

https://dspace.org/

Citizenship, xenophobic violence and law's dark side

Klaaren, Jonathan

2010-02-08
http://hdl.handle.net/10539/10431

Downloaded from a DSpace repository. https://dspace.org/

J Klaaren 'Citizenship, Xenophobic Violence, and Law's Dark Side'

8 February 2010. This paper is intended for publication in L Landau (ed) *Exorcising The Demon Within: Xenophobia, Violence, and Statecraft in Contemporary South Africa* (Wits University Press, 2010) (forthcoming)[1]

Introduction and Method

What was law's place in the South African xenophobic violence of May 2008? I wish first to distinguish three interpretations of this question as I will address in this chapter some aspects of only one of them. One place of law in the xenophobic violence might be as one often thinks of law, as an after-the-fact accountability mechanism. Put simply, South African law should (among other functions) hold accountable those responsible for the rapes, killings, and other acts of violence perpetrated in May 2008. It should prosecute the offenders and, where appropriate, provide compensation to the victims. It unfortunately seems relatively clear that too little of this work of the law was actually done or is being done. For instance, according to a report in the press on 11 May 2009, a year after the violence, not a single conviction for murder or rape had been secured.[2] Of the 68 cases initially placed on the court roll, 35 have been withdrawn, 11 found not-guilty, and only six resulted in guilty findings. Four cases were sent back for further investigation and six were still running as of that date. Statistics provided by the National Prosecuting Authority later in the year have indicated a single conviction for murder.[3]

Another place of law might be as a direct facilitator of the state's response to the violence – through law's governance role in structuring the official response to the

[1] This paper has benefitted from consideration at several workshops organized by Forced Migration Studies Programme as well as by presentation at the Annual Meeting of the Law & Society Assocation, Denver, May 2009. Thanks for helpful and constructive comments on earlier versions go in particular to Natasha Erlank, Loren Landau, Sindiso Mnisi, and Tamlyn Monson. The funding of the Faculty Research Committee of the Faculty of Commerce, Law, and Management of the University of the Witwatersrand, Johannesburg is gratefully acknowledged.

[2] Beauregard Tromp and Alex Eliseev 'Bloody Injustice' The Star, 11 May 2009.

[3] NPA 'X Convictions' July 2009 (conviction secured in Duncan Village in the Eastern Cape for murder and robbery and resulted in a sentence of 15 years).

manifest crisis. In this place of law, one can focus on law's role in, for instance, empowering the declaration of a state of national or provincial disaster and the consequent release of state resources to cope with such a crisis. To a very limited extent, law did indeed play such a role. The "xenophobic attacks on foreign nationals" in the provinces of Gauteng and the Western Cape were classified as provincial states of disaster.[4] Provincial disasters were declared by the premiers of the provinces of Gauteng and the Western Cape.[5] These classifications and declarations indicated a judgment that the severity of the events was something intermediate between a local and a national disaster.[6] Nonetheless, apart from pronouncements, the state response has been evaluated as inadequate.[7]

In any case, this chapter will focus neither on the place of law as an accountability mechanism nor on its place as a facilitator of the state response to the crisis. Rather, this chapter asks questions about the place of law in the actual violence itself. So again, what was law's place in the xenophobic violence? The lens through which I will explore this

Comment [W1]: Hi Loren. You could easily put elipses in for (iii) or more of this legalistic definition as you judge fit.

[4] Classification of a Disaster: Western Cape Province by Lance Williams, National Disaster Management Centre, Department of Provincial and Local Government, Notice 640 in Government Gazette No. 31130 (13 June 2008); Classification of a Disaster: Gauteng Province by Lance Williams, National Disaster Management Centre, Department of Provincial and Local Government, Notice 641 in Government Gazette No. 31130 (13 June 2008).

[5] Declaration of Provincial State of Disaster In Terms of the Disaster Management Act, 2002 (Act No. 57 of 2002) by MS Shilowa, Premier of the Province of Gauteng, Notice 1 in Provincial Gazette Extraordinary No. 149 (5 June 2008); Extension of Declaration of Provincial State of Disaster In Terms of the Disaster Management Act, 2002 (Act No. 57 of 2002) by MS Shilowa, Premier of the Province of Gauteng, Notice 2 in Provincial Gazette Extraordinary No. 243 (5 September 2008) (extending the declaration for one month).

[6] The response of the South African state to a disaster or a situation like a disaster is at least partially governed by the Disaster Management Act 57 of 2002. This Act presumes a disaster to be a local disaster until other actions or evaluations are made. In terms of section 23 of the Act, a disaster that affects more than one local municipality may be considered for classification as a provincial disaster. Subsection 23(5) provides that a disaster may be classified as a provincial disaster if: *(a)* it affects- (i) more than one metropolitan or district municipality in the same province: (ii) a single metropolitan or district municipality in the province and that metropolitan municipality, or that district municipality with the assistance of the local municipalities within its area is unable to deal with it effectively; or (iii) a cross-boundary municipality in respect of which only one province exercises executive authority as envisaged by section 90(3)(a) of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998); and *(b)* the province concerned is able to deal with it effectively. The classification of disasters is a function allocated by section 23 of the Act to the National Disaster Management Centre. The declaration of a provincial disaster is done at provincial level in terms of section 41. The effect of a provincial declaration is to give authority at provincial level to release emergency funding for responding to the disaster.

