Contesting Liberal Legality: Informal Legal Cultures in Post-Apartheid South Africa's Privatizing Seafood Fishery

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Abstract: Constructivist interpretations of law as an open and contested social field whose form is contingent upon the outcome of interacting formal and informal socio-legal practices continue to illuminate how legal fields are formed and transformed. This essay uses these insights to shed light on how the legalities of informal fishers shaped and were shaped by a legal project of the post-apartheid South African state that sought to reconstruct fisheries regulation through a liberal language of individual, universal and abstract rights in living marine resources. Based on an ethnographic survey of informal socio-legal practices triggered by South Africa's transition to a neoliberal democracy in 1994, and a brief historical survey of colonial and apartheid forms of fisheries regulation, it argues that the post-apartheid rhetoric of liberal rights transforms without transcending prior cultures of fisheries regulation based on colonial violence and bureaucratic racism. Moreover, the legal claims of informal fishers to traditional (collective and territorially-specific) forms of access and control over coastal territories expose the dominant liberal rhetoric of individual fishers freely able to transcend historically structured hierarchies of race, class and gender as grounded in ongoing practices of violent dispossession and bureaucratic racism. In contrast to an ahistorical formal rhetoric of individualized rights and an abstract legal boundary between subsistence and commercial forms of fishing, informal fishers claim a political subjectivity as historically structured collectives of subordinated artisanal fishers forced to subsist in commercial territories as both unwaged subsistence producers and low-waged commercial workers.

The Informal sector is what was left out in the process of defining a bounded working class and integrating it into a process of regulation and surveillance by a state. The dichotomy formal-informal like that of market-non-market or modern-backward arose out of the struggles of a colonial state and labour movements trying to seize control of institutions and of discourse. Such labeling has its consequences: the irregular character of those who work without being workers provides an excuse for police harassment and bribe collecting.. Still one must not take the argument of the power of labeling too far: in much of Africa the informal or "second" economy is more dynamic and impossible for the state to control.[1]

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South African legal culture has had much experience of the accommodations between legalism and violence.[2]

POST-APARTHEID FISHING CONFLICTS

On September 26, 1996, two years after South Africa's first democratic elections, more than 500 legally unrecognized and criminalized fishers from the impoverished and racially segregated townships surrounding the City of Cape Town marched downtown to protest the persistence of apartheid rules for allocating, capturing and exporting fish and shellfish resources from the productive west coast of South Africa. They forcibly occupied a boardroom of the new parliament where apartheid-era judge Kotze was presiding over a meeting of mainly white, male Afrikaner bureaucrats, constituted as the Department of Sea Fisheries Quota Board, and held them hostage until the newly-elected African National Congress (ANC) Minister of Environmental Affairs and Tourism, Dr. Pallo Jordan, agreed to meet them. Marshaled by Informal Fishers Association chairperson Andy Johnston, they tore up hundreds of state-sanctioned permits to export high value fish and shellfish to mainly European, American and Asian commodity markets. As Johnston explains, "informal fishers had become disenchanted with the ability of the ANC government to change the corrupt, inhuman and bureaucratic apartheid fisheries policies and our actions on that day were part of a renewed defiance campaign, the scorched-sea campaign, to protest the continuation of legal practices that transformed the high protein fish food our poor coastal communities rely upon into paper. green paper.with a dollar sign on it."[3] Earlier in 1996, he continued,

I led more than 2000 informal fishers on a march to defy Sea Fisheries laws as inhuman and immoral since it criminalizes poor people fishing for food to feed their families. How can you justify laws that give rich people the right to extract and export tons of seafood to foreign countries at the expense of poor families who are forced to subsist from the sea? The bottom line is that the white-owned corporations constituted during the apartheid era are now collaborating with a new black elite to monopolize access to all sea resources. We understand that resources are not limitless, but we have no other option other than to continue the illegal harvesting of fish to feed poor families that were dispossessed and displaced to apartheid ghettoes.

The white-Afrikaner acting Sea Fisheries Director at that time, Rudi Laan, warned that "although Sea Fisheries was sympathetic to fishermen who have been suffering hardship over many years. violence and rape in whatever form is not an acceptable method of problem-solving [and] the existing regulations will continue to be enforced without fear or favor and transgressors will have to account for their actions in the usual way." He ironically concluded that "Mr. Johnson was a member of the government appointed Fishing Policy Development Committee and well placed to influence future fishing [whilst working with the law rather than against the law]."[4]

Seizing the moment, populist former ANC youth leader, the late Peter Mokaba, then Deputy Minister of Environmental Affairs and Tourism (DEAT), staged a televised debate to publicly expose the misery, ecological destruction and economic inequality that apartheid fishing practices had produced. This debate brought into sharp relief the different worldviews of populist politicians, poor fishers, professional scientists, and fisheries administrators. Whilst

populists demanded that the post-apartheid government redress apartheid era injustices by redistributing resources from corporate monopolies, professionals argued that the new ANC government's authority is limited to correcting racial imbalances by appointing representatives from racially marginalized groups to corporate boards in accordance with strict criteria of economic efficiency. Despite their differences, all participants expressed full confidence in the power of South Africa's liberal constitution, with its judicially enforceable bill of rights, to reconcile their opposing worldviews.

