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Legal consciousness and dissent: The formal and informal regulation of foreign shopkeepers in South Africa

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Abstract

Many foreign shopkeepers have opened small businesses in South Africa's township neighbourhoods since the advent of democracy in 1994. Over the years they have encountered animosity from competing South African traders, many of whom have incited xenophobic attacks, and mobilised to curb their businesses. This paper draws on field research on Somali shopkeepers in Cape Town to understand the legal consciousness of parties involved in regulatory efforts to curtail foreign small businesses. It finds that local level regulation reflects a narrative of "parallel to the law", while national level events mirror Halliday and Bronwyn Morgan's (2013) narrative of "dissenting collectivism". However, in this case, parties were targeting progressive laws protecting vulnerable groups rather than laws favouring the elite, and dissent frequently involved cooperation with rather than opposition to the state. Counter-hegemonic action can therefore manifest differently in contexts of rising populism and weakening adherence to human rights principles and values.

Key words

Legal consciousness; legal hegemony; migration; informality

Resumen

Muchos comerciantes extranjeros han abierto pequeños negocios en los barrios de los townships sudafricanos desde la llegada de la democracia en 1994. A lo largo de los años se han enfrentado a la animadversión de los comerciantes sudafricanos de la competencia, muchos de los cuales han incitado a ataques xenófobos, y se han movilizado para frenar sus negocios. Este artículo se basa en una investigación de campo

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sobre los comerciantes somalíes de Ciudad del Cabo para comprender la conciencia jurídica de las partes implicadas en los esfuerzos reguladores para restringir el pequeño comercio extranjero. Se constata que la regulación a nivel local refleja una narrativa "paralela al derecho", mientras que los acontecimientos a nivel nacional reflejan la narrativa del "colectivismo disidente" de Halliday y Bronwyn Morgan (2013). Sin embargo, en este caso, los partidos tenían como objetivo leyes progresistas que protegían a los grupos vulnerables en lugar de leyes que favorecían a la élite, y la disidencia a menudo implicaba cooperación con el Estado en lugar de oposición a él. Por lo tanto, la acción contrahegemónica puede manifestarse de forma diferente en contextos de creciente populismo y debilitamiento de la adhesión a los principios y valores de los derechos humanos.

Palabras clave

Conciencia jurídica; hegemonía jurídica; migración; informalidad

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1. Introduction

Global shifts towards populism and the erosion of democratic and inclusive human rights-based principles have not eluded the Global South. Since the advent of democracy in the mid-1990s, xenophobic sentiment has become an increasing feature of both local grassroots and state politics in South Africa (Landau 2011, Crush *et al.* 2015, Misago 2019a, 2019b, Gastrow 2022). Citizens in the country have frequently expressed their anger towards immigrants by participating in violent xenophobic mob attacks. These attacks usually occur in low-income township neighbourhoods and involve expulsions of foreigners from their homes and the destruction of their shops and businesses (Landau 2011, Crush *et al.* 2015). At times, uncontained anti-immigrant riots have escalated to become provincial and national level crises. For example, in 2008 South Africa experienced nation-wide xenophobic attacks, which resulted in the deaths of at least 60 people and the displacement of more than one hundred thousand people across the country. In recent times xenophobic sentiment has manifested in the emergence of Operation Dudula (isiZulu for "push back"), a vigilante movement whose members' target immigrants with harassment and intimidation under the stated aim of protecting South Africans from illegal immigration (Wroughton 2022, Peralta 2022).

One of the outcomes of acute levels of xenophobic sentiment in post-apartheid South Africa is widespread hostility towards foreign-owned small businesses in low-income township neighbourhoods in the country, especially among competing South African retailers. This has led South African retailers associations, community representatives, political leaders, and government officials to aggressively campaign to curtail the ability of asylum seekers and refugees to operate small businesses in the country (Rogerson 2015, Crush, Skinner and Stulgaitis 2017, Gastrow 2022).

State and non-state actors have responded to mobilisations against foreign traders and threats of xenophobic attacks on their shops, by seeking to find ways to constrain foreign-owned small business activities. These efforts often reveal a disenchantment with state law and constitutional principles, and a preference for expedient extra-legal interventions to reduce local hostility. For example, in Cape Town, parties ranging from community leaders, NGOs, the UNHCR, to state officials supported the establishment of informal neighbourhood rules prohibiting foreign nationals from opening new informal grocery (or "spaza" shops) in many of the city's township (Gastrow with Amit 2015). State interventions such as police operations targeting foreign retailers often also breach formal laws (*Somali Association of South Africa* case 2014, Gastrow with Amit 2015). Furthermore, state departments frequently publish draft bills, only to abandon them due to their overt unworkability or unconstitutionality. Sometimes laws are passed, but not enforced in practice, leaving asylum seekers and refugees confused about what the content of laws really are.

Regulatory attempts to curtail foreign-owned small businesses in the country therefore call for an investigation into the legal consciousness of the parties involved. In particular, there is a need to explore how individuals think about, navigate, sustain, and challenge laws in contexts of legal pluralism and devolved power. This paper draws on Patricia Ewick and Susan S. Silbey's three narratives of legal consciousness (1998), as well as Simon Halliday and Bronwen Morgan's narrative of "dissenting collectivism" (2013) to analyse the legal consciousnesses of parties attempting to curtail foreign-owned small

businesses in South Africa. It suggests that in addition to "dissenting collectivism" local informal governance strategies reflect a consciousness of "parallel to the law" that also undermines legal hegemony. However, these forms of resistance do not necessarily produce more just, fair, or equal outcomes.