[7] Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008, January 2009, Forced Migration Studies Programme, University of the Witwatersrand, Johannesburg (available at www.migration.org.za) (authored by Igglsden, Monson, and Polzer).

question is that of citizenship. Despite the relatively recent nature of the xenophobic violence, the primary method that I adopt is a historical and institutional one. The contest over the legitimate mobility of persons, particularly over the persons of the Asian population from the 1890s to the 1930s, was a significant if not the primary factor in constructing South African citizenship.[8] Both the interests of economic actors in restricting the mobility of labor and the interest of political elites in establishing and safeguarding their status and identity within their communities motivated and influenced the regulation of mobility and thereby the South African concept of citizenship. In this formative and significantly bureaucratic process, the legal, colonial, and demographic position of the Asian population proved particularly crucial to the development of South African citizenship. Based on this identification of the shape and character of the legal cultural concept of South African citizenship as of the end point of my empirical research project 1937, this chapter addresses and reflects upon law's place in the xenophobic violence. The effects of the historical origins of South African citizenship in the regulation of mobility of populations persist to the present day.[9]

The lesson to be drawn from the above historical account of the creation of the South African community can be an optimistic and positive one. Regulation of the mobility of three populations (Asian, African and European) between 1897 and 1937 produced a legal cultural concept of citizenship based on official residence that was inclusive even if it was at the same time structurally unequal.[10] Such a history arguably implicitly focuses on the positive aspect of state contact. While a migration status may have been (and often was) a tool or marker of oppression, it was often at the same time a marker of status. Even to be a non-Union native or an 'Asiatic' (terms that today would be taboo) – was to confer certain rights of residence and legality in terms of official

---

[8] J Klaaren ''Migrating to Citizenship: Mobility, Law, and Nationality in South Africa, 1897-1937', PhD dissertation, Department of Sociology, Yale University, 2004.

[9] J Klaaren 'Contested Citizenship in South Africa' in P Andrews and S Ellmann (eds) The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law (2001) 304-325 (overview of the post-apartheid contested debate over citizenship).

[10] In contemporary South Africa, official residence seems to capture better than lawful residence the notion that some persons have official residence status – with documentation and relative bureaucratic security – despite quite possibly having obtained that status through a process that most would regard as unlawful, such as through fraud or corruption. I am grateful to Yoon Park for raising this point. For a broader discussion of this question, see K Sadiq *Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries* (Oxford, 2009).

policy and were labels positively desired and actively sought by many within those populations.

Furthermore, attention to the Asian population in South Africa identified the legal status of that population as particularly significant in the production of South African citizenship. Indeed, the struggles of Gandhi and other members of Indian political elite in the first decade of the twentieth century over their place and their community's place in South Africa were at least as much about the politics of physical mobility as about labor and economic mobility. In addition to defending their economic interests against the European elites in the Transvaal and elsewhere in the territories that would join to make South Africa, resident Indians were fighting to become and to be recognized by others as part of the South African political community. These Asian-European struggles significantly constructed a common understanding of the existence of a South African political community. Especially in a study of the formation of citizenship, the identity and understanding of the political community cannot be assumed but must be explained.[11] I will return to this theme of the leading role of the Asian community in the final section of this paper, suggesting that it may be the refugee community (broadly understood) that plays a similar role in the contemporary development of South African citizenship. This angle on the history of South African citizenship may fruitfully be cast as the creation of bureaucratically defined populations as understood by Dean and Foucault, employing the notion of statecraft and the specific concepts of territory, population, and discipline?[12]

---

[11] Focusing on the interaction between political elites and their publics, Rogers Smith explains change in citizenship laws by exploring what he terms 'the politics of people-building'. Smith notes that citizenship assumes a collective political identity or a political peoplehood. To explain this political peoplehood, Smith proposes a theory of the politics of people-building that identifies stories that inspire both trust and worth. Smith argues that "enduring successful accounts of peoplehood inspire senses of trust and worth among the members of a people by weaving together economic [stories], political power [stories], and constitutive stories tailored to persuade a critical mass of constituents." R Smith 'Citizenship and the Politics of People-Building' 5 *Citizenship Studies* 73-96 (2001) 80.