A historical reading of these post apartheid expectations of the power of law, and especially liberal legalism, to resolve fisheries conflicts in post-apartheid South Africa is at best contested. Situated within its historical context, law appears as an inextricable part of a long and ongoing social process that dispossessed, displaced, and now excludes informal fishers from the material resources upon which they depend for their livelihoods. Liberal governments of the Cape Colony used informal fishing practices to help construct and reproduce a class of freed slaves and indentured servants that acted as a buffer between masters and slaves. Apartheid laws, in turn, restructured this buffer class, mainly through a Coloured Labour Preference policy in mid-1950, as a racial category of territorially segregated workers in the then Cape Province of the apartheid republic. These apartheid-classified Coloured workers were legally recognized as subordinate to white settlers but superior to migrant black workers. Many of these workers were forced to subsist in inshore coastal territories that were increasingly being incorporated into commercial production and in order to survive they routinely had to poach resources, violently fight low-ranking paramilitary fisheries administrators, and often bribe low-paid court officials to accept high-value fish and shellfish in exchange for bureaucratic legal favors. Viewed from this subaltern perspective, the violent taking hostage of racist, corrupt and bureaucratic fisheries administrators becomes apparent as a counter to the legally structured and often silenced violence of dispossession, displacement and territorial segregation through which commercial fishing territories are produced, reproduced and regulated in Cape Town.

Yet, despite these historically structured inequalities, populist ANC legislators insist that the liberal post-apartheid constitution can produce a better life for all.[5] Buoyed by these promises in 1996 and their post-apartheid status as key voters in the electoral swing province of the Western Cape, informal fishers reconstituted themselves as an ANC aligned fisheries cooperative and helped an ANC-controlled national ministry appropriate the legal power to allocate fishing rights from a provincial government-controlled quota board.[6] Bureaucratic and corporate opposition to this populist legislative victory was swift and formidable. Almost immediately, bureaucratic fisheries functionaries including marine scientists, economists, and administrators challenged the legal authority of national legislators to manage marine resources. After successfully fending off this legal challenge, populist legislators faced a more formidable corporate challenge from a network of industrialized fish processing firms. This network systematically set about using employment dispute legislation to effectively lock out (from their private fish processing factories) all employees sympathetic to the populist ANC's legislative victory and pending redistributive actions. This led to a corporate stand off with unionized fishers that eventually forced populist ANC legislators to withdraw its redistributive fiat on the eve of a crucial provincial election in March 1998. As expected, the withdrawal

provoked a wave of popular protests that helped defeat the Western Cape ANC in a regional election later that year.

Rallying against this regional setback, the populist ANC legislators moved swiftly to proudly proclaim a new act, the Marine Living Resources Act of 1998, to a packed parliamentary gallery of informal fishers who celebrated this act as finally granting them legal control over the territories in which they subsisted.[7] However, this populist legislative victory was, once again, to prove short lived. In January 1999, a network of white controlled fishing firms, re-presenting themselves as new black-employee owned corporations, urgently petitioned a high court to rescind a ministerial decree redistributing 10-15 percent of commercial fishing rights on the grounds that it did not comply with apartheid-era legal formalities for allocating fishing rights. In a much anticipated ruling, an ANC-appointed judge, Dennis Davis, bluntly ruled that the minister's administrative fiat was invalid since it violated rules for the transition from apartheid to democratic fishing practices.[8] Judge Davis's formalistic and terse ruling paralyzed all further legislative attempts to transform commercial fisheries production and signaled a shift in the post-apartheid state's redistributive rhetoric to a corporate friendly, techno-economic and universalistic rhetoric of individual and tradable rights.[9]

This shift from rhetoric of redistribution to a techno-econometric discourse on private, individual and tradable rights, eventually dissolved the populist ANC-led alliance with informal fishers, which then bifurcated into two main groups: an individualistic elite who opted to adopt state schema that classified them as "black-empowered" entrepreneurs and a populist collective that rejected individual rights in favor of more communal forms of access and tenure. The entrepreneurial elite used the state's rhetoric of individual fishing rights to redefine themselves as new entrants freely able to engage in joint ventures with established corporate fishing monopolies and only challenged the dominant legality as insiders.[10] The populist fishworkers rejected the dominant legality since it did not recognize their collective agency as members of dispossessed communities subordinated within commercial territories. They continue to claim that communities dispossessed from their traditional territories have a preferential right to access these mainly inshore fishing zones and use a range of legal actions, political petitions, public protests and media campaigns in support of this claim.[11]