The paper relies on previous qualitative research on foreign spaza shopkeepers' experiences of formal and informal justice and governance systems in Cape Town. It also refers to media reports, legislation, and press releases to supplement the primary data and analyse national political level trends and sentiments of senior political leaders.

2. Legal consciousness theory

The concept of legal consciousness emerged as a theoretical and empirical field of research and thought in 1980s and 1990s and has been defined in many different ways. In an early definition Sally Engle Merry defines legal consciousness as "the ways law is experienced and understood by ordinary citizens" (Merry 1985). She later expands this definition to include not just how people experience law, but also how they actively "use law". She emphasises that "[c]onsciousness, as I am using the term, is the way people conceive of the 'natural' and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world" (Merry 1990, p. 5). This is reflected in Kathryne M. Young and Katie R. Billings' definition of legal consciousness as "a person's attitudes toward, willingness to mobilize, suppositions about, and experiences of the law" (2020, p. 34).

Later definitions go further to highlight that legal consciousness is not simply a matter of subjective experience and individual behaviour, but operates on a collective level too (Halliday and Morgan 2013, p. 4). Ewick and Silbey state that legal consciousness entails "both individual and collective participation in the process of constructing legality" (Ewick and Silbey 1998, p. 84). By legality they mean looking beyond simply official laws to other practices and normative orders that are viewed as legal by ordinary people irrespective of their status in formal law (Silbey 2005, p. 347, Halliday and Morgan 2013, p. 4).

Early studies of legal consciousness sought to understand how legal hegemony maintains its power despite law's repeated failure to live up to its lofty ideals. In other words, legal consciousness asked: "Why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality?" (Silbey 2005, p. 323). Later studies have diversified their focus. Lynette J. Chua and David M. Engel (2019) identify three areas of legal consciousness studies, which they call "Identity, Hegemony, and Mobilization". The studies falling under the identity school examine how identity shapes people's understanding of law without any further inquiry into hegemony. Those belonging to the mobilisation school explore how legal consciousness influences the ways in which people deploy rights in their pursuit of justice. They state that in this school "The researchers' central concern is not to document law's dominance but to explore the circumstances under which people deploy the law to protect their interests" (Chua and Engel 2019, pp. 9–10). Simon Halliday (2019) argues that legal consciousness research has become a diverse school of thought encompassing four different approaches, namely a "critical approach", an "interpretive approach", a

"comparative cultural approach", and a "law-in-action approach". Only studies falling within a "critical" approach are primarily concerned with legal hegemony.

This study falls within Chua and Engel's (2019) "hegemony" school and Halliday's "critical" school of legal consciousness in that it seeks to study legal consciousness to understand the workings of legal hegemony in South Africa today. Many studies analysing legal consciousness' relationship with legal hegemony have relied on a pivotal framework provided by Ewick and Silbey in their 1998 book *The Common Place of Law*. In their book, the authors put forward three narratives that ordinary people tend to hold of legality, namely "before the law", "with the law", and "against the law". They state that these narratives are not mutually exclusive as they operate "much like a braided plait" (Ewick and Silbey 2002, p. 156) with respondents being able to simultaneously reflect two or more narratives of legality in interviews. Those standing "before the law" see legality as "external, unified, and objective" (Ewick and Silbey 1998, p. 113). Individuals perceive the law as fair, impartial, and majestic and submit themselves to its rules and processes. Those reflecting a "with the law" consciousness view law as a cynical game to be used and manipulated to one's advantage. Law lacks any particular inherent value or principle, and is merely a set of neutral and amoral rules used to outplay an opponent. Lastly, an up "against the law" consciousness views law as a product of power that is arbitrary and oppressive. Individuals either avoid the law, accept its unfair outcomes, engage in self-help, or carry out small acts of resistance through foot-dragging, or leveraging minor loopholes in the system.

For Ewick and Silbey, legal hegemony is sustained by the above narratives, in particular, the dialectic between "before the law" narratives and "with the law" (1998, p. 339). Silbey states that "the three schemas are not three experientially separate or distinct narratives; in operation they cannot be separated, as each one constitutes and enables the other" (Silbey 2005, p. 349). This interwoven nature means that when individuals experience oppressive elements of law, their concurrent reification of law as general system based of moral principles, or their belief that at times they can play with law to their advantage, negate their immediate experiences. Instead of viewing negative encounters with law as indicative of an entire system, individuals cast them off as exceptions or deviations from the norm. Ewick and Silbey therefore believe that the interplay between three distinct narratives is what maintains legal hegemony. Were people to possess singular understandings of law, the system would unlikely hold, as many would define legality on the basis of frustrating and harmful encounters with it, or on the grounds of it just being an arbitrary contest (Silbey 2005, p. 350).

3. A fourth legal consciousness narrative

Ewick and Silbey's three narratives have come under critique for not encompassing narratives that explicitly reject the legitimacy of law (Fritsvold 2009, Halliday and Morgan 2013, Hertogh 2018). Erik Fritsvold's (2009) study of radical environmental activists in the United States finds that many activists perceived law as inherently corrupt and serving to defend an illegitimate social order. Accordingly, they aspired to weaken and bring down the entire legal order. Fritsvold explains: "They do not stand Before the Law, work With the Law, or engage in the modest resistance of those Against the Law" (Fritsvold 2009, p. 807). Instead they intentionally and openly engaged in law breaking as acts of subversion. Fritsvold therefore suggests a further category to

supplement Ewick and Silbey's three narratives, which he terms "Under the Law" to reflect the subversive attitudes of activists towards formal state laws.