[12] M Dean 'Foucault, Government, and the Enfolding of Authority' 209-230 in Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government, edited by A. Barry, T. Osborne, and N. Rose. Chicago: University of Chicago Press, 1996. The greatest point of affinity appears to be through the notion of population, rather than the concepts of territory or of discipline. Territory is a cultural product of the regulation of the mobility of populations. Despite rightful attention recently paid to its natural/social aspects, it is in the end derivative rather than given. Discipline – even in its threefold forms of material, coercive, and normative/identitive discipline – does not appear to sufficiently or best capture the processes and politics of the institution of citizenship as applied to a population. These points notwithstanding, there may well be linkages to explore between the legal cultural concept of official residence and contemporary

The next section examines the dark side of South African citizenship and argues that the xenophobic violence is consistent with and draws upon the official residence character of South African citizenship.[13] The official residence script remains dominant as opposed to other arguably ascendant but not yet dominant concepts such as republican or nativist citizenship. Disturbingly, such consistency thus reveals what might be termed the dark side of citizenship in South Africa, even without recourse to the influence of nativist discourse. Reflecting on this, I note that the heroic proposition that opposition to apartheid kept alive the flame of the rule of law meets its inversion in the xenophobic violence where South Africa's relatively strong legal culture arguably fanned the xenophobic flames. The final section of the chapter turns to the politics of contemporary South African citizenship. Noting several different views of how such politics are structured, it argues that the current contestation over the place of migrants in South African society (of which the xenophobic violence is but an extreme manifestation) is a primary generative site of South African citizenship. Furthermore, given the still dominant official residence script of South African citizenship, these politics may be generating a form of denizenship citizenship which would paradoxically provide space for migrants – despite at least some of their expressed desires to stay and quickly move on – in our cities as well as in the South African community.

Part One: The Dark Side of South African Citizenship[14]

In the standard accounts of this violence available thus far, sixty-two persons lost their lives as violence flared first in Gauteng and then later in KwaZulu-natal and the Western Cape as well.[15] The civil society/humanitarian response was an initially

---

disciplines of territorial governmentality. One difference between this chapter and other contributions in this volume is the relatively greater explanatory emphasis placed here on official residence rather than on status as native born or as such status may also be termed 'the naturalization of difference based on spatial/national origins'.

[13] Both elements (the linkage to violence and the official residence character of citizenship) of this proposition are hotly contested by a number of South African citizens. In the view of one commentator on this chapter, "empirical research would indicate that the lawfulness of residence doesn't matter to people, it is their place of nativity that is important."

[14] The discussion here is taken from J Klaaren 'Viewed from the Past, the Future of South African Citizenship' FMSP Working Paper Number __ (12 May 2009, available at www.migration.org.za).

[15] See above, note ___.

heartening one though, at least in Gauteng, it proved unsustainable. Apart from the provincial declarations and bureaucratic classifications noted above, the official state responses to the violence may best be understood as sporadic and half-hearted.[16] In any event, apart from the immediate and institutional responses, South African and other global citizens were forced by the events to ponder questions such as why the violence emerged. As further explored in the introduction to this volume, most explanations highlighted factors including border anxieties and job fears, the persistent effects of apartheid, the lack of service and delivery and poverty. One explanation was largely dismissive – calling the violence the result of criminal elements and based upon nothing structural or systemic. The most empirically-informed explanation yet presented is based on research conducted at FMSP.[17] This research does not dismiss systemic causes or the existence of structural xenophobia but depicts the episode as essentially the result of specific gaps of leadership at local level – violence as the uncontained product of gangsters in various local communities and structures. Violence was prevented where democratic, state-linked leadership was strong. Doubtless more explanations and evidence will emerge as scholars are currently and urgently engaged in these debates. These debates will not be settled easily.

A significant enabling factor in at the least the last of these explanations (the one based on the FMSP research) may well be an element of legal culture that many (particularly in national elites) would wish were not in fact part of the national environment. Put simply it is the following proposition: xenophobia may well be the dark side of South African citizenship. The inverse but intimate relationship of xenophobia and citizenship might be argued to be a feature of legal culture generally.[18] Be that as it may, the connection between the two can be argued to be particularly strong

---

[16] Forced Migration Studies Programme, 'Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following the Attaacks on Foreign Nationals in May 2008' (January 2009, available from www.migration.org.za) (authored by Igglsden, Monson, & Polzer); T Monson and J Misago 'Why History Has Repeated Itself: The Security Risks of Structural Xenophobia' *SA Crime Quarterly* (September 2009) 25-34 (exploring the failures of the state response to the xenophobic violence of May 2008 and proposing recommendations for the future management of the risk of xenophobic violence).

[17] International Organisation for Migration, 'Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa' (February 2009, available from www.iom.org.za) (research conducted by FMSP) (authored by Misago, Landau & Monson).

[18] See e.g. Robert Cover 'Violence and the Word' 95 Yale Law Journal 1601 (1986) and Austin Sarat and Thomas R Kearns 'A Journey Through Forgetting: Towards a Jurisprudence of Violence' 209-273 in Austin Sarat and Thomas Kearns (eds) The Fate of Law (University of Michigan Press, 1991).

in the South African case. This is so based upon two attributes of South African citizenship are foundational to the South African concept: official status/lawfulness and residence. While it is currently undergoing a process of contestation, at present the cultural conception of citizenship in South Africa is characterized by a concept of official residence. Belonging to the South African national community is not underpinned by a notion of republican citizenship or by a kind of cultural citizenship (of which nativism might be a version) or by a notion of cosmopolitan citizenship.[19] The two defining attributes of this official residence form of citizenship are those of residence/stakeholding and of official status/lawfulness. At least for purposes of argument, the remainder of this section assumes that the reigning notion of citizenship is indeed best characterized in this way.

