice." Naturally, Sachs was opposed to any such "de facto constitutional freezing of present unjust and racially enforced distribution of land and wealth." His approach, and the approach of the ANC, centered instead on "affirmative action": ". . . if the law in its majesty were to give equal protection to a family of ten living in a two-roomed shanty and a family of two in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa. . . . [T]he failure to impose a legal duty on the state and the private sector to reduce inequality in living conditions would be to deprive the Bill of true meaning in one important area." Sachs, however,

was opposed to entrusting constitutional and social-economic rights to the judiciary. The judiciary had the “wrong pedigree,” he wrote, to be the “watchdog over the interests of the formerly oppressed.” Not a “mountain-top judiciary” but a social and economic rights commission should be the watchdog for the Constitution’s redistributive commitments. Sachs is now a justice on the Constitutional Court. His missing limb an emblem of his sacrifices, like other heroes and heroines of the Anti-Apartheid struggle now on the Court, Sachs’s presence helps explain the Court’s substantial moral and political authority, as it stakes out its role in the constitutional democratic enterprise, including “watching over the interests of the formerly oppressed” and the Constitution’s redistributive commitments, which were made justiciable.

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As is well known, the ANC’s negotiators and drafters succeeded in prodding and persuading their counterparts among the key representatives of white South Africa to give up on the principle of a white minority veto in the legislative system. All the intricate veto schemes yielded to majority rule and one person/one vote. Minority white rights remained safeguarded, but only via the Bill of Rights (which includes property rights provisions), strong federalism, and a strong judiciary.

The final Bill of Rights resonates with the language of social and economic justice. It makes no mention of state ownership or state control over industry, and its private property rights provisions are not restricted, as Sachs had hoped, to “property for personal use and consumption,” but it hardly gives the National Party and the corporate elite the kind of strong property rights-protective language they’d sought. Instead, its just-compensation provisions are hedged by balancing tests. Social and economic rights are prominent and justiciable. The development of the common law is put under the aegis of

constitutional values of equality and social justice, and these precepts are given horizontal application. Social justice is part of what the Constitution enjoins all organs of government to establish, in order to redeem the past and transform the future.

The ANC succeeded brilliantly in the politics of constitution-making; but when it came to the economy, most participants now seem to agree, the ANC was outfoxed. As with many past constitutional settlements, not all the compromises unfolded in the convention hall or appeared in the text. Alongside constitutional negotiations, widely acknowledged (but not in public view) were a series of economic negotiations and summits between the ANC and national and international business and banking leaders. The heads of the IMF and the World Bank met often with Mandela and others. At the helm of these ANC efforts to arrive at common ground with the economic elites was Thabo Mbeki, SA's second president, from Mandela's retirement until 2008.

Scores of regional and local ANC leaders were ferried to week- and month-long seminars at the World Bank to learn about globalization and economics in these salad days of free market fundamentalism. Many were unconverted. The ANC's shift to neo-liberal orthodoxy was and remains bitterly opposed and contested. But Mandela and Mbeki were unyielding; they steered a stern, conservative course and agreed to commit the new government to a number of binding agreements and understandings with the Bank, the IMF, and South African corporations. In addition to constitutionalizing central bank independence, the new regime would sign the GATT; it would assume the daunting debt racked up by the Apartheid government during the 1980s and forswear any kind of one-time wealth or corporate tax to draw down that debt; and more importantly, it would

lock South Africa into the Washington view of prudent economics: strict conservative fiscal and monetary policies, immediate trade liberalization, opening up capital markets and an end to capital controls. It would privatize state enterprises, deregulate labor markets, and undertake wage restraints, low taxes, and reductions in social spending and public employment.

In some measure, this raft of commitments resulted from the limits of ANC bargaining power. The white elites continued to command the armed forces; they continued to command the economic heights and could threaten a capital strike. Many well-informed accounts suggest that the National Party's ultimate concessions on majority rule were purchased at the economic summits; that the price for democratic government was a sharp contraction in that government's authority over the economy.

But the ANC's economic commitments also dramatized what Mbeki (with his graduate degree from the London School of Economics) and his wing of ANC leaders wanted to show the world: a black South African government did not mean another wacky experiment in African socialism and state-led spending sprees. What's more, for the Mbeki-ites, neo-liberal institutions and policies probably did not seem inconsistent with building a modern, market-friendly social democracy. The late '80s and early '90s marked the demise of the Soviet Union and the beginnings of neoliberal free-market "shock therapy" in Eastern Europe, as well as the "capitalist turn" in China and Vietnam. World Bank officials brought former communist leaders to lecture Mandela and other ANC leaders about the inevitability of neoliberal-style "globalization" and the virtues of "free markets." The collapse of communism shattered their confidence in state-managed direction of national economies along communist or traditional socialist lines; and their

polished World Bank tutors derided the heterodox economic strategies put forward by COSATU economists as alternatives to neoliberal orthodoxy – although some roughly identical strategies show up today in the policy toolkits of the savviest of these tutors, as they’ve grown disillusioned with their own free market fundamentalism of the late ‘80s and early ‘90s.

In any case, the neo-liberal road was a harsh one in a country with 40% unemployment, where roughly 60% of the newly enfranchised black majority lived in grinding poverty with barely any schooling, housing, or basic infrastructure, while the middle and upper classes were affluent by any standard. Thus income inequalities were not only deeply racialized but among the highest in the world. The pay-off was the promise of renewed and plentiful foreign investment and the trickling down of market-driven growth. The new government kept its side of the bargain—low taxes, low social spending, trade liberalization, free flow of capital. But the pay-off never arrived. Foreign investment remains low. South African corporations continue to modernize and have shed roughly a million jobs as they do so. Freed to list on foreign exchanges, they invest mostly outside South Africa. The wealthy and the professional classes are wealthier than ever and include a growing portion of black Africans. The poor black majority, however, is poorer than under Apartheid. They are shut out of the modern economy, which no longer needs them either as workers or consumers. Exclusion has replaced exploitation as their lot.