Halliday and Morgan (2013) observe a similar narrative among radical environmental activists in the United Kingdom who displayed "a collective rejection of the authority of state law" (Halliday and Morgan 2013, p. 1). They therefore suggest "dissenting collectivism" as a fourth narrative of legal consciousness. Unlike Fritsvold, Halliday and Morgan's account of dissenting collectivism does not only entail a rejection of official laws. It also encompasses a willingness by activists to utilise and play games with state laws to their advantage despite their perceived illegitimacy (similar to Ewick and Silbey's legal consciousness of gaming "with the law"). However, in this case the purpose of gaming is not to pursue an entirely self-interested individualistic goal as reflected in Ewick and Silbey's "with the law" narrative. Rather laws are played with by activists for a perceived collective good. Halliday and Morgan also argue that dissenting collectivism is inspired by a belief in a just higher law above official laws, which they view as falling within Ewick and Silbey's "before the law" narrative (Halliday and Morgan 2013, p. 6). However, this higher law exists beyond state law, comprising a form of legal pluralism.

Halliday and Morgan identify these features as the "three principal strands to the legal consciousness of dissenting collectives" (Halliday and Morgan 2013, p. 15). These three strands are woven together by a sense of belonging to a collective group that is systemically disadvantaged by wider society, and a sense that this group can wield collective agency (Halliday and Morgan 2013, p. 16). Although elements of Ewick and Silbey's narratives are visible in dissenting collectivism, they do not serve to prop up legal hegemony. While "before the law" narratives exist, they are used primarily in relation to a higher transcendent moral law that extends beyond state law. Likewise, dissidents played "with the law" as a means of dissent and counter-hegemonic struggle (Halliday and Morgan 2013, p. 29).

Marc Hertogh (2018) critiques Ewick and Silbey's three narratives of legal consciousness from a different angle, arguing that their account is based on a faulty presumption in the first place. He states that instead of examining *how* legal hegemony persists, scholars need to ask *if* it indeed does. Furthermore, he critiques legal consciousness scholarship for its fixation on formal state law, despite claims to focus on legality more broadly. He argues that state law is in continual competition with other competing normative orders (Hertogh 2018, p. 180). Hertogh proposes that legal consciousness scholars should be less concerned with the "critical" project of hegemony and more concerned with the "secular" project of what he terms "legal alienation" (Hertogh 2018, p. 6). Hertogh defines legal alienation as "a cognitive state of psychological disconnection from official state law and the justice system" (Hertogh 2018, p. 14). Relying on surveys and case studies Hertogh argues that in many instances ordinary people have turned away from law, rather than embraced it, and that state law has become "nobody's law" (Hertogh 2018, p. 179).

Although Hertogh raises important points about the assumptions of many legal consciousness scholars, his observations are not entirely incongruent with Ewick and Silbey's framework. Halliday (2019) argues that Ewick's and Silbey's concept of legal consciousness is complex and incorporates internal contradictions and doubts about

state law. He believes that elements of legal alienation can exist alongside a general popular assent to state law and do not on their own indicate that state law lacks overall hegemonic power. In his view, Hertogh's account of legal alienation should therefore be regarded as an exploration of counter-hegemony rather than a negation of legal hegemony. Halliday states that "Hegemony and counter-hegemony, acquiescence and resistance, identification and alienation: these co-exist in a permanent state of tension" (Halliday 2019, p. 873). Yet, Hertogh's theory is important in shifting the legal consciousness lens away from notions of all consuming state power and redirecting scholars towards a greater focus on people's ambivalence towards and alienation from formal state law.

The above accounts of legal consciousness comprise a thorough and careful examination of complex ways in which it operates. But collective mobilisations against foreign shopkeepers in South Africa and attempts to regulate their shops highlight the need for further reflection on legal consciousness narratives in three respects. First, as asserted by Hertogh, counter hegemonic action can take the form of informal regulatory interventions that can bear little resemblance to formal state laws or even general legal principles. This is particularly the case in the South African context where many studies have highlighted the prevalence of informal governance systems in the country's township neighbourhoods (Buur and Jensen 2014, Super 2016, Super and Ballesteros-Pena 2022) including their role in anti-immigrant mobilisations and violence (Misago 2011, Monson 2011, Gastrow with Amit 2015). Such conditions highlight the need for further inquiry into legal consciousness narratives that underpin *plural* legal arrangements.

Second, it is no longer enough to enquire into how disadvantaged groups accept or resist a legal hegemony that undermines a legitimate cause such as confronting class exploitation or environmental harm. There is also a need to examine how some collectives challenge progressive laws by calling for the *reversal of rights* held by marginalised groups. This battle against progressive elements of legal hegemony stands to define future legal orders of many democratic nations confronting widespread poverty, inequality and rising populism and nationalism.

Third, mobilisations against foreign-owned businesses in South Africa often reflect *cooperation* between formal government representatives and informal political groupings more than opposition and conflict. State officials ranging from local police and law enforcement officers, to senior government leaders and advisors have backed calls to restrict foreign small business activities, and condoned and even supported informal regulation aimed at curbing shops. Events in South Africa show that the state and dissident movements are often on the same page, with the judiciary and constitution being viewed as a stumbling block to achieving their mutual goals. This contrasts with many legal consciousness arguments that presume ordinary people attempting to resist laws work in opposition to the state.

4. Methodology

The paper is based on a secondary analysis of archived qualitative data that I collected in Cape Town between September 2010 and June 2013 as part of a project investigating the ability of foreign shopkeepers to access formal and informal justice mechanisms

when they were victims of crime. The project was headed by the African Centre for Migration & Society at the University of the Witwatersrand and the findings published in three reports (Gastrow with Amit 2012, 2013, and 2015).

