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Southern Africa: As Seen Through Sexuality, Mobility and Citizenship

Introduction

This paper develops a framework with which to identify and explain sexual citizenship in Southern Africa, paying particular (and historical) attention to the theme of mobility.[1] The paper goes beyond the juridical in investigating a cultural dimension of citizenship that consists of sexual practices. Additionally, by taking the territory that is usually understood as Southern Africa rather than South Africa as a significant framing context for sexual citizenship, the paper attempts to move beyond a narrowly legal or juridical conception of citizenship as necessarily linked to a singular nation-state.[2]

In investigating these two socio-legal dimensions of citizenship, the paper draws on the work of Achille Mbembe regarding the imagined character of the territory of Southern Africa. Writing within the broad school of African post-colonial studies, Mbembe has argued for the significance of attention to both the natural and the historical nature of territories and boundaries in Africa (2000). Drawing on de Certeau, Mbembe defines a territory in distinction to a place: 'In fact, a place is the order according to which elements are distributed in relationships of coexistence. A place, as de Certeau points out, is an instantaneous configuration of positions. It implies a stability. *As for a territory, it is fundamentally an intersection of moving bodies. It is defined essentially by the set of movements that take place within it.* Seen in this way, it is a set of possibilities that historically situated actors constantly resist or realize'. This definition of a territory importantly is both a people-based one and one that posits movements by those people.

To investigate sexual citizenship in Southern Africa, one can begin with theory from the school of citizenship studies. In that school, a relatively well-developed body of work has emerged around the topic of citizenship and nationality laws.[3] Citizenship studies as a school is comparative and increasingly global in both subject matter and research methods.[4] Its focus on nationality laws gives a point of definition and provides a necessary link to the governmental practice of citizenship. Citizenship studies ultimately depends on more historical explorations of citizenship, in particular the work of Margaret Somers, arguing that various concepts of citizenship are historically contingent products of pre-1600s English legal history.[5]

Within citizenship studies, Linda Bosniak's four-part typology of citizenship is particularly useful (2000). Bosniak argues that citizenship may be

understood variously as a legal status, as rights, as political activity, and as a form of identity and solidarity. The concept of sexual citizenship used in this paper is composed of a combination of the legal and the identity elements of Bosniak's typology. Citizenship as a legal status refers to formal or nominal membership in an organised political community. Citizenship as an affective status examines the psychological as opposed to legal, rights-based or political sides of citizenship.[6]

The paper examines developments over the past ten years in Southern Africa in a historical context. This paper does not attempt a thorough historical analysis, but rather attends to some of the contemporary ways in which gender issues interact with understandings of citizenship. Nonetheless, the development of citizenship is closely related to theories of state formation. Some historians have investigated state formation before the period of this study and have explored similar themes. For instance, in her study of registration practices of African customary marriages from 1910 to 1970, Debbie Posel has called for greater attention to gender dimensions in historical understanding of South African state formation (1995, see also Cheater 1998). In proposing sexual citizenship as a significant driver of Southern Africa, this paper identifies a different agent from some of those of other accounts.[7]

In its first part, the paper will present an overview of some recent legal developments in Southern Africa relevant to sex and citizenship. This overview is not intended to be comprehensive but is intended to indicate the significant contemporary currents affecting sexual citizenship in Southern Africa. This overview is not concerned to identify categories of rights that attach to persons of sexual identities but rather to identify doctrinal legal developments with significant effects upon Southern African sexual citizenship. Without arguing that this list is exhaustive, this part argues that there are two significant currents to explore. First, within the past several years, the South African Constitutional Court has decided a significant line of cases around sexual orientation, a line of cases that finds resonance in legislative developments as well. Second, a number of other Southern African court cases have drawn on less innovative administrative law or constitutional law doctrinal points to also push the boundaries of national immigration and citizenship laws.

In its second part, the paper places these legal developments within the current regional understanding of a changing dimension of citizenship that allows for diverse sexual self-understandings if practised within permanent partnerships. Here, the concept of a regional citizenship will be further specified by drawing on an understanding of regions as spaces imagined from within civil society rather than from within state bureaucracies. This part of the paper recognises two assumptions upon which its argument is based: first that mobility drives the development of citizenship and second that Southern Africa is itself an integrated labour market. Finally, the degree to which sexual relationships may underpin this regional citizenship is explored.

The paper concludes that further research into Southern African sexual citizenship should be conducted using this theoretical framework. In particular, it concludes that the exceptional practices of amnesties (migration regularisation or legalisation programmes) and asylum should be investigated. This research should include attention to the use of kin ties in the practice of amnesties as well as ethnographic research into contemporary practices of Southern African movement among gay and lesbians to Johannesburg.