The persistence of these pluralistic claims and socio-legal practices suggest that liberal legal schema of individual rights are not adequate to represent the range of relations, claims and legalities in South Africa's post-apartheid fisheries. In what follows, I explore how the concept of plural legalities helps us better understand the ability of a liberal legal field to regulate postcolonial relations of fisheries production during the post-apartheid period.[12] More specifically, I explore how the legal practices of informal or subsistence fishers helped form and transform a liberal legal project of the post-apartheid South African state that set out to formalize individualized and universal fishing rights as the common-sense basis on which to authoritatively resolve historically structured social conflicts between commercial and subsistence modes of fishing.

PLURAL LEGALITIES IN POSTCOLONIAL FIELDS

The ability of liberal legalism and its associated ideology of individual rights to authoritatively regulate the polarized social relations that postcolonial processes of economic development produce continue to spark intense debate in post-apartheid South Africa.[13] Whilst some scholars argue that liberal legality is the only viable antidote against the racial, spatial and economic hierarchies upon which postcolonial relations of production rest, others argue that a culture of legality forges an impression that law, like money, acts as a universal standard that can facilitate the negotiation of incommensurables across historically structured differences and otherwise intransitive boundaries.[14] Advocates of a liberal jurisprudence suggest that it could "civilize the bitter political conflicts which up till now have tended to degenerate into violent confrontation" and build a post-apartheid civility free of the violent ethno-nationalisms that apartheid-era development relied upon.[15] Critics suggest that the much celebrated South African constitution allows the state to represent itself as the custodian of civility against disorder whilst guaranteeing neither a means of survival nor the right to earn or produce.[16]

In accord with constructivist interpretations, the power of law to resolve social conflicts is considered contingent upon its ability to authoritatively represent the juridical settlement of social conflicts as a taken for granted reality or common sense set of discursive practices with no self-evident or reasonable alternative.[17] From this worldview, legality is "not only [material] practice and process, but also [symbolic] discourse, code and communication" and social order is no longer the inevitable or desirable result of a single regulatory act.[18] Instead, the power of law is contingent upon the extent to which dominant legal actors are able to authoritatively silence the oppositional, subordinate or counter legalities that their actions produce. In accord with Boa Santos, I suggest that the concept of interacting plural legalities or interlegality best describes the asynchronous legalities that asymmetric social interactions produce. In this pluralistic view, the stability of a dominant legality is contingent upon the extent to which it is able to appropriate and subordinate the counter legalities it produces more than the legitimacy of a pre-selected and self-enforcing legal norm or rule.[19] Richard Wilson convincingly argues that formal legality appropriates its counter legalities in non-linear movements and moves through oscillating, centralizing and pluralizing moments rather than successive stages of progressive development.[20] The idea of an oscillating legal field constructed through interacting plural legalities, I suggest, is echoed in Martin Chanock's conceptualization of South African legal culture as a plurality of discourses about law that "do not exist in isolation from each other . draw upon each other, sometimes critically and sometimes affirmatively. and are set in broader political and social discourses of the state and society."[21]

John Comaroff extends these insights when he argues that the power of law to re-present reality in ways that "plausibly appear to be reality itself" becomes visible only when local, micro-scale practices are resituated in their macro-scale historical contexts.[22] Building on his insight, I attempt to situate the localized legalities of informal fishers in their macro-scale or transnational historical context. Following Ewick and Silbey, I restrict the term "law" to refer to those socio-legal practices commonly recognized as formalized or official and use "legality" to reference a broader ensemble of cultural practices regardless whether they originate from official or unofficial sources. [23] Such a distinction avoids the analytical false binary between

formal and informal legalities that represents law or formal socio-legal practices as unconnected and diametrically opposed to informal socio-legal practices.[24] Moreover, it allows a productive focus on how law produces and is produced by the informal legalities it generates and how such interactions become structured as a specific regulatory field through situated encounters between formal and informal actors. From this pluralistic and interactive perspective, the legalities of informal fishers are constitutive of fisheries law as the formalized legal practices regulating fisheries production. Stated differently, the legal field regulating post-apartheid fisheries production is the outcome of interactions between formal and informal legal practices, values and schemas in historically specific states or conditions-of-existence. Moreover, the authority of law as formal legal practices is contingent upon the extent to which it can appropriate the legitimacy attached to the more familiar informal practices. As Ewick and Silbey note, "by applying schemas from one setting in another, people are able to make familiar what may be new and strange; moreover they appropriate the legitimacy attached to the familiar to authorize the unconventional."[25]