The research focussed on three township field sites in Cape Town, namely Khayelitsha, Philippi and Kraaifontein, where many foreign nationals (particularly Somalis) had set up informal grocery shops (also known as "spaza" shops). It involved interviewing 66 foreign spaza shopkeepers, 65 South African residents, 20 police officers, four prosecutors, as well as local government officials, community leaders, and NGO members (see table 1 below). I also attended three community meetings in Khayelitsha in March and April 2012 where the presence of Somali shopkeepers in the township was discussed (Somalis making up the majority of spaza shopkeepers in the area). I avoided interviewing South African spaza retailers on the advice of South African community workers who felt that it could ignite simmering tensions. Instead I relied on my observations at meetings to ascertain the views of South African retailers.

Interview questions related to respondents' knowledge of formal and informal justice systems and their response to violent crime affecting foreign shopkeepers. They were conducted with the prior informed consent of participants and on the condition that their identities would remain anonymous. During the course of the research I became aware that a frequent means of responding to attacks on and threats against shopkeepers was not the prioritisation of investigations and prosecutions into these crimes, but the establishment of informal agreements to curb their shops. I thus broadened the study to understand these informal regulatory interventions.

While conducting the above research, efforts to regulate foreign national businesses in South Africa intensified on a national level. The paper thus supplements local field research in Cape Town with media reports, press releases, policy documents, and draft legislation to better grasp national level efforts from the beginning of my research on the topic in 2010 until present.

TABLE 1

Interviews								
Area	**Somali traders**	**SA residents**	**SA traders**	**Police**	**Landlords**	**Legal Aid**	**Prosecutors**	**Other**
Khayelitsha	15	14	0	11	1	1	0	3
Kraaifontein	10	10	3	5	2	2	0	2
Philippi	15	35	5	4	4	1	4	3
Small towns	17	0	0	0	0	0	0	0
Other areas	9	6	1	0	0	0	0	5
Total	**66**	**65**	**9**	**20**	**7**	**4**	**4**	**13**

Table 1. Archived interviews carried out by the author between 2010 and 2013.

Although none of the above research related directly to legal consciousness, a great deal of the data reveals everyday perceptions of and attitudes towards the laws governing foreign spaza shop owners, many if not most of whom are asylum seekers and refugees. Because the majority of interviews dealt with matters of formal and informal justice

mechanisms as well as the regulation of foreign-owned businesses, they shed light on lay persons' perceptions of law, rights and justice.

The research did not only encompass investigating individuals' understandings of law, but also observing regulatory actions and events that took place, such as mobilisations against foreign-owned shops, law enforcement operations, and efforts by formal policy makers to curtail foreign-owned businesses. This is important, because the ways in which people *act* in relation to the law also sheds light on their understandings of it. This reflects Ewick and Silbey's claim that legal consciousness "is produced and revealed in what people do as well as what they say" (1998, p. 46).

Importantly because a wide variety of stakeholders and parties were interviewed about laws and legal processes, the research sheds light of the relational dimensions of legal consciousness (Young and Billings 2020). Young describes legal consciousness as "a relational phenomenon, shaped by collective social meanings in addition to individual cognition" (Young and Billings 2020, p. 35). Her case study illustrates how people consider structural factors such as citizenship, material resources, social status, and policing practices when making decisions about how to assert their rights. By focussing on the opinions and actions of more than one group, the data also reveal how differing actors both within and outside of state institutions, think about, understand and contest laws and social rules. This responds to Kathleen Hull's call for scholars to pay "greater attention to how social interactions and institutions produce legal consciousness" (Hull 2016, p. 1).

When it comes to legal consciousness studies on *resistance* towards legal hegemony there is an even greater need to concentrate on actions of diverse actors, than on the individual perceptions of ordinary people. This is because observing the interactions between differing groups, interests and wielders of power brings into better focus how laws are fought over, resisted, or contested (Hull 2016, p. 18), which is often where legal hegemony is most challenged.

5. The regulation of foreign-owned small businesses in South Africa

South Africa has experienced an increase in international migration since the advent of democracy and its adoption of a progressive refugee policy in the 1990s. The country's Refugees Act of 1998 permits refugees to work in the country (section 27(f)), and until recently the state and courts have also recognised asylum seekers' right to seek employment and operate small businesses (*Minister of Home Affairs and Others v Watchenuka* case 2003, *Somali Association of South Africa* case 2014). Instead of an encampment refugee policy, the country has an integration model, where asylum seekers and refugees can work and reside anywhere in the country. Because they enjoy the freedom to work, asylum seekers and refugees are expected to support themselves financially and do not receive any specific social assistance from the state.

Language barriers, skills shortages, and other factors such as lack of reliable paperwork (asylum seeker visas need to be renewed every few months) result in many asylum seekers and refugees struggling to find formal employment (Crush 2017, Carciotto *et al.* 2018). Many therefore set up informal businesses to make a living. This is particularly the case in the country's informal grocery market or "spaza" market where high concentrations of asylum seekers and refugees work. Spaza shops are usually located on

residential township properties (such as in garages, front yards, or renovated rooms) and sell basic household goods such as bread, milk, sugar and soft drinks to surrounding residents. Foreign shopkeepers originating from countries such as Somalia, Ethiopia, China, Burundi to Bangladesh usually rent their business premises from South African landlords, many of whom were previously shop owners themselves (Hikam 2011, Gastrow with Amit 2013). Just because spaza shops are informal does not mean that they are illegal. South African township zoning schemes tend to permit the operation of businesses from residential premises on condition that the dominant nature of premises remains residential (Gastrow with Amit 2013, p. 18). In Cape Town where field work was conducted, spaza shopkeepers do not require permits or licenses to operate (City of Cape Town Municipal Planning By-Law 2015, clause 28). Many citizens express concerns about tax evasion given that informal economies are usually cash based, but traders may also earn below the tax threshold.