It took Stiglitz several more years to grow disillusioned with the Washington consensus, but already in the early ‘90’s South Africa’s trade union economists saw the World Bank/IMF recipe for what it was. A “fifty percent solution” that might help

reinvigorate the modern corporate economy but would leave half of South Africa mired in abject poverty and lead away from more promising paths of development. So, democratic South Africa has remained two nations with two economies: a first-world and a third-world nation growing farther apart, while much of the governing black elite—including Mbeki and his cabinet—resists confronting how little the neo-liberal path offers the other South Africa. And the more they have resisted this, the more they have battened the hatches of the party and state apparatus, using the ANC’s super-majority and their power over party and state administration to punish critics and opponents of government policies within the ANC and shut down Parliamentary deliberation and scrutiny, making public administration and party and Parliamentary processes what one High Court judge has called “a sad mockery” of the Constitution’s “basic values” of “openness,” “responsiveness” and “accountability.”

As we turn the corner to explore the Treatment Action Campaign, you can guess one question on our docket: Will the Constitution’s social and economic rights prove a road to revisiting the premises of South Africa’s political economy and making government more accountable and responsive to the social and economic plight of the excluded half of the nation? There are good reasons to think not. There are those who say that human rights is the socialism of the 21st century. But think about the ways that social and economic rights activism is the kind-hearted twin of neo-liberalism rather than its adversary and interlocutor. Much standard human rights thinking, and the thinking of international social and economic rights advocates in particular, echoes neoliberalism in its antagonism toward state institutions (except courts) and its suspicion of large-scale

political organizations, shunning both in favor of “civil society” and the private foundation, just as neoliberalism shuns both state institutions (except courts) and “politics” in favor of “the market” and the private corporation. The pro-poor-people, anti-poverty human rights outlook’s prescriptions for equitable, affluent democratic societies emphasize *decentralization*. As the U.N.’s celebrated Human Rights and Development Project puts it, “The foundation of poverty reduction is self-organization of the poor at the community level.”

At a time of unprecedented concentration of capital and power in the hands of private corporate conglomerates, the vehicles of positive change for leading 21st century social and economic rights mavens are local participation, local empowerment, micro-credit, decentralized grassroots struggles waged by “new social movements,” self-help and social services delivered by “civil society organizations,” NGO’s, and so forth, with the aid of first-world foundations like the Gates Foundation or the Global Fund. The problem is: If the tools of neo-liberalism like public choice theory teach us anything it is that the uncoordinated actions of many local actors in either civil society or the market are not likely to be able to solve problems like market or state failure on a scale sufficient to lift millions of people out of poverty. Global financial institutions shape and constrain national economies in countless ways; but for now, they are not in the business of supporting substantial pro-poor development and distributive policies in the second and third worlds. For now, the nation state remains the only actor able to extract the resources from society that make substantial pro-poor policies possible, and the only actor able to provide public goods on a large scale. One hopes this may change. Until it does, it is a gloomy note for poor nations. But South Africa is not a poor nation but a rich

one, with massive poverty. It is two nations that may or may not become one. If it does, this may make SA an important force for global, North/South reform. But if becoming one is to begin to happen, it will require more than local empowerment and decentralized activism. In splendid isolation from broader contests over resources and political power, these tend to leave the steely neo-liberal agenda firmly in place.

On that sober note, let's turn, finally, to TAC and our main characters: the TAC activist Zacky Achmat and the TAC lawyer Geoff Budlender. Both Achmat and Budlender marched under the red banners of equal rights plus socialism or communism during the 1980's. Budlender litigated many of the great Anti-Apartheid cases, using the courts to challenge the pass system, mass evictions, and other hated features of the old regime. His work as one of the founders of the Legal Resources Center (LRC) in Johannesburg captured the attention of the Ford Foundation, which was looking for promising venues to have a hand in shaping post-Apartheid South Africa. So the Ford Foundation sent millions of dollars to the LRC, and it sent Jack Greenberg, then legal director of the NAACP Legal Defense Fund, to teach Budlender and his colleagues how to spend the money on an American style of civil rights lawyering, with the hope that this would help shape a road toward American-style liberal democracy. Budlender and the LRC learned much from Greenberg and the INC Fund, but sitting at the kitchen table in Budlender's home in the late 1980s, you'd have heard him and his colleagues worry about whether racial equality in post-Apartheid South Africa might end up *too much* like the United States: civil rights, the franchise, and affirmative action that achieved middle class and professional status for a substantial number of blacks but left a vast black

underclass, which in South Africa might be no minority but much of the nation. A civil-rights strategy framed around anti-discrimination and desegregation might leave class structures intact: opening space for the creation of a black elite and middle class without addressing many severe inequalities.

Of course, that is largely what has transpired. It might have been much worse. But it might be better; and better is what the constitutional social rights provisions still promise. Bringing those promises to court, Budlender draws on a second cautionary lesson from U.S. experience. The classic Inc. Fund strategies were framed around making new law. Remedies famously fell short; often nothing changed. Given the South African context, circa 1995, this model was upside-down. The problem was not advocating on behalf of the rights of a disenfranchised minority; it was advocating on behalf of an enfranchised majority: a poor black majority, the central constituency of the ANC in power, which was bearing the brunt of the ANC's rightward turn. The problem was not gaining recognition for rights—like school desegregation—nowhere expressed in the Delphic phrases of the 14th Amendment; it was finding ways to nudge government to bring to earth rights like health care expressly set out in the nation's new Bill of Rights.