What we can now examine is the degree to which each of these defining factors enables xenophobia. First, xenophobia may itself be heightened to the extent that the character of citizenship is itself dependent primarily upon official status or lawfulness. The emotion behind the charge of 'go home or die here' is the righteous cry rather than the shout of hatred. The very same feeling that articulates 'I belong here and I have rights that I may demand' may also articulate 'I belong here and thus I have the right to oust you'. This understanding is reflected empirically in the Alexandra example discussed by Tamlyn Monson in her chapter in this collection.[20] In Alexandra, the violence was seen as a supplement to the state's authority rather than as a form of opposition or as an exception to the state's authority as were the cases in the other two empirical examples she presents. In Alexandra, the residents mobilized to attempt to oust undocumented foreigners, essentially bolstering and supplementing the immigration

[19] J Klaaren 'Post-Apartheid Citizenship in South Africa' in A Aleinikoff (ed) From Migrants to Citizens: Membership in a Changing World (Brookings Institution Press, 2000) 221-252 (identifying four concepts of citizenship: republican, cosmopolitan, cultural, and lawful).

[20] T Monson 'Chapter 3: Making the Law, Breaking the Law and Taking the Law into Our Own Hands: Xenophobia and Sovereignty in South Africa'. Monson discusses the Sector II, Alexandra example at pp. 11-14. Monson's chapter describes bottom-up (local) regimes of territorial control that interact with, blur or subvert, and yet also to some extent reinscribe a statist (republican) citizenship regime. Her research identifies three regimes each associated with the experience of particular local communities during the xenophobic attacks. Besides the Sector II, Alexandra description, the other two community experiences appear to turn on notions of criminality, in either of two directions. Monson suggests that the process of interaction and reinscription may be viewed as 'nested scales' – the discourse produced around this reterritorialisation [of South African territory] suggests a series of nested scales: not only the impoverished settlement, but also the city and the national territory.' P. 21.

policy of the national state. This relatively limited form of righteous violence is the weak form of the strong form of xenophobic violence that took the forms of murder and rape. Thus, while recognizing the diversity of local responses and situations, the Alexandra situation of ultimate alignment with the national migration regime may be viewed as the archetype of the May 2008 xenophobic violence.[21]

Still, we must add into this discussion of the enabling of xenophobia through official status or lawfulness the paradoxical additional power given by the negotiation of the official and the lawful. In particular, we should not lose sight of the degree to which the very illegality of the official or other action was itself powerful. Indeed, it can be argued that South African migration policing is a practice where the state paradoxically exploits and promotes illegality.[22] If so, in the same way in which the state policy uses illegality to achieve its purposes, so did and can communities. In this sense, breaking the law may also be a form (a powerful form) of taking the law into one's own hands.

Second, xenophobia may also be heightened by the character of South African citizenship through its other constitutive element – residence. Residence is of course at root a place of belonging. Such a sense of belonging – rooted within the popular and legal culture of South Africa -- may firmly ground the exclusive logic of xenophobia and fuel its related violence. As noted above, the most persuasive explanation offered thus far for the 2008 violence uses a local frame for its explanation – a lack of local leadership. The concept of residence within South African culture is, of course, not necessarily a one for one match with local belonging. In addition to mediation through law, notions of residence may be mediated through significant national interpretations of belonging. In any case, whether inflected through national institutions or not, a residential character to citizenship is at least consistent with a feeling and sense of local belonging and entitlement.[23] To that extent, the residential attribute to South African

---

[21] While violence is a key concept for both my and Monson's accounts, the scale of violence differs. My view of law's violence focuses on the interaction between the individual and the national culture – mediated by bureaucracy – and the enabling role that such an interaction can have on inter-personal violence. Monson examines the xenophobic attacks as phenomena with blurring effects into the state-sanctioned social order as well as state jurisdiction akin to violent protests, violent strikes, taxi-related violence and broader forms of vigilantism in South African communities. P. 2.

[22] See J Klaaren & J Ramji 'Inside Illegality: Migration Policing in South Africa after Apartheid' 48 Africa Today 35-47 (2001) (detailing illegal but accepted practices of migration policing).

[23] See L Landau 'Transplants and Transients: Idioms of Belonging and Dislocation in Inner-City Johannesburg' (2006) 49 *African Studies Review* 125-145.

citizenship appears to have underpinned the fundamentally local forms of violence seen in May 2008.

The character of residence in contemporary South African understanding of citizenship might be illustrated through attention to struggles over residence in apartheid times. As noted by Richard Abel, campaigns to win residence rights for urban blacks were crucial to the struggle against apartheid in the 1980s.[24] One aspect of these campaigns seen in the *Komani* case was the fight for the possibility of a wife and a husband to live together.[25] This is part of residence. One of the grounds of the litigation was that of suitable accommodation – such being made a precondition for permission to reside. This is part of residence. In the *Komani* test case, Veli Willie Komani was a lawful resident and Nonceba Mercy Meriba Komani was an unlawful resident. In this litigation, the lawyers for the Komanis argued that making the rights of persons exempted from the permit system as "natives born and permanently residing" in the area could not be dependent on the discretion of administrators. Another test case discussed by Abel concerned the degree to which one could go on annual leave – leaving a place but returning regularly to that place. Again, this is part of the concept of residence.