Part One: Legal Developments regarding Southern African Sexual Citizenship

This part surveys two significant legal developments relevant to Southern African sexual citizenship: the equality jurisprudence with respect to sexual orientation and the pro-family line of immigration decisions.[8] There are of course other potentially significant developments – in particular the recent legal history of AIDS and migration is also arguably significant for sexual citizenship in Southern Africa.[9]

Within the past several years, the South African Constitutional Court has decided an impressive line of cases around sexual orientation. Although the Constitutional Court examined other rights and found some of them additionally violated by some of the governmental practices at issue, these cases can be said to have primarily used the sexual orientation ground in the equality clause of the Bill of Rights to strike down provisions in the South African statute books as well as some common law rules.[10] One case struck down the criminalisation of sodomy.[11] Another allowed for adoption of children by homosexual couples.[12] A third case extended permanent resident benefits to persons in permanent same-sex life partnerships.[13] A fourth case extended certain civil service pension benefits to persons in same-sex life partnerships.[14] The final case is the judgment recognising in principle marriage between persons of the same sex.[15] Demonstrating the depth of the constitutional commitment, the post-apartheid South African Parliament has chosen to provide statutory protection against discrimination on the ground of sexual orientation in the Equality Act.

Additionally, Parliament included sexual orientation as an explicit ground for asylum in the post-apartheid Refugees Act 130 of 1998 (Pantazis 2002). This refugee protection statute places South Africa in a category on its own.[16] Other countries such as Australia and Canada have allowed asylum claims based on sexual orientation since 1994 and the United Nations High Commissioner for Refugees has since 1995 (Millbank 2002). In 2001, Amnesty International (citing the International Gay and Lesbian Association) reported that eighteen countries had provided asylum to persons on the basis of gay or lesbian status (2001). However, the explicit protection afforded by the defini-

tional provision of the South African statute is greater than the implicit protection given elsewhere.

Nonetheless, the law on the books is not always the law in action. There appear as yet to be few asylum applications decided favourably in South Africa on the basis of sexual orientation as a protected ground. In 1994, a man from Uganda was reported to have been granted asylum on the basis that gays were persecuted in Ghana (ILGA 2003). In 1999, as the Refugees Act 130 of 1998 was nearing implementation, a doctor from Uganda and two other men from Pakistan were reported to be readying their application for asylum status on similar grounds. However, a distinction may be made between the grant of asylum to a gay or lesbian and the grant of asylum on the grounds of persecution by reason of inclusion in the particular social group of gays and lesbians. Based on the experiences of a public interest lawyer in Durban, only three instances of the latter category of asylum were granted in South Africa nearly four years after the coming into effect of the explicitly protective Refugees Act (Magardie 2003).[17]

The driving doctrinal force in these South African cases and legislation is the right to equality. These cases of courses were all decided with respect to a specific protected ground of non-discrimination, sexual orientation. But the force behind them is the more general one of equality. As understood popularly in the post-apartheid context, this vision of equality has been taken to mean support for women's rights and for rights of gays/lesbians. This development may lead to unintended consequences to this development. For instance, Reid and Dirsuweit have reported a recent rise in homophobic violence (2002, see also Human Rights Watch 2003).

Certainly, the Constitutional Court decisions and the series of legislative provisions identified above expand the rights and the power of gays and lesbians in South Africa. But read as containing a vision of sexual citizenship, what is the outline of the vision contained? There appear to be two important elements to this official substantive vision: a personal practice of stability and a social practice of limited diversity. First, the vision of sexual citizenship is of persons involved in stable long-term relationship. This personal practice of stability is not necessarily one characterised by legal ties but it is one of permanence. At the least, it operates within a reference framework of legal marriage in its background.[18] This vision would clearly have some continuity with past state visions of 'reputable Africans' of the pre-Constitutional era (Posel 1995, Bonner 1990). Second, this vision recognises significant diversity of sexual practice. As stated, this vision is self-understanding as neutral as between men and women and heterosexuals and gays/lesbians. While it does at least discuss the role of sexual desire and transient relationships, this constitutional vision is limited and does not embrace a transient or pleasure-seeking version of sexual citizenship (de Vos 2003). This is perhaps especially the case where children

are involved. It may also particular be the case where such sexuality is publicly displayed (Epprecht 2003).

