

Xenophobia at the End of the Rainbow: Explaining anti-foreigner violence in the context of limits to the South African *Rechtsstaat* .

Populismus ist einfach, Demokratie ist komplex: das ist am Ende vielleicht das wichtigste Unterscheidungsmerkmal zwischen den beiden Formen des Bezuges auf das Volk. Man muss es noch genauer sagen, Populismus beruht auf dem bewussten Versuch der Vereinfachung von Problemen. Darin liegt sein Reiz und sein Erfolgsrezept.

Mit Komplexitaet leben zu lernen – das ist vielleicht die grösste Aufgabe demokratischer politischer Bildung.

Ralf Dahrendorf¹ 2007

*Can you catch Leviathan with a fishhook
Or tie his tongue down with a rope?*

Job 41:1² Good News Bible 1976 591

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ABSTRACT

In this essay, the xenophobic attacks on mostly foreign black migrants across South African townships in May 2008 is investigated, because these violent and criminal acts, in which 62 people died and 33000 made homeless, raise significant questions about the South African polity: the limits of the state, the political relationship between citizens and the state, the place of its ambitious Constitutional framework and the question around what constitutes South African identity.

The argument proposed is that challenges to the institutions and political decision making has created populist politics, in which simplistic solutions are relied on instead of broadening democracy and effectively addressing the social, economic

¹ Dahrendorf 2007

² Good News Bible 1976 p591

and political challenges, which are acute in the sprawling townships and among the shack-dwellers.

This is an exploratory text, relying on concepts drawn from Benedict Anderson, Social Rights legal scholarship, Steinberg's recently published ISS (Institute of Securities Studies) paper, Ralf Dahrendorf and aspects of Foucault's governmentality analysis to work toward laying the foundation for a larger research project in which the security governance and role of the state in managing urbanisation and its attendant problems can be analysed.

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Post-Apartheid South Africa should perhaps be considered as a Constitutional Fantasy on the Rainbow theme, but legal documents and constitutional conventions and courts are only the props for setting the human rights stage: the lived reality of the constitutional values is what, in fact, gives a state and its people confirmation of a *Rechtsstaat*, and collectively shared values embody an authentic democratic way of life.

On the 19th May 2008, South African newspaper readers were confronted with a shocking image of a burning man on the front pages of a number of editions.³ In a wave of violence across South Africa in May of 2008, immigrants from African countries, both legal and illegal, were targeted by their neighbours, and 62 people died and an estimated 33000 were displaced. The number of shacks destroyed is unknown. The Mozambican man burnt to death was named as Ernesto Alfabeto Nhamuave.

This targeted violence came as a shock against the background of a constitutional discourse which has become the formal norm in reflecting on the social and political reality of South Africa. This wave of intolerance, and aggression, seemingly coming from bigotry and hatred raises challenging questions of the nature of the new South African and the how realities of its urban conglomerations of shacks, deprivation and the challenge of very real poverty will play out in its national identity, challenging the democratic values enshrined in the Constitution.

Crime and violence in the deprived urban areas are often seen as inevitable, and the failure to police it, successfully to prosecute or to set in place effective crime prevention strategies all relate to the limits on the power of the state, and the consequences of flawed policies, or may be due to inadequate commitment on the part of the state official to take crime amongst the poor communities seriously.

Criminal actions and the use of violence are however not meaningless and random, and large scale targeted actions like the xenophobic attacks in May 2008, need to explained as

³ I remember recoiling from the image at a newsagents, and I could not bring myself to buy the paper.

actions which make sense to the perpetrators. It is therefore necessary to pay attention to the motivation and perceptions of the perpetrators.

In the rapid response report produced by the South African Human Sciences Research Council (HSRC Report 25) in June 2008, the authors concluded: “What has been relatively clear about the current wave of anti-foreigner violence is its violent and/or destructive character (killings, beatings, destruction of property and theft); violence largely although not exclusively meted out against socio-economically impoverished migrants from other African countries.”