While this argument for the salience of the residential understandings in the violence remains to be conclusively demonstrated, there is perhaps some corroboration in the features of the politics of the responses to the xenophobic violence. These politics were essentially provincial politics. And that meant provincial-local politics. The politics of citizenship in response to the xenophobic violence did not, by and large, occur at national level but were rather provincial and local phenomena. As explored elsewhere in this collection, the Western Cape had a relatively good response to the violence and the Gauteng Province did not. In both cases, the ferment was at the provincial level – once which may be elided with the local one for analytical purposes here. Indeed, this elision was made manifest in the Gauteng by the leading role played in the coordination of the GPG response by the MEC for Local Government, Qedani Mahlangu, and officials of her department.

---

[24] 'Carving Loopholes in the Pass Laws' 23-65 in R Abel, *Politics By Other Means: Law in the Struggle Against Apartheid, 1980-1994* (Routledge, 1995).

[25] 1980 (4) SA 448 Komani NO v Bantu Affairs Administration Board, Peninsula Area. For a depiction of the litigants and the lawyers involved in this test case, see http://www.beatit.co.za/archive-documentaries/law-and-freedom-part-1-who-was-mrs-komani (accessed 19 January 2010).

The residential axis of citizenship mobilized in the xenophobic violence of May 2008 may also help to explain why a full one-third of the victims were those of South African nationality. Some of those were perhaps mistaken victims but more than those were mobilized against on the basis of their particular identity – their residential status. In this reading, such non-South African victims were mobilized against for having a non-local identity. They were not local – it did not matter if they held South African nationality or not. While close to ethnic mobilization – for instance mobilization on the basis of an anti-Pedi or Shangaan sentiment per se – what is argued for here is of course conceptually distinct.

Of course, these conceptual linkages I have sketched are not manifestly evident and are themselves contested. As such they must remain speculative. But they are consistent with lawful residence character of South African citizenship. Deployed in certain localities – and unrestrained by a sense of civility or shared security or destiny such as may also inhere within notions of citizenship – citizenship as a script of lawful residence had and has its dark and violent side.

It is of course a perversion of the ideals of the South African constitution for crowd members to take matters into their own hands and to hound and maim and kill foreign nationals as well as South African nationals.[26] But it is a commonplace to observe that the Constitution is not fully implemented and this would extend to its formal rights of safety and security as well. Indeed, it may be important not to overplay the xenophobic violence. In the violent society with the number of daily murders as well as deaths due to road traffic accidents as well as in the course of the AIDS epidemic, the sixty-two deaths are more part and parcel of everyday South African life than the noteworthy exception. What was the exception, as pointed out by Julia Hornberger, was the sort of cosmopolitan and inclusive ordering that the victims demanded and the police

[26] For a depiction of the ideal of moving beyond nationality arguably contained within the South African Constitution, see C Albertyn 'Beyond Citizenship: Human Rights and Democracy' in S Hassim, T Kupe, and E Worby (eds) *Go Home or Die Here: Violence, Xenophobia, and the Reinvention of Difference in South Africa* (2008) 175-187. In any case and perhaps more importantly from a historical perspective, the dark and the violent side to South African citizenship has surely been on show before. Apartheid was a pretty good example. The articulated cry of 'foreigners in the land of our birth' during forced removals of grand apartheid was also a manifestation of the dark side of citizenship. For those persons were indeed South African citizens – and never lost that status despite the attempts to take that away. In this sense, one can see apartheid as precisely the struggle over that status of citizenship.

actually surprisingly to some provided when the displaced persons moved to the police stations and demanded refuge.[27] That was the exception – the rule was the more ordinary and the now-revealed in all its ugliness two-sided nature of lawful residence citizenship.[28]

To this point, I have argued that South African citizenship has demonstrated its dark side and that it was plausible enabler if not instigator of the violence. In this respect, what this volume addresses as the demonic was lawful – at least according to that dark code. But what of the usual narrative of law, of its heroic role in particular in the struggle against apartheid? In concluding, this section addresses that question against the background of recent discussions of the place of law in the politics of apartheid. The flip side of the two distinct propositions that law provided a site of struggle against apartheid in South Africa and that law was kept alive through that struggle is that post-apartheid law may also facilitate violence against those seen not to be lawful or official rights-bearers.