A second significant legal development does not depend on the right to equality. A number of Southern African court cases (including some from South Africa) draw on administrative law or constitutional law doctrine to push the boundaries of national immigration and citizenship laws. Much of this boundary pushing has taken place in the sphere of sexual relations. While some of these cases turn on sexual orientation, others turn on heterosexual relations. For instance, there is a line of married persons' cases in Zimbabwe such as Kohlhaas v Chief Immigration Officer, Zimbabwe.[19] These cases use the status of marriage to develop immigration rights. This development has textual support in a growing number of international instruments that recognise trans-border family rights (Jastram 2003) but does not appear to be driven by international norms. The South African case law and legislation has seen greater attention to administrative law to expand the rights of persons in families. For instance, in the Constitutional Court case of Dawood v Minister of Home Affairs,[20] excessive executive discretion as well as the right of married persons to live together in the same place was part of the justification for striking down a Home Affairs prohibition on applications for permanent residence by married persons within the territory of South Africa. There is a legislative as well as a judicial component to this development. The development of trafficking legislation within the SADC region may also fit into this boundary-pushing category, since that legislation aims to protect women and children in particular from transnational exploitation. This line of cases and other legal developments has its own gender and mobility dynamics apart from the South African equality jurisprudence on sexual orientation.

This geographical boundary-pushing line of cases is itself internally contested. For instance, the Zimbabwean line of cases that emphasises the rights of family members as family members has been considered and not followed in South Africa.[21] Likewise, Dodson (2001) has examined the development of South African migration policy (including the early phases of the development of the Immigration Act 13 of 2002) from a gender perspective. She argues that this South African policy in substance continues to discriminate against the concerns of women within Southern Africa, even if by default. The application of neutral rules to persons (such as women) in a position of social disempowerment further disadvantages those persons. Furthermore, Dodson argues that the lack of participatory process in the formation of post-apartheid South African migration policy both reflects and exacerbates this gender discriminatory aspect.

The difference in doctrinal sources of these developments provides food for thought. As noted above and explored further below, these South African and Zimbabwean legal developments (and the others) may be viewed not only from a citizenship perspective that focuses on rights or political activity, but also

from a citizenship perspective that uses collective solidarity or identity. In this perspective, these two apparently separate developments have greater unity and reflect an underlying sexual citizenship of the Southern African region.

In adopting a regional citizenship approach, this paper differs from recent arguments examining similar developments. Charles Ngwena (2002) identifies a category of sexuality rights that has recently come onto the human rights agenda. He views these rights as claims of a variety of social movements but fundamentally as stemming from the diffusion of existing international human rights precepts. Examining the areas of gay and lesbian sexuality, teenage sexuality, and HIV/AIDS, Ngwena concludes that the concept of sexuality rights has yet to take firm root in Southern Africa although it has mustered some support in policy and practice. He argues in favour of further entrenchment of legal sexuality rights. The Human Rights Watch report on homophobia in Southern Africa (2003) applies a method similar to that of Ngwena.

Part Two: Sexual Citizenship, Mobility and Secrecy in Southern Africa

It remains to go one level deeper and to place the significant legal developments identified and elaborated upon in the first part within the current regional understanding of a rapidly changing dimension of citizenship that allows for diverse sexual self-understandings within a frame of permanence. In so doing, sexual citizenship is conceived of as both imaginary and disruptive but nonetheless rooted in an actual social practice, that of access to mobility.

Often regions, such as the SADC region, are conceived of solely in terms of state bureaucracies.[22] An alternative concept of regional citizenship can be specified by drawing on an understanding of regions as spaces imagined from within civil society as well as from within state bureaucracies. Rebecca Karl has observed that it is now 'commonplace' to see regions as 'imagined constructs that they possess historical specificity and are imagined differently by different people at various times' (1998: 1096). Karl's exploration of the construction of the Asian region provides some pointers for the present study of regional sexual citizenship in Southern Africa. Karl is keen to point out that these regional imaginaries are contested and in particular that dominant state-centred narratives may be challenged at specific moments by others. Karl identified a dominant vision of 'Asia' as a region that is anti-imperialist yet state-based, as in Sun Zhongshan's imagination of the region. However, Karl also identified an alternative regional discourse 'rooted in non-state centred practices and in non-national-chauvinist culturalism' (1998: 197). Karl explored the action of a group of 'Chinese intellectuals along with Japanese socialists and exiled Indian, Filipino, and Vietnamese activists', the Asian Solidarity Society organized in 1907, that was engaged in purposeful radical political activity attempting to subvert the emerging state-centred orders. Karl concluded that although this group achieved little of lasting significance, their

importance lies in their demonstration of the ability to contest the imaginary vision of a region against a dominant state-centred discourse.[23]

This exploration of a regional dimension to citizenship also necessarily disrupts the easy identification of citizenship with a nation-state. To do so is consistent with recent trends in comparative constitutional scholarship. For instance, Alex Aleinikoff has recently explored constitutional arguments that loosen what he terms 'the Strict Congruency Thesis'. This thesis holds that a 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 inter-generational project of those with enduring attachments and contact with America (2002). It is noteworthy that the South African Bill of Rights is explicit in offering its protection to 'everyone' rather than to 'citizens' in nearly all instances (Klaaren 1996).