While many of the actions may have been, seen in the isolation of a specific unlawful act, as simple acquisitive crime⁴, the attacks must be seen as part of a series of which have as a central motivating factor aggression against on people and groups because they are migrants from other African countries.

In response to the displacement of the foreigners, the state set up refugee camps, but planned that this would be a temporary measure, and that within months the camps would be closed and the people who have chosen not to return to their countries of origin would be reintegrated into the communities from which they were expelled. This process has itself become mired in controversy and court cases⁵.

In the South African Human Sciences Research Council report on the causes of the violence, the explanation considered include whether it is the failure of service delivery and competition for resources which caused attacks. We should also consider whether it is caused by a systemic failure at other levels of the South African political life.

Locating violence in the social, economic and political landscapes of South Africa interrogates the South African miracle in ways which are uncomfortable and disquieting:

The promise of a new beginning, post-apartheid, with liberal and social rights, building a new society of non-racialism, free from sexism and ethnic violence, symbolised by the “Madiba” magic of the first black President Nelson Mandela⁶, is contradicted by the levels of violent crime, and the extent of these xenophobic riots. Many refugees and immigrants lost their possessions and businesses, causing wide spread displacement of and trauma to, people who have already been displaced by war, political violence or infra-structural failure in their countries of origin.⁷

⁴ Like stealing the property and business stock of the victims. South African Criminal Law does not have a ‘hate crime’ approach.

⁵ The failure to effectively deal with the crisis would be the focus of further research. See the website of the Lawyers for Human Rights (www.lhr.org.za) for developments, and their work with the Consortium for Refugees and Migrants in South Africa (Cormsa). Judge Kate O’Regan of the Constitutional Court is quoted as saying “It was clear that the matter was one of enormous ‘social distress’.” (Polity.org.za 19 Aug. 2008)

⁶ Madiba is the clan name of President Nelson Mandela, whose stature and charisma united South Africans across racial and political divisions after the first democratic elections in 1994.

⁷ Prejudice against foreigners has been a constant feature of South African life, and acts of violence which can be understood as xenophobic have been recorded for some time, with violence against

The Constitutional processes, and the Truth and Reconciliation Commission (TRC) were understood as mechanisms which would provide for a transformed future in South Africa, but as Leebaw (2008 117 – 118) writes:

” . . the assumption of a linear, progressive transitional path has informed the view that if transitional justice institutions succeed in reinforcing approval of compromises and negotiations that frame political change, they will also contribute to the long term goal of cultivating political community based on the principles of human rights and the rule of law.

Instead, as Sriram has observed, “transitional situations. . .are dynamic” and transitional compromises are better understood as serving ‘interim purposes’, rather than permanent goals.” (Leebaw 2008 118)

By accepting that there is no linear, progressive transitional path, the field is opened for analysts to question the social forces at work in a transforming society, and to recognise the limits of the political and constitutional successes which have been achieved, and their diffuse role in actually creating a polity based on the norms captured in the Constitution.

This raises many questions. In this essay I will only enumerate a few, and address some aspects of them⁸.

1. It raises the question of ‘limited statehood’, or at least the limitations of the state. Where urban populations live outside effective policing, but also of social security support of the state, there are very real tensions with the constitutional promise and this compromises democracy.
2. Does it show that the victims of apartheid, finding democracy not elevating their economic position and social experience, are taking refuge in forms of populist violence? Does this relate to, or is it the result of, the increasingly populist character of South African politics?
3. What does it teach us about South African identity, and the politics of non-racial nation building which had been raised as a kind of counterpoint to the

and murders of Somali shop keepers have been a common feature of the Eastern and Western Cape regions for some years. The fact that the UNHCR conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance was held in the South African coastal city of Durban in 2001 is a sad irony. In January 2009 renewed attacks on foreigners took place in that city, with accusations that the Police Service did not react in time to prevent the death of a foreign citizen. A mob of 150 causes the death of 2 foreigners, with another listed as critical. (iol.co.za 12 Jan 2009)

⁸ This text should be seen a preliminary mapping, which I would hope to build and extent as a larger project, in which the theoretical perspectives and analysis will be more comprehensively dealt with. Attempting (but not very successfully) to stay within the 2500 word essay limit necessitates that many issues and theoretical focus areas be deferred.

ethnic divide and rule nationalisms of the grand apartheid era, and its homeland vision.