Once we put aside a view of law as a system of domination that was in service of apartheid, we can say that there were two broad views of the role of law in anti-apartheid work, understood here as ideal types. The first is the liberal one. One of its foremost and thoughtful proponents during that time was a then-youthful Edwin Cameron, who has recently been appointed as a Justice of the Constitutional Court.[29] Cameron recognized in eloquent language the depravity of the apartheid system and its injustices. He recognized as well their systemic nature and the need for legal revolution rather than reform. Yet, in his view, the institutions of the rule of law should be the last ones jettisoned if such were necessary in the exigencies of the struggle. Rather, it was to be applauded that lawyers through opposition to apartheid evils had kept the ideal of the rule

---

[27] J Hornberger 'Policing Xenophobia – Xenophobic Policing: A Clash of Legitimacy' in S Hassim, T Kupe, and E Worby (eds) Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa (2008) 132-143. Focusing on policing, Hornberger argues in a similar vein to this chapter as follows: '[T]his triad of trust-discretion-community …. can potentially produce legitimacy for the state and the police on a local level but it might be exactly that which also produces – with the complicity of the police – brutal forms of local justice and vengeance.' At 143.

[28] As the *Kaunda* case shows, there may be other avenues to explore this dark side. In its deployment (at least by some) to protect the cause of mercenaries or even coup-plotters, citizenship shows one facet of its dark side, as protection offered to the 'dogs of war'. *Kaunda and Others v The President of the Republic of South Africa and Others* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

[29] For a recent symposium on Edwin Cameron's influence within the development of the South African legal system, see (2008) 24 South African Journal on Human Rights __. For one representative exposition of Cameron's views, see E Cameron 'Rights, Constitutionalism, and the Rule of Law' 114 *South African Law Journal* 504 (1997).

of law alive in South Africa – such was a gift to the post-apartheid nation. The contrasting view sees law as playing a role more within struggle. The title of the book by Richard Abel chronicling these struggles after the fact puts its well: *Politics by Other Means: Law in the Struggle Against Apartheid*.[30] In this view, law was a form of politics. In this perspective, to ask whether the rule of law was valid was a bit beside the point. Where legal victories were achieved, the rule of law appeared; where there were defeats, there was no rule of law or only a conservative formalistic version of the doctrine. These two views here are given as ideal types and put in exaggerated form, but the spectrum between the two is what is of interest.

Each of these two views may be associated with a particular proposition. For the first, the proposition is that law itself was kept alive through legal struggle against apartheid during that period. Post-apartheid law thus owes its legitimacy and vitality such legal struggles. For the second, the proposition is not that law was kept alive but rather than law functioned as a form of politics during apartheid and functions again as a form of politics in a post-apartheid setting, although that setting is one with fundamentally changed politics.

At least from the first viewpoint, there is perhaps a bit of a startle in the notion that the very rule of law that was carefully kept alive through the days of anti-apartheid struggle and which underpins inter alia the Constitution is now also to be thought of as a factor in abetting xenophobic violence. This comes about because the understanding of law's power depended upon by the heroic view of law against apartheid – the normative power of the law – is most often rhetorically employed against violence in official sites yet was also so powerfully deployed against particular individuals and victims in popular sites in May 2008. Perhaps one should not be so startled for of course, stories that tell of powerful heroes tell also of powerful villains.

Part Two: What is our contemporary politics of citizenship? Has our post-apartheid citizenship politics been changed by the post-xenophobic violence and if so, how?

[30] See *Politics By Other Means*, note ___.

The understanding presented in the previous section sees an essential continuity between the dominant concept of citizenship in South Africa and the phenomenon of the xenophobic attacks. This view differs from other understandings of the logic or scripts of citizenship and how they are currently structured and may be of assistance in explaining the recent xenophobic violence.

Before surveying some varieties of views on the scripts of citizenship in contemporary South Africa, it is important to note that such specific visions are set within larger visions of the current state of citizenship politics globally. Here, one may discern two poles. On one side, the school of citizenship studies argues the limited proposition that the policy significance of citizenship is increasing at the present time.[31] This argument stands in contrast to the claims, on the other side, of some versions of globalization detecting the emergence of a globalized post-national citizenship.[32] Seen in this light, the current and increasing focus in South Africa on citizenship is an example of a global trend rather than a post-apartheid reaction to denial of equal citizenship. In between these two poles lies the sort of citizenship politics that are at issue here. Our South African politics are clearly neither a manifestation of globalized post-national citizenship nor merely experiencing a minor tick in the policy relevance of citizenship.

So what are our contemporary politics of citizenship? One view (if perhaps immanent) is contained in some relatively recent writing of the path-breaking legal anthropologists, Jean and John Comaroff.[33] The Comaroffs are native to South Africa, but have a principal academic and residential base at the University of Chicago in North America. Their research has identified two parallel discourses in South Africa – a negative discourse regarding migrants and foreign nationals and an equally negative discourse regarding non-indigenous plants. The juxtaposition of the two allows for

---

[31] A Aleinikoff and D Klusmeyer (eds) *Citizenship Today* (2001); A Aleinikoff and D Klusmeyer *Citizenship Policies for an Age of Migration* (2002).

[32] See e.g. Y Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994); D Jacobsen, *Rights Across Borders: Immigration and the Decline of Citizenship* (1996). See also J Meyer 'The Changing Cultural Content of the Nation-State: A World Society Perspective' in G Steinmetz (ed) *State/Culture: State-Formation after the Cultural Turn* (1999) 123-143.