There also remained plenty of left-leaning figures in the party and state apparatus, the press and the professions, chafing against Mbeki's right-leaning social and economic policies and their authoritarian leadership, and looking for leverage to change them in favor of more democracy and more substantial redistributive social spending and institution-building. So, armed with the Ford Foundation money and Greenberg's advice, Budlender's and the LRC's mode of constitutional lawyering actually has been the opposite of the NAACP model. Not bold new law, but big changes on the ground and

narrow strategic legal interventions in broad and complex political struggles have emerged as the keys. Budlender's social and economic rights lawyering is in service of clients' many-sided strategies to change state policy. Litigation is deferred, tailored, and trimmed to fit the political groundwork.

Let's be clear. Big and bold constitutional claims are central to these struggles—more so, in fact, than in the framing discourse of U.S. civil rights struggles—but they are the province of movement leaders like Achmat, not the lawyers who are called on, and prefer, to craft cases cautiously and narrowly. This combination of politico-constitutional boldness and legal-constitutional gingerliness, so I'll suggest, has fitted well with and helped to shape the Constitutional Court's own thinking.

Here was a court composed of revolutionary heroes and heroines husbanding their great moral authority as they began to take up the roles of watchdog and midwife of the “transformative” Constitution. In their public addresses during the mid-'90's, several key justices also turned to the U.S. for inspiration. But it was not *Brown v. Board* and Warren Court liberalism they most often evoked; nor was it Ronald Dworkin or other liberal legal moralists, although both get some play. It was Critical Legal Studies. Ignored or scorned as left-wing intellectual nihilism in the U.S. judiciary, CLS has found a purchase in the judiciary of South Africa. Thus, for example, Dikgang Moseneke is now Deputy Chief Justice of the Constitutional Court. Moseneke became an ANC activist in the 1970's in his mid-teens. He studied law during his ten years in prison on Robbin Island. Like many fellow justices, he was a key ANC constitutional draftsman and negotiator. Like Sachs and others, when Justice Moseneke lectures about jurisprudence and the Constitutional

Court's project, he quotes Karl Klare and Frank Michelman and talks about the need for pragmatic, contextualized, candidly value-laden (and so, "inevitably controversial") and historically sensitive and committed interpretations of the rights-bearing provisions of the new Constitution.

And indeed, you'll find that the decisions of the South African Constitutional Court have increasingly departed in form as well as substance from Apartheid-era Roman Dutch and common law jurisprudence. The latter was a formalist style of decision making. Many features of that formalist style endure, including its insistence on a sharp "law" versus "politics" distinction, which the Court, we'll see, wields for many purposes. But, at the same time, you find justices adjudicating in the style Klare and Michelman have modeled. By recounting the social and political actualities of a given practice and set of relations under Apartheid—let's say land evictions in cases of squatters—the Court reflects on the unjust and oppressive role of the law and the judiciary in the given practice and how that role must change if the Constitution is to become "an historic bridge" between Apartheid and democracy.

Under the old legal regime, Justice Sachs recently has written in an eviction case, "for blacks dispossession was nine tenths of the law." Courts legitimated in "neutral and impartial" sounding ways the consequences of manifestly racist laws in a setting of state induced inequality, wielding law to criminalize and brutalize black shack-dwellers, even if they had been born on the land and spent their whole lives there. Today, courts confront the same kind of demand: "Evict these 9,000 illegal squatters from my property." But the Constitution enjoins courts to balance the constitutionally entrenched private right of the property owner with the no-less entrenched constitutional social right

of the shackdwellers to access to land and a dwelling place. Recalling the victims of past racist policies and their necessitous quest for homes, such homeless people had to be treated with dignity and respect. And often this means denying eviction orders, ordering constitutional damages to the land owner from the state, and ordering the state to provide alternate space for the squatters before their removal. Historical context, a comparative assessment of the present competing needs and uses of the land, and the motivating purposes of the constitutional provisions about land evictions all figure in the analysis, which thus takes the form of what 19<sup>th</sup> century legal historians, following Karl Polyani, often call the “creative destruction” of old property rights, in service of new visions of political-economic development.

But how have history and memory and judicial method played out in the daunting arena of social provision for South Africa’s five million HIV/AIDS sufferers? Here the clash is not between rival claimants to the uses of a plot of land, but between rival claims to the public fisc, where the democratically elected government claims that the anti-retroviral drugs, which Achmat and his organization say are essential to saving millions of South African lives, are dangerous, indeed toxic, and beyond the government’s means to afford and capacity to deliver. But that is to get ahead of ourselves. How did TAC get sideways with government? How did Mbeki and his lieutenants get in bed with AIDS denialists and begin thwarting the rollout of anti-retroviral treatment for HIV/AIDS patients in the public health system?

It did not start that way. Founded by Achmat and other ANC leftists and gay rights activists in 1998, TAC began immediately operating in local, national, and global

arenas. Drawing its rank and file mostly from poor and working class, HIV positive, young, urban, black African women with secondary education, TAC also enlisted health professionals and university students across racial, ethnic, and class lines. TAC swiftly captured the imaginations of human rights and AIDS activists around the world with its legal contests, mobilization, protests, and publicity campaigns against international pharmaceutical companies to bring down drug prices and allow importing of cheap generics to treat HIV/AIDS patients in South Africa.

A few years earlier, in 1994 had come an important breakthrough in HIV/AIDS medicine: simple, effective treatment for Preventing Mother to Child Transmission (PMTCT). TAC announced its first programmatic objective: demand for a government program to prevent MTCT. In an initial show of cooperation, TAC and the government issued a joint statement naming drug prices as a major barrier. Thus, lobbying, litigation, and publicity aimed against the manufacturers of anti-retroviral medications promised to be the heart of TAC's PMTCT campaign. Drawing on the precedent of divestment campaigns during the Anti-Apartheid struggle, TAC used international networks of human rights organizations to pressure corporations, only now the target was big pharma. Some of these organizations, such as Oxfam, were familiar players during the Anti-Apartheid era.