Ewick and Silbey's insight echoes feminist interpretations of how patriarchal power becomes normalized by appropriating hierarchical classifications of nature that have become common sense or naturalized.[26] In this view patriarchal power is legitimated through interpretive schema and discursive practices that associate women with nature and can, under certain conditions of existence, colonize the consciousness of westernized women. As John Comaroff insists, however, hierarchies of power usually work paradoxically and law is only temporarily able to appropriate its informal subordinate legalities and transmute these historically structured differences into a universal sameness. Colonial states, he continues, simultaneously reproduce and undermine their own hierarchically structured conditions of existence since "at the same time as they [speak] of transforming colonized peoples into civilized i.e. modern free, right-bearing citizens. they [deal] in heterogeneity by naturalizing ethnic difference and essentialising racial inequality."[27] This foundational contradiction means that the teleology of colonial governance always pointed toward a secular citizenship while its reality fostered a racinated world of ethnic subjection and autonomous cultural groups. For June Nash, this paradox of colonial existence is embodied in contemporary survivalist struggles of colonized and these dispossessed subsistence producers are organizing their struggles in the languages of human, ecological and cultural insecurity rather than formalized idioms of legal rights.[28]

Against this theoretical background, the essay shifts to tracing the plurality of languages, historical moments and social movements through which a subordinate collective of informal and localized fishers produced an ensemble of informal legalities in response to a state project aimed at reframing and regulating post-apartheid fisheries conflicts through a formal discourse of liberal legal rights.

POST-APARTHEID FISHERIES AS TRANSLOCAL ENCLAVES OF COMMODITY PRODUCTION

Historical studies of commercialized territories in postcolonial polities such as South Africa suggest that they are constituted through translocal forces that sometimes work with, other

times against, and often in the shadow of the law in order to effect political, economic and cultural domination of local social formations. These forces dislocate local social connections, appropriate local cultural practices and subordinate local territories within transnational networks of commercial production in forms that appear disconnected from its translocal origins.[29] Moreover, translocal political, economic and cultural forces work together to rhetorically and bureaucratically authorize the deliberate violence necessary to dislocate localized social relations and produce a class of dispossessed local producers that are unable to subsist except through engaging in exploitative commercial relations of production. In these translocalized territories, where "capital no longer needs to pay for the reproduction of labour power," social relations and networks are governed less by state and inter-state processes than the unaccountable practices of intra-firm and inter-firm polities of joint corporate-state power.[30] These polities organize translocalized territories through a diversity of regulatory practices in a "polymorphic territoriality [of] multiple institutional and regulatory forms at sub and supra regional geographical scales" in order to produce stable enclaves where local social relations are dislocated from those in the rest of the national territory but positively articulated with transnational economies.[31] Historically, the deliberate disconnection, dislocation and subordination of local social relations to translocal economic forces required the periodic collaboration of unaccountable para-military groups, inter-firm economic networks and despotic local cultural formations, often acting as private proxies of the state.

Since the late 1980's in Africa, local social conflicts in transnational enclaves producing agricultural commodities have increasingly been subjected to the structural adjustment programs imposed by global bureaucracies like the World Bank, the International Monetary Fund and the World Trade Organization.[32] In most enclaves of commodity production these processes have over time structured distinctive, contract-labour markets that both replaced open-market exchanges and contractually bound local producers to centralized processors and purchasing units. These export-orientated contract markets have allowed transnational commercial contractors to impose production practices, price, and credit in advance of actual production, and at the expense of the subsistence needs of local producers and ecosystems, especially in negatively developing countries.[33]

In concert with these worldviews on the role of translocal forces of production on local social relations and practices, the remainder of this essay sets out to identify the plurality of local and transnational legalities reshaping commercial fisheries production in the post-apartheid South African postcolony. In modernist histories, "succession is supercession, [and] where to be forward in time is to have a consciousness and awareness superior to those behind in time."[34] This essay takes a contrasting position that traces the trajectory of the legal field regulating fisheries production as a dynamic constellation of three idealized types of legalities, each legality in a hierarchal relation with the other two ideal types:

- Violent legalities structured by colonial practices that dispossessed, dislocated and dominated subsistence fishers;
- Bureaucratic legalities structured by apartheid practices that racially and territorially segregated subsistence fishers;

- Rhetorical legalities structured by liberal narratives of free markets, flexible labour and individual rights for subsistence fishers.

THE VIOLENT LEGALITIES OF COLONIAL PRODUCTION

Following postcolonial scholar Patrica Tuitt, the opening story of this essay can be framed as an insurgent collective of dislocated subsistence producers engaged in unsanctioned acts of violence and a rhetoric of social justice to counter the legal violence that structured their colonial state-of-existence. In this view, the unsanctioned or informal violence acts as a counter to bring a law "suffused in violence" and its bureaucratic administrators, judges, and commercial benefactors into congruence with claims of social justice.