The presence of foreign-owned spaza shops in low-income black township neighbourhoods has garnered intense animosity from competing South African business owners who have mobilised and unleashed violence against their foreign competitors. When nation-wide xenophobic riots broke out South Africa in May 2008, many surrounding residents targeted foreign owned shops, which were often left looted and destroyed. In Cape Town, South African spaza retailers have called for the removal of foreign competitors from their neighbourhoods by threatening violence and anarchy should their demands not be met. This occurred in Khayelitsha in August 2008, Kraaifontein in June 2010, and Philippi in May 2011. Police, NGOs, community leaders, the UNHCR, and local government officials responded to these events by arranging meetings between South African and foreign retailers associations where parties agreed to new informal rules governing spaza trade.

For example, in Khayelitsha, when a South African retailers association named Zanokhanyo sent threatening letters to Somali shopkeepers in the township in August 2008, police set up meetings between traders organisations in the township. These discussions culminated in an agreement between Zanokhanyo and the Somali Retailers Association prohibiting the opening of any new businesses in the township without the approval of both associations. They appealed to "all stakeholders such as KFD [Khayelitsha Development Forum], local leaders, ward councillors, law enforcement agencies, religious leaders, SANCO and all other stakeholders to assist us in enforcing these agreements" (copy of agreement dated 27 November 2008). Although the agreement stated that both South African and foreign national shops lacking approval would be prohibited, foreign retailers believed that the agreement would only be enforced against their businesses because they lacked the power to refuse approval to South African shopkeepers or to close down their shops. Police in Khayelitsha agreed stating that "South Africans can open shops anytime" (interview with two police officers in Harare, Khayelitsha 7 December 2012).

Similar arrangements emerged in response to mobilisations by South African retailers in the remaining field sites of Philippi in and Kraaifontein, where Somali shopkeepers were prohibited from opening new shops in both townships in 2011. These curtailments on foreign owned businesses did not only exist in the field sites, but most of Cape Town's

townships (Gastrow with Amit 2015). They also existed beyond the city in small towns in the Western and Eastern Cape Provinces (Gastrow with Amit 2015).

When it came to enforcing informal agreements, the first and simplest port of call for South African retailers associations and police was to turn to township community organisations. Township community organisations were involved in the informal regulation of community affairs in all three field sites in Cape Town. Local residents formed street committees that operated on most township streets. These would engage in matters ranging from local development projects, resolving domestic disputes, investigating and adjudicating crime, punishing offenders, as well as generating and enforcing local rules governing the neighbourhood. Punishments meted out varied from apologies, fines and banishments, to lashings, beatings and even death. Street committees reported unresolved matters to area committees who oversaw several streets, who would in turn report to ward or township committees. These structures fell under the auspices of the South African Civics Organisation (SANCO), which was a national umbrella body representing township civic structures in the country. SANCO was politically aligned to the country's ruling party the African National Congress (ANC) with the result that SANCO members were often also party members.

Street committee activities varied from place to place. Some street committees met sporadically when the need demanded, while others were more active and held meetings weekly or even bi-weekly. Some were closely involved in investigating and adjudicating crime, while others deferred matters to the police. Committee proceedings also varied greatly, with certain committees investigating criminal matters thoroughly and giving accused criminals an opportunity to be heard, and others simply rounded up "suspects" and meting out violent punishments without any semblance of due process. Despite activities varying greatly, overall street committees were a force to be reckoned with in township neighbourhoods. For example, the Khayelitsha commission of enquiry into police inefficiency found that almost a fifth of all murders in the township between 1 April 2011 and 30 June 2012 were carried out what it termed "Bundu courts" (The Commission of Inquiry 2014, p. 193, and pp. 214–218).

Despite the speed and breadth at which informal regulatory arrangements governing foreign-owned spaza shops sprung up in Cape Town, these efforts eventually only had limited effect. Many South African shopkeepers and residents found it lucrative to rent out properties to foreign shopkeepers. Local community leaders attempting to close down new shops therefore encountered resistance from South African shop landlords. Police and local municipal law enforcement officials found it difficult to enforce agreements that lacked any legal authority. Many township residents were also not averse to the presence of foreign owned shops because they sold basic household goods at reasonable prices and in close proximity to where they lived. As a result it was relatively easy for residents to side-step agreements and lease out property to foreign spaza shopkeepers. This was evident from three community meetings that I attended in Khayelitsha in March 2012 where many participants discussed the poor implementation of the 2008 trade agreement in the township. The Chairperson of the meeting, a local reverend and community leader, complained that "This agreement was not properly managed or monitored. It has not become binding and is now just a piece of paper".

Over the past decade South African retailers have thus not been able to rely solely on informal regulation to curb foreign competition and have agitated for the reform of formal laws governing foreign small businesses in the country. In March 2012 South Africa's ruling political party, the African National Congress (ANC), published a discussion document in preparation of its June 2012 policy conference titled "Peace and Stability" (ANC 2012). The document suggested radically changing the country's refugee policy by arguing that asylum seekers should not be able to engage in informal trading (p. 6). The document declares "Non-South Africans should not be allowed to buy or run Spaza shops or larger businesses without having to comply with certain legislated prescripts", and asks "Should by-laws apply equally to both asylum seekers and citizens?" (p. 6).