Also on hand from the Anti-Apartheid era was a repertoire of symbolic action and civil disobedience. The defiance campaigns of the 1980's provided a script for Achmat's public defiance of the national and international legal bars to importing generic HIV/AIDS drugs. TAC pressured the government to invoke the emergency provisions that would trigger exemptions from TRIPP. Pfizer became the subject of an international

public outcry, while South African pharmaceutical associations became the targets of litigation.

In late 1999, however, as the campaign against big pharma unfolded, a second front opened: this one against the government. The emergence of a denialist outlook in government circles led to resistance and delay on the government's part, even as TAC's efforts against big pharma met with some significant success and HIV/AIDS drugs became more affordable and accessible. Denialism wove together many strands of culture and ideology. One was "dissident" science originating in the U.S. and Canada that held that the evidence linking HIV to AIDS was unpersuasive; that the AIDS epidemic in Africa was more likely a constellation of many illnesses and the result of many causal factors, including malnutrition and poverty; and that scarce medical resources were ill-spent on anti-retroviral drugs that were called dangerous, even toxic.

Another was African nationalist and anti-imperialist/post-colonial thinking, which heard in mainstream medical and public health approaches to the HIV/AIDS epidemic in Africa echoes of colonial and apartheid rule: racist stereotypes and stigmas about "uncivilized" and "promiscuous" "African sexuality;" a yoking together of "black Africans" with homosexuals, drug users, and sex workers; a universe of despised "others;" brutal "experimenting" with dangerously toxic drugs on African subjects—all profiting Western drug manufacturers and injuring Africans, while ignoring the social-historical roots of the epidemic in Apartheid's generations of poverty and neglect.

Perhaps it should be no surprise, then, that this outlook took hold among a significant portion of the ANC leadership. Although it flouts overwhelming evidence that HIV and AIDS are causally linked and that anti-retroviral drugs save lives, it gathers

support from the bitter historical experiences of racist medical “science” and brutal treatment of black South Africans at the hands of white public health officialdom. It resonates with popular resistance of and unease toward the sexual and gender issues raised by HIV/AIDS, as well as well-earned popular mistrust of “Western medicine,” “white doctors,” and big pharma. Denialism from above has tapped into and bolstered popular forms of AIDS denial from below, those fueled by stigma and shame, driving AIDS sufferers out of families and communities, and by popular “white conspiracy” theories.

Mandela shunned the topic during his presidency. The Mbeki-ites, however, vocally embraced it. Peter Mokaba, a Mbeki lieutenant and ANC leader, wrote a few months before dying of AIDS himself, “The story that HIV causes AIDS is being promoted through lies, pseudo-science, violence. . . . We refuse to be agents for using our people as guinea pigs and have a responsibility to defeat the intended genocide and dehumanization of the African family and society. . . .” Lashing out at the bigotry that equates blacks with promiscuity and portrays Africans as diseased, poor, and begging the West for aid, Mokaba’s long manifesto concluded: “Yes, we are sex crazy! Yes, we are diseased! Yes, we spread the deadly HIV through uncontrolled heterosexual sex! In this regard, yes, we are different from the US and Europe! Yes, we the men, abuse women and the girl-child with gay abandon! Yes, we do believe that sleeping with young virgins will cure us of AIDS! Yes, as a result of all this, we are threatened with destruction by the HIV/AIDS pandemic! Yes, what we need, and cannot afford because we are poor, are condoms and anti-retroviral drugs! Help!”

Mbeki was more controlled and eloquent making the same point in a 2001 lecture at Fort Hare University, South Africa's leading historically black university: "And thus it happens that others who consider themselves to be our leaders [i.e., Achmat and TAC] take to the streets carrying their placards. . . convinced that we are but natural born, promiscuous carriers of germs, unique in the world, they proclaim that our continent is doomed to an inevitable mortal end because of our unconquerable devotion to the sin of lust."

Mbeki found himself drawn to "dissident" HIV/AIDS science for two compelling reasons, I think. It resonated with genuine Africanist pride and Africanist rage and revulsion at racism garbed as medical science, and it buoyed his resistance to the vast fiscal burdens of taking on board anti-retroviral treatment for millions of South Africans. Hundreds of millions of rands for anti-retroviral drugs was hundreds of millions less for other social programs in a context in which Mbeki was constantly fending off demands for more spending. Thus, Mbeki's finance minister, Trevor Manuel condemned what he called "the medicalisation of poverty": "The rhetoric about the effectiveness of antiretrovirals is a lot of voodoo, and buying them would be a waste of limited resources." Better to spend on fighting the poverty that makes South Africans vulnerable, the Mbeki-ites believed. *Better to spend on the healthy than on the sick and dying* was the not-so-hidden subtext of many of their AIDS pronouncements. And so, steely economic "realism" melded with bitter historical memories and racial and sexual rage to produce wildly dysfunctional policies.

Mingled with the Mbeki-ites' lunatic dissident science and the denialist current in official circles were genuine cautions about costs, risks, safety and capacity to implement

anti-retroviral treatments and even the simple form of PMTCT. Thus, in late 1999 and early 2000, TAC agreed to still its demands for a national PMTCT program while the government awaited the outcome of a local South African trial of the simpler Nevirapine regime for PMTCT. The local trial's preliminary results were heartening. At the same time, in virtue of persistent mobilizations and pressure from TAC and its international allies, the manufacturer of Nevirapine, Boehringer Ingelheim, offered to supply the drug at no cost to the South African public health system for five years. Still the government resisted rolling out a PMTCT treatment program, invoking arguments from complexity and institutional capacity (ironically, echoing those Western "experts" who long doubted the capacity of "third-world and developing" nations responsibly to use and administer antiretroviral treatment for HIV/AIDS). Here, the government's position—lamenting the high cost of ARV drugs, making Nevirapine available in a handful of pilot sites, but deferring full-scale roll-out of PMTCT program, while it gathered "more information" about matters like "resistance" [i.e., drug-resistant strains bred by inconstant drug regimens] and needed infrastructure—was not obviously unreasonable. On its face, this was the kind of complex policy judgment that courts are loathe to overturn. Thus, TAC's painstakingly patient path to court, its tenacious and highly visible accumulation and dissemination of medical/scientific evidence and persistent calls on government to hasten—and to make transparent—its decision-making processes, such as registration of Nevirapine, combined with TAC's persistent dramatizations of the human toll of procrastination: this tack may have been essential to generating broad agreement among much of South Africa's elites that the government's PMTCT policies were, in fact,

morally and medically indefensible, and this tack surely was essential to the courts' readiness to rule against government and order the roll-out.