More specifically, the opening story suggests that contemporary acts of informal violence in post-apartheid fisheries are historically justified as counter claims to the colonial violence of genocide, ethnocide and ecocide that subordinated pre-colonial territories of subsistence to translocal commodity markets centered on metropolitan Cape Town. Historiographies of colonial dispossession at the Cape confirm this perspective and trace how European merchants and settlers violently used law to dispossess native peoples of the communally organized territories on which they relied for subsistence and social reproduction.[35] These ethnographic, archival and archeological studies offer evidence of remnant slave-forts, jails and fortified commercial trading posts as indicative of the "colonial-capitalist" violence upon which extractive enterprises such as commercial fishing are founded. Robert Ross recounts how Portuguese looting of the Cape commons in the 1500's continued until the killing of the Portuguese admiral Francisco de Almeida in Table Bay by the indigenous Khoi-San. According to Ross, native resistance to freely provision mercantilist traders with food, firewood and water was only subdued when the premier corporation of the colonial seventeenth century, the Dutch VOC, financed a series of genocidal land wars to extirpate the native Khoi-San. In the wake of its bloody victory, the VOC granted Dutch burghers and Protestant French refugees who had settled at the Cape the legal rights to control dispossessed land, coerce labor, and oversee the transfer of profits to European commercial markets.[36] These records include eyewitness testimony by a Dutch VOC soldier, Otto Mentzel, of the systematic public beatings, executions and torture of slaves and captive laborers unable to meet the VOC's production quota.[37] This violent looting and systematic transfer of economic wealth from colonial Africa financed European industrialization and, more importantly, created the despotic and bureaucratic administrative structures that continue to regulate contemporary relations of commercial production in African enclaves. They produced a class of subservient local elites that collaborate with translocal colonizers to conceal the violence of colonial extraction under an authorizing rhetoric of civilizing native peoples.[38] As Timothy Keegan explains, Dutch colonialism created a triple alliance of free burghers, slaves and native Khoi as an authorizing legal hierarchy that would form the basis of a subsequent racial order, "which in its fundamentals was unaffected by the jettisoning of legal foundations of inequality in the 1820s and 1830s."[39]

At the dawn of the nineteenth century, the scramble for more territories, cheap labour and raw materials by an industrializing Europe intensified and the colonization of African territories dramatically escalated.[40] At the Cape, British merchants unleashed a tidal wave of capital investments after Britain's victory in the Napoleonic wars in order to finance the construction of

ports, mines, mechanized ships and factories through which to extract profits more rapidly.[41] In the fishing industry, this commercial impulse transformed local catches of linefish and cape barracuda or *snoek* into a commodity for export to Mauritius as reliable and cheap food for slaves working the sugar plantations recently seized from French colonists.[42] Ironically, the cultural stigma of *snoek* as slave food has helped it survive as a contemporary staple for dispossessed agricultural and industrial workers living around metropolitan Cape Town.[43] The subordinate integration of the Cape into the victorious British empire and the arrival of an entrepreneurial class of English settlers in 1820 at the eastern Cape created a brief but unstable alliance between mercantile and humanitarian interests fuelled by "visions of a society built on free contract rather than on hierarchies of legal status, rights and privileges."[44]

Hostilities between the feudalistic Dutch and entrepreneurial English settlers faded, however, as an association of entrepreneurial elites embarked upon systematic land wars to enslave conquered natives on wine plantations, wool farms and, later, diamond and gold mines.[45] The process of capital accumulation through colonial plunder, or colonial-capitalism, peaked in 1893 when, as Keegan describes, British imperialism under the sway of free trade capitalism awakened to the fabulous deposits of gold and diamonds in the interior of the colony. This scramble for mineral wealth created a need for cheap and reliable industrial food and marked the onset of commercial fishing at the Cape as a combination of mechanized fish trawling and centralized administrative practices.[46] The colonial state, Van Sittert argues, under guise of the bureaucratic Wolfe commission of 1892, prohibited all local competition with metropolitan trawling interests, rescinded ecological restrictions on pelagic fishing, consolidated sea territories along the Cape coast into a regional market, and demonized unwaged subsistence fishermen as uncivilized, lazy and primitive. This rapid mechanization of commercial trawling was so intense that a local corporate monopoly, Irvin and Johnson, reported a collapse of pelagic fish stock in False Bay after only twenty-six years. Moreover, False Bay's ecological collapse triggered the ecological plunder and economic enclosure of adjoining coastal bays: at Hout Bay in 1903, when a British-owned crayfish-canning company restricted local resale of crustaceans; and at Saldahna Bay in 1918 when the British-owned Oceana Corporation was exclusively permitted to exploit shoals of pelagic anchovy and pilchards.[47]

This brief historical survey of socio-legal practices at the colonial Cape makes legible the violent legalities through which commercial fishing territories are produced and reproduced. The colonial conquest and commodification of communal fishing territories at the Cape required violent socio-legal schema in order to subordinate localized subsistence practices to transnational commercial economies. As evident from the current conflict described here, these violent relations in contemporary fisheries production persist and are now fuelling new, neoliberal forms of legal violence that subordinate all remnants of self-reproducing subsistence production to the shibboleth of a self-regulating and global free market.