In July 2012 police launched "Operation Hardstick" against foreign spaza shops in the province of Limpopo. Hundreds of foreign-national shops were fined for not possessing business licenses. At the same time local authorities withheld licenses from asylum seekers and refugees. However, the operation had limited effect. The Supreme Court of Appeal condemned the state's actions and held that asylum seekers and refugees were entitled to apply for new licences (*Somali Association of South Africa* case 2014). This was because prohibiting them from operating small businesses could leave them indigent and undermine their right to dignity. The court also found that the state's closures of businesses operated by asylum seeker and refugees in Limpopo had been unlawful.

State officials tried other means of curbing foreign-owned small businesses. In March 2013 the Department of Trade and Industry published an ambitious draft bill titled the Licensing of Businesses Bill. The bill required all people conducting business in the country to possess a business licence. In this way the state hoped to keep a better record of informal business activities, especially those of foreign retailers. Furthermore businesses targeted or threatened by public violence such as xenophobic attacks could have their licenses revoked by local authorities. Although there was much state fan fair when the bill was published, it was quickly and vocally rejected by the country's business community and civil society sector. Critics viewed it as introducing red tape measures that would stifle economic growth, and soon thereafter the bill was scrapped (Nicolson 2013, Bauer 2013, Rogerson 2015).

The state persisted despite these setbacks. In December 2017 South Africa's parliament passed the Refugees Amendment Act of 2017, which introduces major changes to the country's refugee policy including asylum seekers' rights to work. In particular, asylum seekers need to comply with complicated conditions to obtain work endorsements on their visas. It also seems that these endorsements do not encompass self-employment. However in practice authorities have largely overlooked these provisions and asylum seekers' activities in the country's small businesses sectors has remained unchanged. In 2020 the Gauteng provincial government published a draft Gauteng Township Economic Development Bill that forbade a range of foreign national groups from engaging in a number of economic sectors in the province. However, the provisions were scrapped after the provincial government received public comments and legal advice on the bill's unconstitutionality (Tau 2021).

6. Analysis

The above case study reflects two phases of mobilisation and regulation. The first phase entailed state and non-state actors seeking to regulate foreign-owned shops informally by turning to township street committees that fell under the banner of SANCO. These township structures reflected a legal consciousness that I term "parallel to the law" where they neither outwardly rejected nor reified formal laws, and regulated day to day life with little or no reference to the state and its processes.

However, informal regulation did not prove to be sufficiently effective, as community structures were split on the matter of prohibiting new foreign national spaza shops in the field sites. This gave rise to a second phase of lobbying by dissenting groups which involved mobilising for *formal* legal reform. When South African retailers associations failed to obtain full community support for informal agreements, they lobbied the state (often by threatening violent mayhem) and called for the enactment of new state laws to restrict foreign nationals' rights to work in the country. This process in many ways reflected Halliday and Morgan's fourth legal consciousness narrative of "dissenting collectivism". However, in contrast to Halliday and Morgan's case study where dissenting radical environmental activists acted in opposition to unjust laws, dissenting collectives can also mobilise to erode progressive legal hegemony. Furthermore, their activities can be in cooperation with the state, in opposition to the judiciary and constitutional principles.

6.1. Informal township regulation: Parallel to the law

Hertogh (2018) argues for a greater awareness of legal alienation and pluralism in examinations of legal consciousness. An important feature of considering legal consciousnesses theory in contexts of legal pluralism is to explore legal consciousness narratives that underpin plural normative arrangements. This involves examining how those who defer to informal authority and normative systems at the same time perceive, understand, and relate to official state law.

Many township residents in the field sites were reluctant to engage with the country's formal justice system and largely looked to informal street committees when dealing with matters of crime and neighbourhood regulation. Their actions and perceptions challenge Ewick and Silbey's three narratives of legal consciousness, which are based mostly on observations of people's perceptions and practices in relation to formal legal systems. As a result, Ewick and Silbey's three narratives do not fully explain how state officials, South African retailers and ordinary township residents conceived of and approached legality in the field sites. A further legal consciousness narrative however, which I term a "parallel to the law" helps to shed light on these processes.

"Parallel to the law" entails a collective group or groups recognising a separate legality existing alongside state legality. This legality operates freely alongside state law, with little to no reference to it. This was particularly the case with township street committees charged with enforcing informal agreements prohibiting new foreign-owned shops. These committees not only regulated spaza shops, but also took responsibility for a range of state functions including investigating and adjudicating crime. In doing so they would often follow their own procedures and inflict their own punishments.

Ewick and Silbey's three narratives of legal consciousness (i.e. before, with, and against the law) were often absent amongst those espousing "parallel to the law" narratives. Township residents frequently breached or paid no attention to official laws when regulating foreign-owned shops or tackling crime. In these instances one could argue that they lacked a reifying "before the law" consciousness. For example, many residents described how community members assaulted and even murdered suspected criminals, despite the fact that official law prohibits corporal punishment and the death penalty. A Khayelitsha resident explained: "If a thug is caught stealing something, community leaders will beat him up. They do it their own way and do not involve the police." A Philippi resident explained that there was nothing that the police could do "because they can't arrest the whole community" (interview, 16 November 2010).

When it came to the regulation of foreign-owned spaza shops in the field sites, SANCO leaders attempted to enforce an agreement that conflicted with zoning schemes that permitted businesses to operate from residential premises. The agreement also bound new foreign shopkeepers who were technically third parties who had not agreed to its terms. This ran counter to general principles of contract law. It furthermore potentially breached other laws such as the Refugees Act which entitled refugees the right to work in the country, the Competition Act which prohibits unfair restrictive business practices, as well as asylum seekers' and refugees' rights to equality and dignity. Residents often went about their day to day lives grappling with crime, renting out business premises, and learning of trade rules without ever invoking or even thinking about state laws. Sometimes behaviours did reflect a degree of "before the law" consciousness. Residents usually contacted the police when faced with urgent matters such as xenophobic mob rioting, which they were unable to contain, or to report violent crime such as murder where a body would need to be accounted for.