Although it resumed preparations for litigation against the government in July of 2000, once more TAC paused on the path to court, this time to await registration of Nevirapine by MCC to avoid the issue of "off-label" use of the drug for PMTCT and to avoid framing litigation around demand for AZT, which was registered but entailed a more complex treatment regimen. Meanwhile, the Premier of Gauteng announced that his province would implement a province-wide roll-out of Nevirapine for PMTCT, only to be assailed by Mbeki's Minister of Health and forced – as a subordinate in the ANC hierarchy – to retract his announcement. But the Gauteng roll-out continued and was widely reported. And TAC renewed and intensified its campaign for a nation-wide PMTCT program in the media and in civil society, via public discourse, debate, demonstrations, and protests, keeping in the public eye the results of manifold tests and pilot programs of Nevirapine for PMTCT and the intransigence and resistance-to-reason of government decision makers.

After the MCC registration process was completed, the protests, framed around denial of constitutional rights to life and health, grew increasingly militant. TAC activists occupied government offices. Achmat confronted the Minister of Health face-to-face in a tense televised public meeting. The government, TAC charged, was bringing about needless deaths, hundreds each month, killing the children of the poor; the government had no more justifications for denying the right to treatment. A poster appeared on township and city walls, juxtaposing the iconic photograph of a teenage boy carrying a younger brother, killed by the security forces during the 1976 Soweto uprising, with

another photo of another teenager carrying a younger sibling, felled by AIDS. Achmat and TAC were rekindling all the memories of Apartheid, all the cultural forms and practices—the songs, chants, funeral marches, defiance campaigns, and mass demonstrations—that were wielded against the white Apartheid government in the freedom struggle, and wielding them against the ANC. “We could not have mounted TAC a generation later,” Achmat observes. “Everyone would have forgotten the steps. Everyone remembered the songs; the women [HIV positive, urban, black Africans living in townships] remembered the demonstrations for our rights. . . . The human rights networks in England and the U.S. we relied on for support were still alive. And the strong links to COSATU [the trade union federation].” (COSATU continues to be seen as the preeminent voice of pro-poor/working class social democratic reform within the ANC, as it was during the Anti-Apartheid era.)

Mbeki and ANC spokespeople and ministers assailed TAC as extremist and irresponsible, as a tool of big pharma and “Western capitalists.” There was much popular anger and mistrust among ANC rank-and-file against TAC. It was seen as disrespectful of ANC leaders and a troublemaker. But TAC’s mobilizations from below—built on a base of TAC-organized and TAC-run Treatment Literacy groups in hundreds of urban clinics and community centers and on its broader coalition-building and education campaigns with COSATU and the churches, bringing union and church activists into the public fray on TAC’s side—meant that government’s claims were met by thousands of voices of articulate and outraged poor and working-class black South Africans, largely unemployed women, suffering from HIV/AIDS and demanding antiretroviral treatment for themselves, their family members, and their children, as well as others who’d lost family

and church and union brothers and sisters to the pandemic and each day watched more wasting away untreated. Despite Mbeki and the party leadership's suppressing dissent and debate in the ministries and Parliament, here was dramatic evidence that it was not only the "white medical establishment" and "white liberals" who demurred from the popularly elected government's ambivalent, procrastinating HIV/AIDS policies—and its underlying moral and political judgments about the low value of providing treatment. Rather, the mobilizations showed that the policies had generated anger and opposition among the nation's black poor and working classes, whose interests government claimed to represent and defend in its clashes with TAC.

The Constitutional Court's July 2002 decision in *Minister of Health v. Treatment Action Campaign* upheld TAC's challenge to government's policy limiting provision of the anti-retroviral drug Nevirapine for purpose of preventing mother to child transmission of HIV (PMTCT) to a handful of "pilot sites." Outside those sites, government had been refusing to allow public health service doctors to provide the life-saving drug, even though it had been made available for free and had been found by South Africa's Medicines Control Council to be safe and effective, and even though a large portion of the clinics and hospitals in the public health system had the capacity to provide HIV testing and counseling. This refusal, the Court held, violated the affected mothers' and babies' constitutional social right to basic health care. The Court ordered government to remove the restrictions on Nevirapine and to implement a comprehensive, nation-wide program for PMTCT.

The narrow demand in court, focused on Nevirapine for PMTCT, contrasted with the broader demand for ARV treatment roll-out for all HIV/AIDS sufferers, which TAC pressed with equal vigor in public political arenas and petitions, proposals and reports to government. The Nevirapine for PMTCT claim was one that enabled the courts to find a constitutional SER violation and order a remedy, without “intruding” on complex policy judgments about resource allocation, basic treatment options, or the public health system’s readiness for broader programmatic initiatives. Nevirapine was in use for PMTCT throughout the private sector and at pilot sites; it was available to government at no cost, and the heart of TAC’s claim rested on the unreasonableness of government’s prohibiting doctors throughout the public health system (save in the pilot sites) from prescribing, in the Constitutional Court’s words, a “potentially life-saving” “single dose of nevirapine at the time of the birth of the child,” when the drug is freely “on offer” from its manufacturer and hundreds of clinics and facilities already had the capacity to administer HIV testing and counseling to the expectant mother.