[33] J Comaroff & J Comaroff, 'Naturing the Nation: Aliens, Apocalypse and the Postcolonial State' 27 *Journal of Southern African Studies* 627-651 (2001). This view appears largely congruent with that of Peter Geschiere. See P Geschiere and F Nyamnjoh 'Capitalism and Autochthony: The Seesaw of Mobility and Belonging' 12 *Public Culture* 423-452 (2000) (detecting a continent-wide movement towards autochthony (indigenous belonging).

cutting-edge but perhaps somewhat precarious insights and theorizing around the discourse of the alien. In the Comaroffs' view, "aliens – both plants and people – come to embody core contradictions of boundedness and belonging. And alien-nature provides a language for voicing new forms of discrimination within a culture of 'post-racism' and civil rights". The implication of their analysis of the contours of these discourses is there is a substantial ferment towards indigenous belonging and nativist sentiment in South Africa. While the Comaroffs may have only implied such a powerful position for a contemporary nativist discourse, others make the case directly.[34]

In terms of accuracy of perception of South African politics, there is much of value in the Comaroffs' view. Today, we see a significant and arguably growing discourse of South Africans first. And that discourse does at times provide a vehicle for the articulation of racist and rights-denying sentiments. Nonetheless, at other times, for instance, in its articulation in Constitutional Court debates primarily in the writings of Ngcobo J, the ascendant discourse is by no means a racist one although it does represent a challenge to the reigning lawful residence conception of South African citizenship. In any event, the significance of this discourse remains open to assessment and should not in my view be overstated. While a nativist discourse is present in its popular and public debates, South Africa has not gone nativist. This is certainly the case assessing national practice at an institutional level. When one examines the judicial, executive, and legislative manifestations of South African citizenship in its primary political institutions, the South African conception of citizenship – of the meaning of the bounds of the national community – appears to remain largely where that concept and those bounds were in 1937, as inclusive of those with official residence status.[35]

In a more complex view of the politics of citizenship in contemporary South Africa, Loren Landau both critiques the Comaroffs' metaphor and presents a more substantial alternative view. Presenting the results of three years of research into the migrant communities in Johannesburg, Landau critiques the Comaroffs metaphor on two

[34] See e.g. Michael Neocosmos 'The Politics of Fear and the Fear of Politics' (5 June 2008) (identifying "a conception of citizenship founded exclusively on indigeneity") (available at http://www.abahlali.org/node/3616, accessed 19 January 2010).

[35] A potentially interesting line of enquiry would look at the place of official residence within the discourse of ANC party politics. To some extent, one might limit the empirical argument in this chapter to the institutionalized side of a distinction between institutionalized conceptions of citizenship and public/popular ones. I am grateful to Sindiso Mnisi for raising this point.

counts. One is that it implies the existence of an objective and definable native community shaped by its physical environment – which is not the case since few blacks have grown up in the city centre. Secondly, he argues that the new migrants are not transplants but are consciously transients – he identifies a counter-idiom of transience and superiority. Landau's view on the substantive politics of citizenship in South Africa stems from this observation and gives rise to a three-part analysis. In his contribution to the collection of essays in 'Go Home or Die Here', a three part vision of citizenship in contemporary South Africa is sketched. In this view, the middle class holds a cosmopolitan view (perhaps reawakened to its urgency by the attacks), the vast masses hold a deeply territorialized (but not yet ethnic national view), and the migrant communities themselves hold a rights-based but self-exclusionary view.[36] In Landau's scheme, '[f]or the mobs and those sympathetic to them, the Fanonian violence will go a step further [than an overt assertion of a territorially bound community], strengthening the principle that South Africa belongs to all who were *born* in it.'[37] As detailed in his earlier piece, the migrant discourse of transience and superiority is opposed to an exclusivist discourse of citizenship by black South Africans (identified primarily with the masses in this scheme). The opposition between the two is then generative of post-apartheid nation building – with the pointed (for white South Africans) implication being that where the nation is being built is on the side of black South Africans, in particular those who are newly exploring their access to the city of Johannesburg. Landau, however, also notes the urban phenomenon whereby both migrants and black South Africans are 'entering' South Africa's cities and negotiating their ways to ways of belonging there.

So where does all this take us? Agreeing largely with Landau, I would suggest that the current struggles of migrants for official status are at the centre of the generative politics of contemporary SA citizenship. The transience of migrants fits within an

---

[36] L Landau 'Violence, Condemnation and the Meaning of Living in South Africa' in S Hassim, T Kupe, and E Worby (eds) *Go Home or Die Here: Violence, Xenophobia, and the Reinvention of Difference in South Africa* (2008) 105-117.