This essay will look at the political context in which this violence erupted, and raise questions concerning the nature of the South African state and legal framework, with particular questioning of what these aspects of the rule of law/ *Rechtsstaat* can mean for those who live in the urban shanty towns of the major cities. In some ways the most vulnerable of these are the arrivals from the rural areas of South Africa and the combination of refugees and illegal immigrants who compete for living space and resources with them.

The dominant political discourse during the first years of the new South African government were national liberation, and non-racialism and new South Africa. The governing party had credentials as national liberation movement, the new Constitution (Constitution of the Republic of South Africa Act 108 of 1996) provided for an inclusive national non-racial founding document and the 'Madiba' magic enabled people to address their fears and overcome racial prejudice and stereotyping in various forms and at differing levels of success.

The economic reality of most South Africans has only indirectly been addressed by the government projects and policies, and the successful implementation of these policies depend on the skills and operation of national, regional and local governments. The founding myth and political ideology has come under pressure, and during the first, and more particularly the second term of office of Thabo Mbeki, the political hegemony of the 'new' South Africa and the uniting ideologies have come under significant pressure.

The tentative thesis which I am exploring in this essay, is that the limits to delivery and access to resources which the post-apartheid state can provide to its citizens and others is a real challenge to the idea of a comprehensive democracy, and that a political-social solution to these challenges may be expressed in various forms populism, not only a response to their conditions of poverty, but that (without claiming a link) there are other populist discourses which have become current in South Africa polity: I think it is possible to argue that various aspects of the Mbeki presidency, and the challenge for leadership of the African National Congress which came from the previous Deputy President, Jacob Zuma has fueled, or reflects a rising form of populist politics. Of course, it is reductionist and expedient to reduce analysis of a national identity (especially in such a complex and fractured country like South Africa) to an analysis of the presidential incumbent, and his challenger, and yet leadership is not without consequences.

1. STATEHOOD AND SOCIAL RIGHTS

The constitution contains important social rights, and Marius Pieterse (2007 811) concludes that the analyses of the Constitutional Court show that it conceives of socioeconomic rights not as separately enforceable rights to particular goods or services, but as a single, overarching guarantee that socioeconomic policies may be abstractly reviewed for their adherence to certain principles of good governance.

The Constitutional Court gave a significant judgment in the case of *Grootboom* on rights to housing in 2002. (*Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 CC) The reality however was that when Ms Grootboom died in 2008, she was still waiting for house. Thus while legal academics hailed the case, the challenge to live up to these constitutional promises for citizens pose a challenge to the state.⁹ Brand (quoted in Pieterse 2007 811) explains the answer to what socio-economic rights are as “The assurance that government, in attempting to alleviate poverty and hardship, will act in a manner consistent with good governance, and only that.”

Many of the rights in the Constitution are not limited to citizens, but the text would provide that “everyone” has the right, but political reality seems to indicate that the deeply entrenched structural inequality in our society, is not so easily addressed, and that transformation poses a more intransigent dilemma than constitutional discourse would like to acknowledge.

Pieterse (2007 812) acknowledges that

“ the more concrete articulation of a socioeconomic right will not in itself enable that right to bring about a tangible improvement in the living conditions of its subjects”

Judge Albie Sachs asserts: “. . .the question is ceasing to be whether or not we can enforce social and economic rights through the courts . . . the real question is how can it best be done.” (Yamin 2005 1220)

If the named applicant in a Constitutional Court Case has not benefited from a successful judgment, then the tensions around illegal immigrants and refugees and housing and the supply of other services must be understood. It is then a question, what are the limits of the state, of Leviathan? It is significant issue, to debate what the state should do, but also raising the practical question of policy implementation, what the state can in fact do.