Nonetheless, this exploration of sexual citizenship cannot be too imagined or too disruptive. Any identification of a regional citizenship must be rooted in actual social practices to have lasting significance. This part suggests that the historic differential access of women to mobility in the Southern Africa region may have given rise to the specifically Southern African form of citizenship. While this paper is not the place to present a comprehensive view of the historical understandings of Southern Africa, it is important to recognise that the concept of regional citizenship as developed here thus has two assumptions.[24] The first assumption is that control over mobility drives the development of citizenship. Migration regulation is a significant cause in the development and elaboration of citizenship. The second assumption is that since the late 1800s, the Southern African region has been an integrated labour market.

To demonstrate the plausibility of these assumptions, we can explore the social practice of women's differential access to mobility in the region. Theresa Barnes's study of the pass laws in urban colonial Zimbabwe from 1930 to 1980 demonstrates the ways control over mobility drives the development of citizenship, including sexual citizenship (1997). Barnes notes it was only in Southern Africa that state bureaucracies attempted to impose mobility controls on women. State authorities had imposed controls over the mobility of African men with relative (and increasing) success from the late 1880s. Those authorities attempted to extend that control over women as well. However, these attempts were famously resisted (Wells, Barnes). Barnes thus argues that African women enjoyed relative freedom of mobility in Zimbabwe until the late 1970s. Likewise, significant controls over the mobility of African women in South Africa were imposed only from the 1960s.

This history is arguably reflected in the present. A. P. Cheater's exploration of contemporary citizenship practices in Zimbabwe reveals evidence of a single (albeit contested) regional sexual citizenship (1998). In her view, the current construction of nationhood in Zimbabwe is under the domination of the

black male elite. Their vision of citizenship has the character of being exclusivist.[25] Nonetheless a significant (and mostly female) segment of the Zimbabwean population is engaged in resisting the ascendant exclusivist vision of citizenship. This segment is composed of the 'hundreds of thousands of individual members of internationalised networks, who, from different parts of the country and speaking different home languages, regularly cross Zimbabwe's borders legally in what is called going out of the country' (1998: 192). Cheater focuses on these regional travellers although she also notes the existence of a significant population of more specifically local cross-border shoppers, also majority women (those who 'jump').[26] Cheater paints a picture of these women using a deeply rooted and pre-existing version of citizenship to contest and resist the citizenship being pushed by the ascendant black male elite. 'The behaviour of the cross-border traders reflects popular views of what Zimbabwean citizens ought to be able to do with their lives, in contrast to the state's narrowing definition of citizenship' (1998: 193). This pre-existent citizenship dates to the 1950s or before and is a cosmopolitan one extending to links with all the states that border on Zimbabwe. These states include Botswana, Zambia and Mozambique as well as South Africa.

The studies of Barnes and Cheater support the assumptions of this theoretical framework. Through the processes that Barnes and others have described, Southern Africa became a region with a history of differential levels of control over mobility according to gender.[27] From a state point of view women were more mobile than men. This differential regulation has created opportunities for exploitation and indirectly influenced the gendered understanding of regional citizenship in Southern Africa. As Cheater puts it, there may well be a more cosmopolitan sense of regional citizenship that inheres in particular in economically active women. Today's regional sexual citizenship is in part a legacy of the largely failed attempts to control women's mobility. The attempt – through bringing women into some degree of regulated contact with the state bureaucracies – may be as significant as the failure in the generation of this regional sexual citizenship.

Finally, the perspective of secrecy (perhaps particularly in the historical context of apartheid) may be used theoretically to link sexual practices to governmental practices of legalisation. To do this we can look at secrecy both in immigration and in refugee law contexts. One recent exploration of the theme of clandestinity in relation to practices of legalisation is Susan Coutin's work on legalisation of Salvadorans in the United States (2000). Coutin considers the relationship between immigration and law as a series of governmental practices by which the law produces both citizens and illegal immigrants. Referring to the status of illegality as a 'space of nonexistence',[28] Coutin details several practices by which this space is constructed and maintained (2000: 29-34). One practice is 'limiting reality to that which can be documented'. Without documents, one is in a space of non-existence. Another practice is 'the

temporalization of presence'. This links presence to the ticking of a clock, and until the clock has finished ticking, there is no (official) presence. Another practice is the definition of wage labour as a privilege that states can either grant or deny to certain categories of people and another is how kin ties are made 'legally inert for immigration purposes' in this space of non-existence. Coutin also notes that 'many of [undocumented immigrants'] daily practices must be clandestine'. Finally, the space of non-existence is also constructed by practices that limit the mobility of undocumented immigrants.