Beyond its core claim that this refusal on government’s part violated government’s obligation to realize the social right to basic health care within its available resources, TAC also demanded a court order that government implement a comprehensive PMTCT program throughout SA, including Nevirapene and also voluntary testing and counseling and formula milk (to prevent HIV transmission through breast-feeding). All aspects of TAC’s case were upheld in the High Court in Pretoria. The High Court’s decision was terse in its reasoning. With almost no discussion of SER doctrine, the decision is chiefly given over to distilling the many affidavits on both sides, but revealingly, the High Court took advantage of the way TAC had crafted its claim to

characterize the constitutional violation at hand in terms of a “negative” right: “I am of the view that the policy [of]... prohibiting the use of Nevirapine outside the pilot sites in the public health sector is a breach of [government’s] negative obligation (see **Grootboom’s** case *supra* at para 34) to desist from impairing the right to health care.”

Courts and jurists shaped by classical liberal legal traditions are more comfortable with the judicial role of vindicating “negative” rights and liberties, over against “positive” ones. SER are seen as quintessentially “positive” rights, imposing “affirmative” duties on government, and ill-suited, for a host of familiar reasons, to judicial elaboration and enforcement. Thus, the crafting of the case – drug on offer without cost, relevant public facilities equipped to administer the single-dose-regimen, the system’s physicians keen to prescribe it, but thwarted by the state from doing so - enabled the High Court to recognize and enforce the “positive” right to basic health care, while casting the core claim for relief in “negative” terms: government must desist from wrongful, because “unreasonable,” restrictions on health care provision that would otherwise be “already there” – rather than in terms of government undertaking new affirmative obligations. Of course, this is partly word play, and not true of the aspect of the order that compelled a program, with timetables, across the country. But it is not only word play; and it rested on the spare way TAC crafted its core claim – and on the key victories TAC and its allies (in and out of government) already had won in other arenas.

For its part, the Constitutional Court (CC) on appeal also seized on the narrowness of TAC’s core claim. But the CC had much more to say about SER and the role of courts, government and civil society in their “progressive realization.” Combining caution and boldness, the CC offered a distinctive vision of judicial collaboration with civil society

organizations like TAC, on one hand, and government, on the other, in the realm of SER. The opinion offers a subtle account of the interplay of politico-constitutional SER claims and legal-constitutional interventions: the first a matter of organizations like TAC backing up claims of right with the exchange of views, information and expert opinion between state and civil society via petitions, proposals, reports, conferences, joint commissions, hearings and negotiations; the second a matter of the courts keeping the civil society/state exchanges and negotiations open and vital, and prodding and compelling the state when it falls short of its procedural or substantive constitutional duties and commitments. Because the main task of charting the meaning and realization of SER is one for civil society organizations, political parties, and government, the courts' main contribution must be to "guarantee that these democratic processes" through which deliberation, debate and contestation over the achievement of SER "must unfold" "are protected to ensure accountability, responsiveness and openness."

Above all, the CC in *Treatment Action Campaign* is at pains to reaffirm that the SER provisions of the SA Constitution were *legal* rights, not mere aspirations. The SER provisions, the CC declares, impose imperative obligations on the state to "act positively" to "provide access to housing, health-care, sufficient food and water and social security" to those in need; and "[t]hose in need have a corresponding right to demand that this be done." Thus, the CC holds out the judiciary as a space for the poor – and civil society associations representing them – to hold government to account and to condemn government inaction and failure in respect of fashioning adequate SER programs or translating general SER legislation, policies, and programmatic commitments into actions and institutions on the ground. Constitutional judgments are to be had as authoritative

condemnations of such failures. What's more, the CC holds out the SER provisions of the Constitution as obligations that "Courts can, and...must enforce." "Particularly in a country where so few have the means to enforce their rights through the courts, it is essential" that rights be "effectively vindicated." Constitutional remedies, including mandatory and structural interdicts, to enforce SER are not "breaches of the separation of powers" but essential tools, notwithstanding that such exertions of judicial power "affect policy as well as legislation." And no matter the disposition of government, courts should and would heed civil society's constitutional voices and grievances where government falls short.

These are bold and important affirmations, but the CC is equally at pains to stress their limitations – limitations which, for this CC, go to both the ways SER are defined and the ways they are enforced, and which emphatically put the main burden of change on SER advocacy outside the courts. Like the High Court, the CC highlights the narrowness of the core claim, noting it "may be" seen as no more than enforcing the "negative obligation" "to desist from preventing or impairing the right of access" to health care.

But the CC also addresses the general question of how SER should be defined and elaborated as constitutional law. The SA Constitution states that "everyone has" SER and alongside this provides that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." One way for a court to interpret these paired provisions would be this. These rights are not for courts to interpret and enforce, because only law- and policy-makers can sort out what government reasonably can do within its resources to realize

this costly and complicated family of rights at any given time. The drafters of the SA Constitution did not want that; and the SA CC has rejected it. SER are “justiciable.” This raises a dilemma. Shouldn’t the CC, as it decides cases, offer government and civil society at least a rough sketch of the minimum content and meaning of SER? After all, how know whether government is progressing toward SER without a sketch of where it is meant to be going? This argument was made by amici – not TAC – in the TAC case. The notion of a “minimum core” definition of SER is one the UN Committee on Economic, Social and Cultural Rights has embraced. The CC rejected this path. It insists on defining the SER in the SA Constitution as rights to have access to what the state reasonably can do, within its resources, at present – and no more.