Complicating this, particularly in the case of health services, is the effects of what can at this stage only be called the failure of the Zimbabwe state, and added to the economic implosion which has driven many Zimbabweans to live illegally in South Africa, the

⁹ Pierre De Vos (2001 52) writes: “. . .at the heart of the Court’s approach to social and economic rights . . . lies a particular understanding of the role of the Bill of Rights as a transformative document aimed at addressing the deeply entrenched structural inequality in our society.”

current cholera epidemic, related to the total collapse of infrastructure in that country, is adding to the stream of migrants, seeking treatment in South Africa. This reached crisis proportions in December 2008, and has become worse at the start of 2009.

Of course, there are theorists which warn against giving such prominence to the law and state in analysing how the forces in social formations play out. Foucault argues:

“We must eschew the model of Leviathan in the study power. We must escape from the limited field of juridical sovereign and state instructions, and instead base our analysis of power on the study of the techniques and tactics of domination.” (in Hunt, 1992 8)

In July 2008, at the Official Memorial Service for the victims of the attacks, President Mbeki said (Mail & Guardian 3 July 2008):

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“There was no xenophobia, only criminal elements”

With this bland denialist statement, President Mbeki seem to be asserting the vision of South African as a transformed state, upholding the rule of law and struggling, like other states against a criminal element, in fact ‘normalising’ the events, from a governmentality perspective. Such a perspective also requires that we look at the ways in which ordinary people ‘govern’ themselves and relate to institutions of power.

The very recently published paper from the Institute of Security Studies (ISS) authored by Johnny Steinberg (2008 1) makes the following contribution:

“Aside from recording some of the complexity of what happened on the ground . . . , the paper makes one modest analytical contribution to understanding the causes the violence. It notes that local South African politics at the sites of the violence is consumed by struggles for state patronage.”

A provisional deduction which I would like to make from this, is that while the state has not succeeded in effecting real social rights for people, their perception is one where their relationship to the state is one of achieving benefits through political connection and affiliation. Since this not a social right, but the acquisition of a privilege, and as such undermines the concept of the rule of law and people’s sense of belonging to a *Rechtsstaat*.

2. POPULISM

This undermining of the idea of the *Rechtsstaat* also relates to the failure to deliver (especially in housing), to corruption in the police and especially the Department of Home Affairs¹⁰. These are failures which challenge the complexity of democracy with simplistic explanations and solutions. I submit that there is a currency of political populism, very visible since the ANC National Conference in Polokwane (December

¹⁰ This was specifically noted in the HSRC Report 2008

2007) , but a kind of politics which can be identified in South African politics even under the Mbeki presidency.

Dahrendorf (2007) explains Populism as a mechanism to provide immediate solutions for intractable problems, and how there are often '*Randfiguren*' (peripheral figures) who fuel this kind of politics.¹¹

The iconic politics of Mandela, with its attendant rainbow, is a difficult kind of government to follow. The extent to which 'delivery' required technical and governmental expertise, the Mbeki presidency aimed to produce results, but it had also located itself within an elite framework – the idea of the African Renaissance and the supra regional mechanisms – New Partnership for Africa's Development (NEPAD www.nepad.org), and its African Peer Reviews Mechanism. Complimenting this regional and elite perspective, was a perceived absence - the president not as a man of the people. A process of locating the president close to the people through the process of imbizo's (meeting with communities) and – at least this is my perception, a discourse of formal populism. The politics within the ANC became significantly infused with populism under Jacob Zuma, who won the presidency of the party at Polokwane, and is the likely successor to President Mbeki in 2009, despite corruption charges which was reinstated by the Supreme Court of Appeal in January 2009. (National Director of Public Prosecutions v Zuma (537/08) [2009] ZASCA 1 (12 Jan 2009))

The governing party under Mbeki became perceived as elite and distant, and fairly violent protests about the failures of service delivery have taken place during the past 2 years. A community which was moved from one province into another embarked in 2007/8 on very violent resistance against the decision of the governing party.(Mail & Guardian May 17 2007) There was a sense that the state was not listening to people, and frustrations led to violent protest. In the culture of violent protests, and the increasingly populist political style of Jacob Zuma¹²(Daily Mail 19 December 2007) ,who was challenging for the leadership, on the face of things contributed to demands for immediate solutions to difficult problems.