[37] Ibid at 114 (emphasis in the original). There are a number of institutional locations where nativist politics – stressing the value of birth in the territory -- are not ascendant. One significant example is the continuing convention of the Department of Home Affairs to grant citizenship to children born to one permanent resident despite the contrary wording of the relevant statute. See 'Post-Apartheid Citizenship in South Africa' at 230, note __ above.

official residence paradigm – they need legal status while transient here. And migrants demand such status – at least in their interactions with the Department of Home Affairs even if not through collective political formations. Migrants by and large do not organize collectively but instead deal with the DHA on an individual level.[38] In this, they exert a pressure on citizenship that is distinct from that put onto citizenship from other quarters in contemporary South Africa. These other pressures appear to constitute a drive for citizenship in order to achieve and enjoy rights in a globalizing economy (derived largely from elites) and a drive for citizenship in order to enjoy the delivery of benefits and services and the enjoyment of opportunities to which members of the South African political community ought to enjoy (derived largely from non-elites). Consistent with their paradigmatic occupation of a space in a city, migrants are asserting a place within the South African population broadly understood, however transient and superior that desired place may be.

Put into the theoretical terms of a historical and institutional analysis, migrants indeed occupy a great deal of the bureaucratic site that generates current understandings of South African citizenship. Most scholarship in the nativist and exclusivist vein sees migrants serving as a convenient but external foil. Migrants are the other and are the subject of various mechanisms of othering. Instead, I would suggest that migrants are us. Migrants in contemporary South Africa and the opposition to their place are generating and re-generating our contemporary script of South African citizenship. This occurs in particular through the contestation and regulation of their status as lawful residents.[39] Both through the generative power of discourse (even and perhaps especially xenophobic discourse) and through the appropriation of the official residence concept, migrants are literally crossing the line daily into the South African political community. Despite their own desire to be in but not of South Africa, migrants are not just present in our cities; we are also present in theirs.

---

[38] See Aurelia and Tara's chapter.

[39] See R Smith, note ___, for an enquiry into the contribution made by the ascriptive logic of racism to the formation and re-formation of American citizenship which is parallel to the argument made in this chapter. Cf. Judith Hayem's observation that ' … being South African is now conceived on a differentiating basis: nationals *versus* foreingers.' J Hayem 'May 2008 as a revelator? National identity, human rights and the nature of politics' 2.

Conclusion

Three implications of the above line of thinking may be drawn in conclusion. First, we may need to recognize today's migrants as the new Asians. Or, one could say, Asians were the old migrants. Using a historical method, we might then usefully compare the xenophobic violence with several of the instances of collective violence levied against Asians in the South Africa's past.

Second, we may have to face the unavoidable implication is that xenophobic violence is normal within South African society. This means that further violence is likely to occur. It also means that even violence on the scale of the attacks of May 2008 is not likely to have been of such national significance to have changed in any significant way our politics. Instead, it may well be the case that today's xenophobic violence is reflective of interinstitutional contradictions and is built-in.[40] Indeed, echoing the view of at least one contemporaneous commentator, one election campaign after the attacks, we still have not seen any significant political capital being made of opposing migration.[41] For those liberal constitutionalists who wish to see in the South African constitution a theory of postnational citizenship – equal rights for equal persons equally everywhere – this recognition will be a disappointment. The operative logic of South African citizenship is considerably less clean than that. At the very least, it may oscillate towards the demonic.

Third, it may be that the demand for the recognition of transience pushes the official residence paradigm away from its focus on the permanent residence status and towards a greater embrace of a spectrum of residential categories. In this way, the South African polity may be pushed towards embracing full-blown denizenship as its logic of citizenship. This concept is usually defined as granting membership in a community on the basis of residence rather than nationality.[42] Denizenship is a contemporary concept

---

[40] See e.g. Roger Friedland and Robert R. Alford, 'Bringing Society Back In: Symbols, Practices, and Institutional Contradictions.' Pp. 232-266 in The New Institutionalism and Organisational Analysis, edited by W. W. Powell and P. J. DiMaggio. 1991, Chicago: University of Chicago Press.

[41] See D Glaser '(Dis)connections: Elite and Popular "Common Sense" on the Matter of "Foreigners"' in S Hassim, T Kupe, and E Worby (eds) Go Home or Die Here: Violence, Xenophobia, and the Reinvention of Difference in South Africa (2008) 53-63.

[42] Alex Aleinikoff is one of the American practitioners of constitutional legal scholarship that is taking the concept of denizenship seriously. Aleinikoff's recent work explicitly offers support for denizenship as part of a more textured understanding of citizenship. A Aleinikoff Semblances of Sovereignty: The Constitution, the State, and American Citizenship (2002) 147. Aleinikoff explores constitutional arguments

with global as well as local import, since it represents one of the directions in which citizenship may move (in part through increasing its attention to intergenerational equity in addition to the bare notion of lawful residence).

that loosen what he terms 'the Strict Congruency Thesis'. This thesis holds that the Constitution (in Aleinikoff's writing, the US Constitution) protects its nationals and only protects its nationals. In contrast, Aleinikoff explores ways in which the United States Constitution has and should protect a broader group of persons, the intergenerational project of those with enduring attachments and contact with America. For an identification of denizenship in contemporary African policy, see J Wood & C Shearing 'Nodal Governance, Denizenship and Communal Space: Challenging the Westphalian Ideal' in S Robins (ed) *Limits to Liberation: Culture, Citizenship and Governance After Apartheid* (2005).