Why so? First, I think the CC wants the constitutional law it pronounces on SER to be and to be seen as “real law,” binding on government and producing real results. (The heroic SER decisions and decrees of the Indian Supreme Court, Budlender suggests, serve as a cautionary counter-example – where the SA CC does not want to go.) So, it refuses to define the meaning or content of a SER like the right to health care in terms broader than it can actually order government to deliver on the record at hand. Second, I think, is a genuine constitutional-democratic – or anti-juristocratic – impulse, which seeks to evoke a very broad and radical conception of the full constitutional reach of the SER and substantive equality guarantees, while at the same time assigning as much as is “constitutionally possible” (see O’Regan dissent in *Volk*) of the tasks of demanding, charting and hammering out this radical, rich and evolving conception of those

guarantees to civil society and the public sphere, the Legislature and the Executive.<sup>1</sup> At the end of the day, a more fully justiciable set of SER and substantive equality guarantees would be a less “transformative” one, both in content and mode of rights claiming and realization. In service of this vision, however, the CC promises that “the courts will guarantee that the democratic processes” through which the achievement of SER and substantive equality must unfold “are protected to ensure accountability, responsiveness and openness.”

Still, on the CC’s account, there remains the “justiciable” right to SER “within available resources.” *TAC*, we’ve seen, crafted this case to remove the resources issue from the dispute. But what about the next case when needed drugs might be affordable by the public sector, but not freely on offer? The CC leaves that for another day. It reassures government that it understands that “the courts are not...equipped to make...wide-ranging...enquiries...for deciding how public revenues should most effectively be spent.” At the same time, the CC reassures civil society that the courts won’t shy from searching scrutiny of the “reasonableness” of the measures the state is taking to achieve SER in a given case, even if this “reasonableness” inquiry has “budgetary implications.”

Many left-leaning legal academic critics of the CC and the *TAC* decision complain that the “reasonableness review” which the CC adopts is a cop-out. I find this hard to fathom. These critics don’t know what deferential review looks like. This is a model of

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<sup>1</sup> This is manifest in many doctrinal areas (see, e.g., *Du Plessix* – on horizontal application of the Bill of Rights; *Walker – Sachs* on the juristocratic perils of “indirect discrimination”; *Volk* – handing off to Legislature the task of expanding protection for vulnerable women; etc, etc. ).

heightened, richly contextualized and wide-ranging judicial scrutiny<sup>2</sup>: the CC narrates TAC's efforts outside the courts to press government to fashion and implement a program for PMTCT; the CC highlights the government's own decisions (at TAC's and its allies' prodding) to adopt nevirapine, plus testing and counseling and other measures for PMTCT. Then, the CC walks through the reasons government offers for limiting nevirapine's availability to the pilot sites. It is stern and thorough and finds the reasons wanting. Its assessment of government's biomedical cost/benefit analysis is withering and plunges deeply into the substance of biomedical expert debate. Yes, even a single dose of nevirapine might induce "resistant strains of HIV," but "this mutation is likely to be transient." Besides, the weight of this possibility "is small in comparison with the potential benefit." "The prospects of the child surviving" absent the treatment "are so slim and the nature of the suffering so grave that the risk...is well worth running."

The first two years after the CC decision saw implementation of PMTCT programs, and, at the same time, renewed government denialism and rage against TAC and its allies. Mbeki and most of his cabinet-level officers wielded power to thwart, delay, and deflect efforts to deliberate, draw up, and mount a full ARVT roll-out in the public sector. TAC responded with high profile "town meetings" in every province, and at least some of them succeeded in drawing high-level provincial and a handful of dissident ANC leaders to align themselves publicly with TAC. Meanwhile, mass protests and civil

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<sup>2</sup> SA CC reasonableness review doctrine has been crafted in a way that calls for social historical, contextual and structural analysis much as U.S. left legal academics imagine in anti-caste counter-models of "substantive" equal protection. Thus, the CC doctrine calls for examining the social vulnerability of complainants, their position in social structures of advantage and disadvantage, the long- and short-term historical contexts of property or resource allocations afoot, the extent and severity of needs, disadvantage and deprivation in the instant case, in relation to the demands on public resources which addressing the deprivations entails. Much weight is given to the needs of the most deprived or disadvantaged.

disobedience also intensified, mock criminal trials of Mbeki and the Minister of Health were staged; and once more, TAC threatened to return to court. In all these arenas, the CC's decision in *Treatment Action Campaign* loomed large, repeatedly invoked by TAC, its allies and the media to lend credence to TAC's rights claims and threats of litigation.

It was looming litigation that finally prompted Mbeki's cabinet to relent. A new national HIV/AIDS planning and budgetary commission was constituted in 2005, this time with Mark Heywood, one of TAC's leaders (and the SA AIDS Law Project director), as its co-chair, and with several TAC allies from the public health field among its members. The plan they produced includes TAC-crafted Treatment Literacy programs in every clinic and other democratic-experimentalist features in its design. It provides for HIV/AIDS patient councils with authority to participate in the local organization and implementation of HIV/AIDS treatment and prevention programs, as well as civil society and patient organizations' representation on regional and national boards charged with ongoing monitoring and benchmark- and standard-setting. It mandates community "outreach" in respect of sexual violence and women's equality, as well as HIV/AIDS discrimination and also mandates reform of social assistance programs to better support HIV/AIDS patients, looks toward development of "basic income grants" (a leading demand of SER advocates in SA), and provides for a commission to draw up plans to bring greater equity of resources between the private and public health and health insurance systems.

A reasonably well-funded, full-scale roll-out of ART in the public health sector has begun. Conversations with Heywood suggest that TAC has begun directing its strategic energies toward creating a dozen "pilot site" clinics and community centers in diverse

urban and rural areas to model the possibilities of actualizing the various visionary elements of the national plan. As was the case with the Nevirapine pilot sites, showing that it can be done “within available resources” in these diverse settings may, once more, supply a basis for demanding comprehensive action, and, if need be, going to court again.