THE BUREAUCRATIC LEGALITIES OF APARTHEID PRODUCTION

The formalizing of racist fisheries practices can be traced to a suite of administrative reforms in the 1940's that white supremacists initiated to secure access and control over lucrative shellfish and trawled whitefish markets. Emboldened by their electoral victory in 1943,

entrepreneurial Afrikaner elite from the Cape organized an apartheid state-owned company, the Fisheries Development Corporation (FDC) to challenge Anglo-owned fishing monopolies for control of these lucrative export and domestic markets.[48] As FDC chairman S. Skaife remembers, the proposed reforms were intended to "skim off profits" from the profitable Anglo-owned whitefish trawling sector for redistribution to a poor white Afrikaner working class still reeling from the devastating Anglo-Boer war. After the corporate defeat of its reforms, the apartheid state brokered a deal that gave an Afrikaner elite access to the less profitable pelagic, fishmeal-processing industry at St. Helena Bay in exchange for corporate exemption from all trawling regulations. Whilst this deal laid the basis for incorporating an Afrikaner elite into the commercial fisheries, it also reduced the regulatory power of the Afrikaner-led state to an annual bureaucratic ritual of allocating fishing rights to corporate monopolies and justifying this ritual with an abstract rhetoric of scientific fisheries management.

The collusion of an Afrikaner elite with Anglo-owned fishing corporations continued until a wave of anti-apartheid rebellion swept through South Africa's peri-urban labour reserves: Sharpeville in 1960, Soweto in 1976 and the Cape Flats in 1985. Sampie Terreblanche argues that the Soweto uprising of 1976 not only precipitated the overthrow of the racist white regime but also produced profound shifts towards new forms of social exclusion based on casual labour, structural unemployment and abject poverty. Stephen Ellis characterizes the pariah apartheid state during the mid-1980s as a militarized garrison for the private, illegitimate, and wholesale looting and export of local resources. In its death throes, lucrative contracts lured many of the apartheid state's administrators to become covert paramilitary police and corrupt smugglers of illicit weapons, ivory and high-value fish to shadow states. In a final attempt to re-impose bureaucratic control over commercial fisheries production, the destabilized apartheid state in 1988 staged a series of legislative performances that culminated in the enactment of a troubled fisheries quota board.[49] However, these legislative acts, like their predecessors in 1943, were subordinated to the commercial power of an alliance of transnational fishing corporations and local political elite. By the early 1990's, the bureaucratic apartheid state had lost all effective control over commercial fishing territories as a rhetoric of free-market-led production, deregulated trade, privatized access rights, and flexible labour markets was being imposed worldwide. In response, transnational corporations began deregulating employment conditions by offering low-wage employees market-related incentives such as share-options, management positions, and appointments on corporate boards.[50] Such workplace-based programs of incorporation into corporate schema further excluded informal workers and itinerant contract producers who, in turn, rallied around a rhetoric of social justice and equitable redistribution of resources.

THE RHETORICAL LEGALITIES OF FLEXIBLE PRODUCTION

When the ANC took political office in 1994, it encountered a commercial fishery well on the way to inclusion in a market-based world economy through a neoliberal rhetoric of private rights to property, self-regulating commercial markets, and flexible labour markets. That trajectory contrasted sharply with the ANC rhetoric of redistribution that animated its base of subordinated working peoples. In fisheries policy debates, this contradiction surfaced as tension

between collectively organized forms of subsistence production and the individualized appropriation of commercial fishing profits. The former approach argued that fisheries development is best organized through equitable redistribution of fishing rights to producer collectives of subordinated people whilst the later claimed that stable economic growth depended on creating individualized and transferable private property rights in fish.[51] The analysis here explores how this paradoxical rhetoric of the post-apartheid state was articulated by informal fish-workers.