Among the Salvadorans she interviewed, Coutin does not claim to have identified any sense of transnationalism. But she does claim that there are commonalities of language when speaking of citizenship. Salvadorans, whether transnational, Salvadoran, or legalised American, spoke of birth on the soil of a nation and also of relationships to family members. They used these facts to as stories to express their feelings of citizenship. Coutin does not celebrate this fluidity but recognises that Salvadorans are both able to manipulate existing models of citizenship and to produce alternative modes such as dual citizenship and citizenship located outside of a state structure (2000: 158-161). Without celebrating the resistance element of clandestinity, Coutin shows how that status may be negotiated at times and used at times within the immigration context in ways that both fit with and change the traditional understandings of legal and illegal.

Another exploration of the theme of clandestinity is contained within Audrey Macklin's account of the bureaucratic context of persecution stories told by asylum applicants (1999). In this essay, Macklin's prime concern was with the credibility of stories. In order to present a convincing case to a Canadian refugee tribunal adjudicator, applicants claiming to be fearful of persecution on various grounds needed to negotiate a fine line between a demonstration of genuinely engaging in protected activity and a demonstration of fleeing from persecution. At the same time, the applicant must be presenting a stable identity consistent with the belief or activity underlying the ground of persecution. As Macklin suggested, these negotiations and presentations can be complex. As part of this exploration, Macklin briefly noted how, like other applicants, gay and lesbian applicants face the question of how much to reveal in telling these official stories. The adjudicator would also then be in an official position to question the credibility of the identity as well as that of the broader persecution story.

A theoretical framework can put these two studies together. The gay or lesbian refugee applicant may well be linked by the phenomenon of sex and secrecy to the applicant for legalisation. Just as a gay or lesbian person may need to negotiate their disclosure of identity within a refugee context, in a legalisation context, many migrants often need to decide whether to keep certain things secret from immigration officials, including the existence of family relationships across borders.[29] Both negotiations have important immigration

and family dimensions and consequences. In this sense, both legalisation amnesties and asylum practices for gays and lesbian experience a similar phenomenon of sex and secrecy.

In sum, an examination of the stories of birth, family relationships, and sexual identity may reveal much about the character of sexual citizenship in Southern Africa imagined as a place of common membership. On the one hand, such stories may constitute a mere common language for discussing issues of citizenship. On the other hand, such stories may reveal an understanding of sexual citizenship in Southern Africa that crosses the existing juridical borders. Within this examination, the zone of secrecy often negotiated with respect to sexual practices and family relationships may be usefully compared to the zone of secrecy inherent in the legalisation context.[30]

Conclusion

A specific line of empirical research into Southern African sexual citizenship with two particular threads is suggested by the terms of the theoretical framework elaborated here. The exceptional practices of asylum and amnesties in contemporary South Africa should be investigated. This research should include both further investigation into the gender nature of recent state practices of legalisation[31] as well as ethnographic research into contemporary practices of Southern African movement among gay and lesbians. Research into these exceptional practices of amnesties and asylum could also provide a useful exploration of the substance and trajectories of contemporary Southern African citizenship beyond the element of sexual citizenship singled out here. In particular, the character of Johannesburg as a gateway city into a broader global world may be specified.

Finally, there are independent arguments for investigation of these exceptional sites. First, within the policy-oriented sectors of migration and citizenship scholarship, it is the regular exception that becomes the rule. For instance, the 'exceptional' practices of amnesties often take shape as a normalised migration policy tool. Amnesties were a regular and significant policy mechanism used by the apartheid state and such a use of amnesties may well characterize contemporary South Africa.[32] Likewise, asylum can be put into such a policy understanding, both globally and within Southern Africa. One understanding of the function of asylum law, crudely put, sees it as a safety valve for the operation of immigration policies. Here, following James Hathaway rather than Micheal Walzer, asylum is important as policy rather than as a direct expression of political values of particular national societies – for example of giving membership and community to those (refugees) who are by definition those without such goods.

The second argument for examination of the exceptional sites derives more directly from post-colonial studies than from the citizenship studies argument

advanced above. Here, it is the extreme exception that proves the rule. For instance, Lars Buur has recently examined the informal justice practices in townships which incorporate physical violence in opposition to the supposed values of tolerance and the rule of law of the post-apartheid constitutional order. He argues that by the very virtue of their exclusion they are included and constitute part of the new legal order (Buur 2003). Buur, Mbembe, and others have recently explored and drawn on the work of Giorgio Agamben to examine the exceptions in order to see the rules (Agamben 1998, Mbembe et al. 2003).