Accepting the difficult social conditions (identified by the HSRC Report 2008) and the explanation offered by Steinberg (demands on state patronage) (Steinberg 2008) it is then not difficult to see that people can choose a political course of which simplifies their issues and gives an apparent immediate solution. This then would be a populist denial of

¹¹ In addition to those mentioned by Dahrendorf, one can add the peculiar rise and fall of Sarah Palin, as the Vice-Presidential Candidate of the Republican Party in the 2008 US election, indicating that there is scope for this kind of politics even in more mature democracies.

¹² Mr Zuma's trade mark is singing a liberation struggle song, "Awulethe Umshini Wami" which translates as "Bring me my machine gun", while dancing to the tune. This is a constant feature of his political campaigning, and accompanies his *quasi* campaign rallies following his (many) court appearances.

the values of the constitution, democracy and the principles of *ubuntu*¹³, which should underlie this African democracy.

3. SOUTH AFRICAN IDENTITY

The challenge of analysing political identity in South Africa will require some theoretical focus: In order to make sense of what and who “South Africa” is, and how the differentiation between local and foreign is expressed, and have on occasion become expressed in xenophobic violence, I will utilise concepts drawn from Benedict Anderson’s *Imagined Communities* (1991), and responses to his ideas.

Given that there is no easily discernable “South African” identity, because of the complex social interactions and state practices of the past, it is interesting to note that ‘South African’ is a kind of negative identity – it involves having a [legal] ID book (Identity Book) and being ‘not too black’¹⁴: There is extensive evidence of prejudice against what South Africans call ‘foreign blacks’ or in the pejorative language common in South Africa: *Kwere Kwere* or *amakwerekwere*. The perplexing question of South African Identity is in part answered by the inclusivity of the Constitution, but also the kind of nation building actions since 1994, and the rainbow metaphor was used in the 1990’s to symbolise this inclusivity.¹⁵ What it is in reality, is much more difficult to determine,

J Clyde Mitchel (1987 271) writes

“ it must be emphasized that ethnicity emerges as a significant category in social relationships in response to a specific social situation. There is nothing inherent in characteristics of customs, beliefs, and languages which make them socially significant.”

He goes to say that migrants may well not be aware of these factors, until they

“ thrown into juxtaposition with others whose customs, beliefs, and languages are dissimilar, and these differences become the basis of determining in what way people should react to one another.”

¹³ Principles holding a *Gemeinschaft* sourced interdependence of people –“ I am a person through another person” which is mentioned in the Constitutions and has been utilised in some judgments, including the Makwanyane decision of the Constitutional Court which abolished the death penalty.

¹⁴ There are many reports of people arrested by the South African Police Service, on suspicion of being illegal foreigners, when they are dark in skin colour.

¹⁵ While I am reviewing this, the Day of Reconciliation advert appeared on SABC television: portraying One Nation: where different stereotypes of South African characters were listing aspects of what makes us “South African” rugby, cricket, soccer, bunny chow (Curry in a white bread), braaivleis (barbecued meat), - but the food or sports affiliation is claimed by a character from a different racial or ethnic group, rather than the one with whom the item is traditionally associated. Flighted on SABC 3 13 December 2008

The facts of the 'xenophobic violence' shows that a significant number of the victims were in fact South Africans, and that tensions around South African ethnicity could also have played a role. I was initially drawn to Benedict Anderson's concept of Imagined Communities (1991: 2) because my own sense of being South African makes it difficult for me to get a clear grasp of who is South African, and how he or she experiences that sense of South African, and my premature conclusion is that it is an imagined thing, and not a real sense of identity. This is in fact Heasly's criticism of Anderson: - that imagined community is almost without boundaries. Heasly (2004: 5) suggests that in order to be clear about the concept it is necessary to further specify both elements. His contribution is to identify four elements which makes a sense of community:

Membership, influence, fulfillment and a shared emotional bond.