Residents did not frequently mention playing "with the law" when it came to regulating shops or grappling with crime. Most could not afford attorneys' fees and in any event viewed the formal court system as ineffective. The state also rarely intervened in their informal regulatory activities. However this is not to say that playing with the law never occurred. "Parallel to the law" is just one legal consciousness narrative or schema existing alongside others. For example, a legal aid attorney described that when on occasion vigilante action was prosecuted, cases almost always collapsed because of accused's reliance on legal technicalities: "[I]t's difficult for the state to prove murder because you do not know which blow actually killed the person, *novus actus*." As a result prosecutors would usually have to charge the whole group leading to continual delays: "Say there are 20 accused and 15 attorneys on record. Try getting them there for one postponement… It's hell. At the end of the day the DPP [Director of Public Prosecutions] usually withdraws these kinds of cases". South African shopkeepers would also sometimes play with the law by lobbying the police and municipal law enforcement officials to use official laws to assist them in enforcing informal agreements barring new foreign shops. This may have encouraged unlawful fining operations targeting foreign national spaza shops in the field sites.

In Ewick and Silbey's account of being up "against the law" they depict respondents as engaging in acts of violence and self-help. These include playing one's radio loudly to retaliate against a neighbour's loud music, or threatening to kill someone's cat if they

failed to return a borrowed item (1998, p. 274). These small isolated acts differ materially the types of self-help that many township residents in the field sites resorted to. Township residents' recourse to self-help often entailed the collective and wholescale establishment of intricate governance systems that took primacy over state law. In the neighbourhood of Thabo Mbeki in Philippi East, a committee of 15 members governed the area by deciding whether community members could lease out premises to foreign traders, organising patrols, and adjudicating crime and punishing suspected offenders. These groups did not always see themselves as up against the law, but often working in collaboration with the police and the state. For instance, in the field sites, SANCO aligned street committees were tasked with enforcing informal curtailments on foreign-owned shops that had been negotiated at meetings hosted by local police. Sometimes community members would contact police to arrest suspects after they had meted out informal justice. A resident in Philippi explained: "[I]f youth misbehave they will punish them with lashings. Once this has been carried out the police will be called… The police continue with a case as if no one has been beaten".

Although the legal consciousness narrative of parallel to the law had the effect of weakening formal legal hegemony by usurping state functions and encouraging collective disobedience and non-compliance, it cannot strictly be seen as being up "against the law". State law was alien and far removed from everyday informal regulation. In many instances state actors approved of and condoned informal arrangements, and police worked in cooperation with street committees, neither party viewing themselves as "up against" the other. Often parallel governance suited both residents and the state, as police could sidestep tackling issues such as the regulation of foreign national shops where they lacked formal authority to intervene. By recognising residents' informal regulatory powers and working in collaboration with them, police garnered local legitimacy and informal assistance in dealing with crime and social conflict.

Despite not being strictly "against the law", the legal consciousness of parallel to the law is linked to a sense of disillusionment and alienation from the formal justice system. Residents repeatedly complained about police being ineffective and letting criminals off the hook. It was therefore more effective for communities to handle such matters themselves. For example, a resident in Philippi explained "There is community law in Browns Farm because usually the community, not the police catch criminals. The community are also tired of robberies so take the law into their own hands". "Parallel to the law" also operated along a continuum as there were varying degrees to which informal regulation in the township field sites held sway. While some residents described their street committees as having almost completely usurped all the state's judicial and regulatory roles ("We are not being governed by the police but by SANCO" as one Philippi resident put it), other residents described their communities as being less involved. For example, sometimes street committees would investigate crime and locate suspects, but thereafter hand them over to police.

Despite its many uses, informal regulation that draws on parallel to the law narratives has its limitations. It cannot rely on state enforcement mechanisms, due to the country's relatively independent judiciary. This is a key weakness, as enforcement becomes a critical problem when grassroots regulatory structures are split on an issue – as they

were when it came to the regulation of foreign-owned township shops in the field sites. Reflecting Bähre's observations of "reluctant solidarity" (2007) – community relations in the field sites were rarely free of disagreement and division. Conflicts between South African retailers and landlords sowed confusion over the validity of local regulations. It also left community leaders caught uncomfortably in the middle and reluctant to close down new foreign-owned spaza shops. Although South African retailers had police support in spirit, police could not close down shops without any formal authority. The chairperson of a meeting in Khayelitsha conceded that "We have to engage more broadly because not all community members agree with the agreement".

In the field sites informal regulation of spaza shops was therefore unreliable and inconsistently enforced. For proper uniform enforcement, there was a need to amend formal laws and thereby leverage state intervention. Local South African retailers – especially those operating larger township businesses (whom the police referred to as "big bosses") – threatened to incite xenophobic mob attacks and mobilised local political party branches to change laws governing foreign national small businesses. For example, at meetings between South African and Somali retailers that I attended in Khayelitsha, violence was a continual underlying threat. At one meeting the chairperson warned: "We need to work this out before it gets ugly. I just heard that there are problems in Plettenberg Bay and that there is xenophobia happening there. We do not want that in Khayelitsha and our townships". State officials and political leaders took South African retailers' grievances earnestly. They could not afford to be seen as siding with foreigners in a political climate burdened by poverty, inequality, and social and political discontent. As the minister of Small Business Development explained in the aftermath of xenophobic riots in 2015: "[F]oreigners need to understand that they are here as a courtesy and our priority is to the people of this country first and foremost" (Magubane 2015).