## CONCLUSION

We seem to be in the grip of a contradiction here: between my account of the Treatment Action Campaign’s political and legal strategies, and my earlier remarks on the characteristic views of 21st-century human rights/social-economic rights advocates as a mirroring of much of 21st-century neoliberalism. TAC’s strategy seems inconsistent with my sketch of a staunchly anti-state, anti-political-parties-and-unions, decentralized, civil-society-based rights-claiming strategy. Instead, TAC has seemed a social movement and NGO which also has cast itself as an opposition party in the public political sphere; its strategy has been directed at state policy, enlisting and collaborating with allies in the state and party apparatus (and equally with COSATU, the national trade union federation). All this seems to clash with what I said was the standard *modus operandi* of SER/human rights activists and organizations. All they seem to have in common is a commitment to rights and a high regard for courts.

And that’s right. TAC is not a standard human rights organization. If you were to have asked the heads of the major international HIV/AIDS human rights foundations about TAC at any time between 1998 and 2005, I suspect they would have told you that TAC was “altogether too political,” “too involved in politics,” too “controversial,” too riveted on confronting and changing government policy. It would achieve more if it

focused on scaling up its grassroots clinical programs with foundation money and leaving government out of it. They'd tell you that even TAC's grassroots programs, like its Treatment Literacy Campaign, were too bent on political mobilization. "Best practices," they'd say, in neoliberal social policy lingo, focus more narrowly on "responsibilizing" HIV/AIDS patients and changing local community attitudes without getting embroiled in larger political struggles. There are, you'd find, a great many "non-political" scripts and handbooks, unlike TAC's, for "empowering" HIV/AIDS patients.

Zackie Achmat and Geoff Budlender would agree TAC is out of sync with much of the human rights establishment with its kind face of neo-liberalism and its dual emphases on the local and the global, with its regard for the courts as the sole state institution worth cultivating. For all its deft action on the international plane, TAC is chiefly about a politics of rights aimed at the South African state and polity, about empowering the stigmatized and disease-ridden and enabling them to gain medical treatment and new social and political identities as rights bearers with claims on all levels of government, about making common cause with the churches and trade unions who are losing thousands of constituents each month to the pandemic, about mobilizing from below but also building networks of allies in the public health services and the party and state elites. TAC consistently links HIV/AIDS treatment to broader rights claims, from women's rights to claims for universal social assistance (which the Constitution also vouchsafes). It is a model of rights claiming, however, that refrains from taking any of these demands to court until government has formally acknowledged and embraced them as national policy and usually has made some halting steps toward their realization. It is a mode of rights claiming that depends on a measure of genuine democratic constitutional

machinery and substantive constitutional commitments, as well as a measure of national wealth, that are beyond reach for social and economic rights advocates in many parts of the globe. It is also a politics that fits well with the legal outlook and identity of the South African Constitutional Court, which has staked its claim to transformative law in the domain of SER on helping make such a politics deliver the goods.

In the process, I've suggested, and for the time being, this model of civil society/judicial collaboration on the plane of constitutional SER has served as a kind of constitutional brake on SA's drift toward a "one-party [ANC] state." TAC has become the ANC's most vexatious, astute and highly visible "loyal [but militant] opposition." More broadly (and speculatively), the courts and the public sphere of social rights advocacy seem to have become the institutional and constitutional space for accountability via opposition politics and participatory and deliberative policy-making. They are no substitute for robust democratic processes in state and party, but, for now, they have managed to keep that constitutional ideal alive by bringing to earth something of its actuality: Executive accountability, participatory- and deliberative-democratic policy-making and administration, and institutionalized vindication of social rights – in an iterative cycle which may enable successively broader social rights claims and broader forms of institutionalization.

SA's predominantly poor, black, female citizenry with HIV/AIDS dwells at the intersection of many kinds of disadvantage and exclusion. This makes the constitutional chronicle of TAC at once more remarkable – and distinct from the constitutional plight of the larger "half of the nation" whose access to SER remains largely unrealized. One can't imagine the same rights claiming strategy expanded all at once to build that bridge.

But one can hope that campaigns like TAC may help instigate other and broader institutional transformations.

We've seen how history and memory have shaped present conflicts and how the new SA Constitution acts as a bridge between contending pasts and competing futures. The HIV/AIDS pandemic grew so terribly vast in South Africa by running through the grim circuits of migrant labor and sexual exchange among dispossessed subjects formed by Apartheid rule. The disease thrived in the climate of popular and elite denial and neglect during the last years of Apartheid and the first decade of black majority rule. Denialism itself, we've seen, flowed out of bitter, wounded memories of apartheid and Afrikaner and British colonial racism—and out of a lunatic brand of “economic realism.”

The original commitments Mbeki and the ruling wing of the ANC meant to honor were the neo-liberal ones: creating a black African government equal to the challenges of the global economy and continental leadership. For them, these neoliberal commitments were not inconsistent but of a piece with a fierce Africanist pride, committed to redeeming the injustices and inequalities of the Apartheid past by building a modern, liberal social democracy. For Zackie Achmat and TAC, the Mbeki regime betrayed the nation's founding commitments to social justice and equality. Fortunately, the revolutionary past was still present in the memories of the poor and excluded, memories of not only the meaning of the popular struggle but also the organizations that led it, organizations like COSATU and the left wing of the ANC, along with the cultural memory of making rights claims via marches, music, protest, and disruption.

Finally, there is the constitutional past, present, and future as the Constitutional Court understands it, a Court composed in significant part of revolutionary heroes and heroines husbanding their great moral authority as they take up the roles of guardian and midwife of the “transformative” Constitution. They have aligned themselves with TAC and the “responsible Left” much as the U.S. Supreme Court once aligned itself with the Civil Rights Movement. What the pair will make of the hands history has dealt them is something history can’t decide.