Edgar Pieterse quotes Tajbakhsh on this point: "Complexity is the a priori feature of social identity" and agrees that

"... identities are not expressive of a deep 'essentialist' core, but are seen as contingent and articulated. . ." (Simone & Abouhani 2005: 143)

Heasly (2005: 10) specifically notes that Anderson has observed: "that there exist myriad styles of imagination", and Heasly concludes that "the veracity of a national myth is not essential to its importance to a nation; however it is critical that enough people in the polity accept and internalize this myth to make it salient."

Anderson writes that: "The nation is imagined as *limited* because even the largest of them. . . has finite, if elastic, boundaries beyond which lie other nations." (quoted in Heasly 2005: 10 footnote 5)

Loomba (1998: 197) also draws our attention to the views of critical post-colonial theorists like Benita Parry and Leil Lazarus,

"... that it is important to remember and acknowledge the enormous power and appeal of anti-colonial nationalism. It would be foolish to deny this. But the anti-colonial nationalism ought not to be celebrated by forgetting its exclusions. Nationalism itself invites us to disregard these, . . . several critics have suggested that Imagined Communities pays so much attention to who is included in the communities that it fails to consider who are excluded and marginalised such as women, or lower classes, or castes. The 'fraternity' which represents the nation does not explicitly include them as equals however it always implicitly claims to represent them."

What is needed, is comprehensive sociological research¹⁶ which acknowledges postcolonial theory, urban sociological and legal perspectives.

¹⁶ Like to work done by J Clyde Mitchel in the period 1960-1980. The HSRC Report is an effective starting point to build on perceptions and responses. The South African Human Rights Commission announced in January 2009, that it will also investigate the xenophobic violence of 2008.

SOLUTIONS

The question of authentic democracy, raised at the opening, is deliberately provocative concept, because while African states very often exemplify the failure or formal democracy, this essay is concerned with the experiences of marginalised migrants, living in conditions of urban hardship in South Africa, because the exercise of power should not only be an expression of the will of the majority of the electorate, but also constitute a legitimate form of governmental power and legal authority, thus not only a formal democracy but also one in which the substantive values express the values aimed for in the constitution, and international human rights documents.¹⁷

The state and its agents need to be held to their constitutionally circumscribed responsibilities, which means that corruption in the police, and Department of Home Affairs should be effectively addressed, but as Foucault shows us, that the exercise of power can also be from the bottom up – and the way in which people are governed, but also govern themselves, should express the values of humanity and *ubuntu*. If it is the failure of state support to the poor which creates the conditions in which urban migrants turn on each other, and attack the most marginal(which could be political, not only economic) of the shack-dwellers, then we need to revisit the social rights agenda and constitutional legal processes. If the state complied with the injunctions for good governance in their polices to deliver on these rights, it may already reduce the tensions within the urban poor communities.

But it may also be that the state should not seek to take responsibility for housing, and a whole range of social expectations, which runs the risk of creating a class of dependent clients, but the state should instead be pursuing policies which will in fact empower people, to become effective citizens, in their own lives and in their communities and the state. This would allow people, even those who are poor and still suffer deprivation, to relate to refugees and even illegal migrants on the basis of *ubuntu*, and not destroy lives and livelihoods through violence.¹⁸ This latter approach requires then an ‘imagined community’ which would be conscious of processes of exclusion and marginalisation, and would seek to build more than a mythical rainbow nation, but a community which lives through a democratic consciousness, and which will question the nature of its transitional processes and become critical and aware citizens.

The national myth, the internalised values of the imagined community should include these shared values. As Dahrendorf (2007, freely translated) writes, learning to live with complexity, that is perhaps the greatest task of democratic political education.

38 There is no space in this essay to engage with the post-modern surface/deep structure issues raised by Fredric Jameson (1991) and other critical authors.

¹⁸ This essay forms part of a wider concern in my research agenda, to deal with law, democracy, transformation and legitimacy

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