Notes

1. Versions of this paper have been delivered at the Pittsburgh USA annual meeting of the Law and Society Association (June 2003), at the Sex and Secrecy Conference organized by WISER in Johannesburg and held at the University of the Witwatersrand in June 2003, and at the Law in a Transforming Society conference held at the University of South Africa in January 2006. Thanks are due to all comments and criticisms as well as to research funding from the University of the Witwatersrand.
2. This paper primarily treats developments in South Africa and Zimbabwe, both countries of the political SADC grouping. However, the Southern African region or even 'South Africa' may be described as extending as far as from Cape Town to Katanga (Mbembe 2000).
3. This school of citizenship studies itself derives in part from a re-examination of immigration in America. See Yans-McLaughlin (1990) (discerning a network-exchange theory replacing assimilation and human capital theory as the dominant paradigm in immigration scholarship). Aleinikoff prefers the term 'sovereignty studies' (2002: 4).
4. See Bosniak 2000, 2002; Aleinikoff and Klusmeyer 2001 (studying the citizenship laws of 25 countries).
5. See M Somers, 'Citizenship and the Place of the Public Sphere', *American Sociological Review*, vol. 58, 587-620, 1993, (citizenship practices emerge from the articulation of national organizations and universal rules with the particularisms and varying political cultures of local environments (types of civil society)); M Somers, 'Rights, Relationality, and Membership: Rethinking the Making and Meaning of Citizenship', *Law and Social Inquiry*, vol. 19, 63-112 (1994) (modern citizenship rights are not the outcome of the emergence of markets but rather a continent outcome of medieval English legal revolutions). Somers' themes – the articulation of the national with the local and the dissociation of citizenship from the triumph of capitalism – link to the post-colonial school of Mbembe and others. See for example, B von Lieres, 'New Perspectives on Citizenship in Africa', in *Journal of Southern African Studies*, vol. 25, 1999, 139-148 (arguing that 'contemporary African politics... rather than hegemony and resistance... is about adaptation, accommodation, and collaboration'). For a recent special issue on contemporary developments, see 'Sexual Movements and Gendered Boundaries:

Legal Negotiations of the Global and the Local', 14 *Social & Legal Studies*, vol. 14, No. 1, 2005.

6. Bosniak points out that most explorations of the affective side of citizenship have assumed national 'community' such as explorations of patriotism. She argues that the 'community' engendered by trans-migrants within social formations across borders may also serve as an affective link between personal and collective identity (2000: 486-487).
7. For instance, D. Miller 'South African multinational corporations, NEPAD and competing regional claims on Post-Apartheid Southern Africa', *African Sociological Review*, vol. 8, 176-202, 2004, (identifying multinational corporations as drivers of regional integration).
8. Other legal developments do not seem so significant. In one example, the Hague Conventions are a series of standard international agreements covering issues both of legal process (for example, evidence, service etc.) and sexual citizenship (adoption, child abduction etc.). Neither type of Hague Conventions are signed or ratified to any great extent among the member states of the Southern African Development Community as of the end of 2002 (The Hague Conventions, 2002). However, these conventions and linked developments may have significance in other regions (Jastram 2003).
9. This topic is broader than what can be covered in this article. At present, Malawi and Zimbabwe regard homosexuality as a ground for prohibited immigrant status (Klaaren and Rutinwa 2003).
10. The statutory provisions were contained in laws enacted before the constitutional transition of 1994. For a survey of the historical development of such laws see the appendix of HRW 2003.
11. See for example, National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), De Vos 2000. This South African case can be compared with the result of the S v Banana 2000 (3) SA 885 (Zimbabwe), (deciding that the Zimbabwe Constitution did not decriminalise sodomy), Ngwena 2002: 8-10.
12. Du Toit v Minister of Welfare and Population Development CCT, 40/01, (10 September 2002).
13. National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC). Compare the opposite result in the Namibian case of Chairperson of the Immigration Selection Board v Frank and Khaxas (Case No. SA 8/99), Ngwena 2002: 9.
14. Satchwell v President of the Republic of South Africa CCT, 45/01, (25 July 2002).
15. Minister of Home Affairs and Another v Fourie and Another CCT 60/04, (1 December 2005). One interesting thing regarding this recent case is its remedy, which effectively gives Parliament a year to consider and enact either a same-sex marriage law or another version, along the lines of civil union statutes.
16. This was done through the definition of the term 'social group'. Section 3 of the Refugees Act 130 of 1998 states, in part, that a person qualifies for refugee status if that person has a well-founded fear of being persecuted by reason of his particular

social group. Section 1(xxi) states that 'social group' includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste.