The opening story of micro-conflict shows how in 1994, populist ANC legislators set out to construct fisheries as a site for socio-legal reform. In an attempt to break with a violent, racist and bureaucratic past that criminalized their subordinated supporters, they set out to legislate the redistribution of fishing resources as restitution for past dispossession and displacement and bring the coastal commons under government control. To this effect, the ANC-led state initiated a project to reincorporate subordinated producers into state-controlled regulatory schema.[52] This project brought to light the conflicting political claims of subordinate groups that ranged from claims by informal producers for redistribution to the relatively narrower, workplace-related claims of formally organized factory workers. It produced an unlikely alliance between a local political elite, transnational traders, established fishing factory bosses, and organized labour in an attempt to stabilize commercial fisheries through a techno-economic rhetoric of fishing rights, flexible labour markets and joint economic ventures. The main legal project of this alliance was to reconfigure subordinate political subjectivities as juridical categories of "Black empowered entrepreneurs."[53] In response, informal producers embarked on mobilizing an alternate rhetoric to validate their claims for redistribution of fisheries benefits from the established corporate monopolies to marginalized producers. They appropriated the human, social and environmental protection discourses encoded in international treaties on responsible fishing practices and assailed the nationalist ANC for failing to recognize their cultural rights as artisanal fishers to collectively access inshore territories as the material base for their traditional livelihoods. The populist ANC legislators in turn countered with a rhetoric that their legislative acts would decisively break with an apartheid past that forced informal fishers to sell their catch to a monopoly of five big companies and allow them to participate in an essentially privatized commercial fishery.[54]

At the start of the 1999 season, the ANC made good on their rhetoric and allocated more than 400 tons of high value shellfish and whitefish to informal producers now restructured as the commercially registered and publicly traded South African Commercial Fishermens Company Ltd (SACFC), comprising more than 2000 members organized in twenty-five regional production co-operatives under the control of a holding company with assets in excess of three million rand.[55] The SACFC, however, soon became mired in conflicts between the member co-operatives and a rapidly bureaucratizing executive that, three years later, led to the violent separation of a corporatist executive from its social base of subordinated producer cooperatives.[56] More devastating to the ANC's legal victory was a campaign launched by a corporate alliance of more than sixty white factory bosses that effectively locked out unionized employees from their workplaces, left long-suffering subsistence producers without an income, and effectively halved commercial fisheries production during the 1998-1999 fishing season.

At this crucial point, the Cape High Court took a pivotal role in legally repressing the redistributive agenda of populist legislators when the ANC-appointed Judge Dennis Davis ruled that since apartheid-era legal formalities still applied, the ANC's decree to redistribute 10-15 percent of the commercial quota was formally invalid. This terse ruling paralyzed all further populist attempts to legislate fisheries reforms and stabilized the stage for further exclusion of subsistence fishers through a techno-economic rhetoric of economic efficiency, free trade and neo-liberal markets.[57]

In its wake, a now restructured ANC fisheries administration finally concluded a free trade agreement in February 2002 with the European Union trade commissioner, Pascal Lamy, that would eventually allow foreign-based, transnational fishing corporations indirect access to South African fisheries in exchange for continued access by South African fruit and wine exporters to European commodity markets. In terms of this agreement, foreign fishing companies could indirectly access South Africa's territorial waters through joint ventures with local political elites.[58]

With the judicial defeat of populist legislation in1998, workplace stabilization through the incorporation of organized labour movements, and the transnational economic pressure for free trade agreements, the ANC controlled fisheries administration opted in 2001 to formalize its regulation of commercial fisheries through a techno-economic rhetoric of liberal rights, free markets and free trade. The hegemony of this liberal rhetoric, however, remains contingent on whether it can silently incorporate the lived political experiences and historical consciousness of informal and subordinate fishers.

CONCLUSION: THE LEGAL FIELD REGULATING POST-APARTHEID FISHERIES PRODUCTION

Rather than assume that state sanctioned legal projects are self-enforcing, this essay has argued that their social effects are contingent upon an unresolved struggle between disparate social formations to reconfigure the historically structured socio-legal field in which state projects are located. From this perspective, present state projects are generated as much from past legalities of colonial violence and bureaucratic racism as from a contemporary and still ambiguous rhetoric of individual and collective rights. Specifically, the analysis here suggests that the post-apartheid legal field regulating fisheries production is a dynamic constellation of abstract rhetorical legalities and repressed, bureaucratic and violent legalities. Finally, informal fishers are challenging these abstract representations of their legal subjectivity as either pre-colonial subsistence-fishers, "black empowered" petty traders and the new entrants into commercial fisheries by re-presenting themselves as victims of violent dispossession, bureaucratic administrative practices and economic exclusion.

Notes:

1. Cooper, p. 466.
2. Chanock, p. 514.
3. Personal interview with Andrew Johnston at his home in Fairways, Cape Town on July 2004.