17. Communication to author from Sheldon Magardie.
18. Based on the cases to date, some have argued that same-sex marriage should be constitutional in South Africa (Byrn 2002).
19. 1998 (3) SA 1142 (ZS).
20. 2000 (3) SA 936 (CC).
21. See the lower court decision in 'Dawood'.
22. The Southern African Development Community is an organisation of fourteen states (Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia, and Zimbabwe). It has passed two Declarations on gender issues: the 1997 SADC Gender and Development Declaration and the 1998 Addendum to the Declaration on Violence Against Women. See Banda 2002, Ngwena 2002.
23. The conception of competing visions of citizenships can of course be more broadly applied. For a view of the American military and higher education institutions as locked in such a conflict over gay and lesbian citizenship see Kapczynski 2002.
24. One can note the early 1900s practice of naming the entire region not as Southern Africa but – in a term that should be distinguished from the term Union of South Africa – 'South Africa'. See for instance Martin Chanock's aptly named *Unconsummated Union* (1977)
25. Indeed, Zimbabwe has over the past twenty years moved further and further towards an increasingly intolerant view towards dual nationality (Klaaren and Rutinwa 2003). As Cheater notes, an intolerant view towards dual nationality will impact particularly harshly on women who are married exogamously in a patrilineal society.
26. Cheater describes a conversation with one of these women who opened the conversation as follows: 'Good morning madam. We are the ladies who travel to Botswana. Is there anything you would like to order? Shoes? Clothes? Microwave? Steam iron? Computer? Video? Discs? Fax?' (1998: 202).
27. Women were of course subject to other restraints (including legal restraints) on their mobility, such as their status of legal minority. What is of significance is how their differential access to physical mobility structured their mobility in other senses.
28. Coutin thus links the character of fleeing persecution usually seen as part of refugee law with the character of an undocumented status, usually seen as part of immigration law (2000: 27-47). Nonetheless, she concludes that physical presence and social participation have proved more powerful than the need to escape physical destruction in the legalisation of the Salvadorans (2000: 42).
29. This may be relevant both for revealing kin ties across borders as well as the existence of more than one family.

30. The project proposed here is of course related to but distinct from a doctrinal history of the conflicts of law 'in the Southern African region, a worthy topic of study in its own right. The field is of course dominated by the scholarship of C. Forsyth at present: C. Forsyth, *Private International Law* (4th ed.). However, other scholars are also working with different voices. See E Schoeman, 'Choice of Law and Legitimacy: Back to 1917?' (1999) 116 *SALJ* 288-298. For comparative purposes, see C. Forsyth, 'The Domicile of the Illegal Resident' (2005), *Journal of Private International Law*, vol. 1.
31. Crush and Williams have analysed the recent South African set of three post-apartheid amnesties but did not investigate the concept of sexual citizenship (1999).
32. More broadly, one could claim that the discriminatory practice of illegality was a structure of the apartheid state (Klaaren and Ramji 2001).

References

Agamben, G., 1998, *Homo Sacer, Sovereign Power and Bare Life*, Stanford: Stanford University Press.

Aleinikoff, A., 2002, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship*, Cambridge, Harvard University Press.

Aleinikoff, A., and D. Klusmeyer, (eds.), 2001, *Citizenship Today*.

Amnesty International, 2001, 'Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment based on sexual identity', 22 June, available at www.amnesty.org.

Banda, F., 2002, 'Going It Alone? SADC Declarations and the Gender Debate', 46 Journal of African Law, vol. 46, 259-264.

Barnes, T., 1997, '"Am I A Man?": Gender and the Pass Laws in Urban Colonial Zimbabwe, 1930-1980', African Studies Review, vol. 40: 59-81.

Bonner, P., 1990, '"Desirable or Undesirable Basotho Women?" Liquor, Prostitution and the Migration of Basotho Women to the Rand, 1920-1945', in S. Walker, (ed.), *Women, and the Organisation of Gender in South African History.*

Bosniak, L., 2000, 'Citizenship Denationalized', *Indiana Journal of Global Legal Studies*, vol. 7, 447-509.

Bosniak, L., 2002, 'Multiple Nationality and the Postnational Transformation of Citizenship', *Virginia Journal of International Law*, vol. 42, 979.

Buur, L., 2003, 'The Sovereign Outsourced: Local Justice and Violence in Port Elizabeth', available at wiserweb.wits.ac.za.

Byrn, M., 2002, 'Same-Sex Marriage in South Africa: A Constitutional Possibility', *Minnesota Law Review*, vol. 87, 511-542.

Cheater, A. P., 1998, 'Transcending the State? Gender and borderline constructions of citizenship in Zimbabwe', in T. Wilson and H. Donnan, (eds.), *Border Identities: Nation and State at International Frontiers*, Cambridge, Cambridge University Press, 191-214.

Coutin, S., 2000, *Legalizing Moves*, Ann Arbor, University of Michigan Press.

Crush, J., and V. Williams, 1999, 'The New South Africans? The Immigration Amnesties and Their Aftermath', IDASA, Cape Town.

De Vos, P., 1996, 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution', *South African Journal on Human Rights*, vol. 12, 265-290.

De Vos, P., 2003, 'WISER Sex and Secrecy Paper', forthcoming at wiserweb.wits.ac.za.

Dodson, B., 2001, 'Discrimination by Default? Gender Concerns in South African Migration Policy', *Africa Today*, vol. 28, 73-89.

Dolan, C., 2003, 'WISER Sex and Secrecy Paper', forthcoming at wiserweb.wits.ac.za.

Epprecht, M., 2003, 'WISER Sex and Secrecy Paper', forthcoming at wiserweb.wits.ac.za.

Forsyth, C., 2003, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts*.

Forsyth, C., 2005, 'The Domicile of the Illegal Resident', Journal of Private International Law, vol. 1.

Human Rights Watch, 2003, 'More Than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa', 14 May, http://www.hrw.org/reports/2003/safrica/.

International Lesbian and Gay Association, 2003, 'Are LGBT refugees granted asylum by [South Africa]?', http://www.ilga.org/information/legal_survey/africa/southafrica.htm, accessed on 1 May 2003.

Jastram, K., 2003, 'Family Unity: The New Geography of Family Life', Migration Policy Institute, 1 May 2003, available at www.migrationinformation.org.

Kapczynski, A., 2002, 'Queer Brinkmanship: Citizenship and the Solomon Wars', *Yale Law Journal*, vol. 112, 673-680.

Karl, R., 1998, 'Creating Asia: China in the World at the Beginning of the Twentieth Century', *American Historical Review*, vol. 103, 1096-1118.

Klaaren, J., 1996, 'So Far Not So Good: An Analysis of Immigration Decisions under the Interim Constitution', *South African Journal on Human Rights*, vol. 12, 549-564.

Klaaren, J., and J. Ramji, 2001, 'Inside Illegality: Migration Policing in South Africa after Apartheid', *Africa Today*, vol. 48, 35-37.

Klaaren, J., and B. Rutinwa, 2003, 'Report to MIDSA on Migration and Population Laws in Southern Africa', Cape Town, South African Migration Project, April.

Macklin, A., 1999, 'Truth and Consequences: Credibility in Refugee Determination, International Association of Refugee Law Judges, Realities of Refugee Determination on the Eve of a New Millennium', The Hague, Netherlands: Kluwer Law International, 80-93.

Magardie, S., 2003, '"Is the Applicant Really Gay?": Legal responses to asylum claims based on persecution because of sexual orientation', *Agenda*, vol. 55.

Mbembe, A., 2000, 'At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa', *Public Culture*, vol. 12, no. 1.

Mbembe, A., et al., 2003, 'Bio-Politics, States of Exception, and the Politics of Sovereignty', WISER Symposium, 6-7 February, available at www.wiserweb.wits.ac.za.

Millbank, J., 2002, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia', *Melbourne University Law Review*, vol. 26, 144, available at http://www.austlii.edu.au/au/journals/MULR/2002.

Miller, D., 2004, 'South African multinational corporations, NEPAD and competing regional claims on Post-Apartheid Southern Africa', *African Sociological Review*, vol. 8, 176-202.

Ngwena, C., 2002, 'Sexuality rights as human rights in Southern Africa with particular reference to South Africa', *South African Public Law*, vol. 17, 1-21.

Pantazis, A., 2002, 'Home and the World: Lesbian and Gay Places in the Law', *South African Law Journal*, vol. 119, 305-316.

Pantazis, A., 1996, 'The Problematic Nature of Gay Identity', *South African Journal on Human Rights*, vol. 12, 291-307.

Posel, D., 1995, 'State, Power and Gender: Conflict over the Registration of African Customary Marriage in South Africa c. 1910-1970', *Journal of Historical Sociology*, vol. 8, 223-256.

Reid, G., and T. Dursuweit, 2002, 'Understanding systemic violence: homophobic attacks in Johannesburg and its surrounds', *Urban Forum*, vol. 13.

Schoeman, E., 1999, 'Choice of Law and Legitimacy: Back to 1917?', *South African Law Journal*, vol. 116, 288-298.

'The Hague Conventions: Signatures, Ratifications, and Accessions in the Member States of the Southern African Development Community', 2002, 19 December, available at http://www.hcch.net/e/status/.

Yans-McLaughlin, V., (ed.), 1990, *Immigration Reconsidered: History, Sociology, and Politics*, Oxford University Press.

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