4. *Cape Argus* 16 January 1996.
5. ANC Reconstruction and Development Program 1994:104.
6. RSA Marine Living Resources Bill of 1997.
7. *Cape Argus*, 24 March 1998.
8. Langklip Seeprodukte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others (1994), (4) SA 734(C).
9. Department of Environmental Affairs and Tourism Fisheries Management 2001-2004.
10. Bato Star (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 CC.
11. Andrew Johnston interview 2002; *Noseweek* no. 58.
12. Ethnographic information for this study was obtained from a variety of primary and secondary sources of fishery related data over the decade since South Africa's political transition in 1994. Direct data was obtained as an elected representative for informal fishers in a post-apartheid government inquiry into subsistence practices in 1997, a witness to a wave of public protests against pro-privatization government polices since 1999 and most recently as part of a pro bono public interest legal team supporting artisanal producers legal challenge against the government's privatization policies. During those periods, I interacted with and interviewed more than 50 key informants: including 10 fisheries administrators, 5 corporate executives, 25 women and men informal producers and petty traders, 5 unionized fish processors 5 marine scientists and geographers, 3 high court judges, 10 ANC and 5 opposition party legislators and 2 public interest lawyers. Secondary sources include materials from official and informal archives of academic journals and popular newspapers.
13. Regulation, following Boa Santos, is the antithesis of emancipation and refers to a historically structured and socially situated ensemble of socio-cultural practices, ideas and values aimed at the reconstructive management of the excesses and deficits of modernity through three, semi-autonomous principles of the state, market and community. The role of regulation in contemporary societies, according to Santos, is to guarantee the scientific and technical management of society through the juridical depoliticization of social conflict and social rebellion. Polarization, following Manuel Castells (2000: 68) is used here to refer to the "specific process of inequality that occurs when both the top and bottom of the scale of income or wealth distribution grow faster than the middle, thus shrinking the middle, and sharpening the social differences between the extremes segments of the population." Following Eve Darian-Smith and Peter Fitzpatrick (1999) the term postcolonial refers to a category of persons subject to historical processes of colonial rule that paradoxically represents their identities as inassimilable yet demands their political incorporation as emergent Western or European subjects. In the result, they argue the identity of the postcolonial is ever unresolved and the postcolonial condition exists as an ambivalent belonging to the West and, I emphasize, Western ideological and material practices that separate human from non-human nature. Comaroff & Comaroff 2004; Ellis; Bond 2002 & 2004; Cheru 2001; Moore ; Klug; Wilson; Carmody ; Desai; Terreblanche.
14. See, for example, Klug for a proponent of legal liability, while Comaroff and Comaroff (2004) argue that such an approach poses as a supposed universal standard.

15. Klug, p. 5.
16. Comaroff and Comaroff (2004).
17. Lazarus-Black and Hirsh: Silbey; Sarat and Kearns; Ewick and Silbey; Santos; Sarat and Simons (2003).
18. Lazarus-Black and Hirsh, p. 5
19. For Boa Santos interlegality is the phenomenological counterpart of legal pluralism and a highly dynamic process produced through the unstable mixings of non-synchronic legal codes.
20. Wilson.
21. Chanock, p. 23.
22. Comaroff (1994).
23. Ewick and Silbey (p. 45) distinguish at least three ideal-types of legality: "conformity *before* the law","engagement *with* the law," and "resistance *against* the law."
24. In accord with Robert Biel, informal practices refer here to the many formally unrecognized and often even criminalized social practices through which those who are alienated from the products and places they produce struggle to transform the social hierarchies authorizing that alienation. For Biel, the durability of social hierarchies depends on how the various social agencies reproduce and transform those symbolic and material state practices that differentiate them.
25. Ewick and Silbey, p. 40.
26. Merchant; Mies.
27. John Comaroff (2001), p. 46.
28. Nash.
29. Santos; Hoogeveldt; Castells; Sassen; Dicken.
30. Hoogeveldt, p. 113; Snyder.
31. Mbembe; see also Roitman.
32. Watts.
33. Chossudovsky.
34. Korang.
35. Van Sittert (2003), Jaffe, Ross, Lees, and Worden et al.
36. Ross, pp. 20-23.
37. Quoted in Guelke and Shell, p. 819.
38. Williams; Rodney.
39. Keegan, p. 281.
40. Pakenham.
41. Jaffe.
42. Van Sittert (1992).
43. Lees.
44. Keegan, p. 281.
45. Jaffe.
46. Van Sittert (1992).
47. Stibbe and Moss, p. 62.
48. Van Sittert (2002).

49. Glazeskwi.
50. Von Holdt.
51. RSA Fisheries White Paper (1998).
52. Martin & Nielsen.
53. Employment Equity Act 1998; Promotion of Equality and Unfair Discrimination Act 2000.
54. The five companies were: Irving and Johnson Ltd (est. 1912), Marine Products (est.1942), Premier Fishing (19??), Sea Harvest (1960?) and Oceana Fishing Group Ltd (est. 1918). For the legislation, see RSA Debates of the National Assembly, 1998: 899.
55. SACFC Registered Number 97/101276/07. *Cape Argus*, 24 March 1998.
56. *Cape Times*, 3 August 2000.
57. CBN Archive June 1999; *Out to Sea in Earnest*.
58. O'Riordan.

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