6.2. Resistance against formal laws: Dissenting collectivism

By 2012 it became apparent that formal efforts were underway to curtail foreign-owned spaza shops in South Africa. These interventions were driven by South African retailers associations, as well as local political leaders and state officials. When the ANC's "Peace and Security" policy document was published in March 2012 questioning asylum seekers' right to open township businesses, ANC representatives in the Western Cape province praised the document. In their view foreigners owned too many shops in the province's townships, which disadvantaged South Africans (Barnes 2012).

When mobilising against the formal law, South African shopkeepers combined their influence with that of the ruling party and the state. The obstacle to change was the hegemony of the constitution and the courts. In many respects this stage of mobilisation reflected Halliday and Morgan's account of "dissenting collectivism". First, there was a clear rejection of state laws as unjust and willingness to break them. South African retailers had long snubbed formal laws governing spaza shops and used all manner of means including inciting mob attacks and orchestrating assassinations to expel their competition (Gastrow with Amit 2012). However the state was not immune to rejecting the law itself and frequently engaged in subversive and illegal acts. For example, in Cape Town police hosted meetings where shopkeepers negotiated agreements prohibiting new foreign national shops in their neighbourhoods, undermining all range of laws and

legislation. At one meeting in Khayelitsha in March 2021, a senior adviser to the national minister of Police gave a speech applauding the agreement in the township, stating "The beauty of Khayelitsha post 2008 is this agreement. We must ask the Somalis to give an audit of shops in 2008 and we start from there." Law enforcement officials and police in Cape Town used purported "law" to fine and penalise foreign-owned spaza shops for operating their businesses without a license. However, the law cited on the fines the "Local Authorities Act" did not exist and traders did not in actuality require licenses or permits to operate their shops. The Supreme Court of Appeal also found that local government officials had unlawfully blocked foreign nationals from applying for business licenses in Limpopo Province (*Somali Association of South Africa* case 2014). However, unlike Fritsvold and Halliday and Morgan's accounts, these actions did not necessarily reflect a rejection of the legitimacy South Africa's "legal system as a whole" (Halliday and Morgan, 15). Instead their aversion mainly related to laws perceived as favouring the rights of foreign nationals over those of black South Africans.

Like Halliday and Morgan, this rejection of official law drew on a "before the law" consciousness that was inspired by a higher moral law, in this case the belief in the economic liberation of black South Africans from poverty and economic inequality. At a budget vote in 2017 the Minister of Small Business Development Lindiwe Zulu stated "It is inconceivable for liberation to have meaning without a return of the wealth of the country to the people as a whole". True liberation therefore required "radical socio-economic transformation". This entailed fundamental structural change to the economy "in favour of all South Africans, especially the poor, the majority of whom are African and female…" (Zulu 2017). The principle of economic liberation was also reflected at the grassroots, with many South African retailers arguing that the presence of foreign owned small businesses interfered with their ability to liberate themselves from poverty. As one meeting participant explained: "It is not true we have xenophobia, we just want to benefit from the fruits of our revolution".

The higher transcendent principle of economic liberation is distinguishable from the founding values of South Africa's constitution which include human dignity, equality, freedom, non-racialism and non-sexism. Although these endeavours entail addressing poverty and economic inequality, the constitution does not explicitly mention the eradication of black impoverishment as a founding value, let alone a primary one.

Lastly, as was the case with Halliday and Morgan's dissenting collectivism, mobilisations against formal laws governing asylum seekers and refugees reflected a degree of playfulness with the law. This was particularly the case in regard to the state. Police fining operations, as well as state departments' repeated attempts to pass new legislation illustrated ways in which state officials attempted to use law as a game to crack down on foreign shops. Mirroring Halliday and Morgan's "dissenting collectivism", these efforts were not only made in pursuance of an individual goal, but also towards the perceived collective aspirations of black South African small business owners. Playing with the law did not reaffirm legal hegemony. To the contrary it entailed repeatedly confronting and attacking the country's constitutional legal hegemony, with attempts to amend laws and fine foreign shops usually rejected by courts or state legal advisors on the basis of their unconstitutionality (*Somali Association of South Africa* case 2014, Tau 2021).

Halliday and Morgan describe that the legal consciousness of dissenting collective narratives reflect three principles, namely a rejection of law; gaming with the law as means of counter-hegemonic action; and standing before the law by being inspired by a higher moral purpose. These principles are connected together by a sentiment of being part of a socially disadvantaged collective group, and a belief that such group have the capacity to act collectively. Efforts by informal and formal actors to curtail foreign shops reflected these sentiments. They were underscored by a belief that South African citizens as a collective were being threatened and disadvantaged by foreign shopkeepers, and that combatting this scourge required joint mobilisation and effort.

Although the collective mobilisation against formal laws regulating foreign-owned shops and businesses in South Africa largely mirrors Halliday and Morgan's account of dissenting collectivism, the case study challenges some of the authors' assumptions about collective dissent and legal hegemony. First, although anti-hegemonic struggles tend to be inspired by "justice and ethics" (Halliday and Morgan 2013, p. 16), these terms are subjective and understandings what is in actuality "just" and "ethical" can be open to debate. As a result, dissenting collectivism can work against marginalised groups and progressive human rights-based elements of legal hegemony. In this case study, dissenters' counter-hegemonic action sought to amend state laws that promoted the integration (as opposed to the encampment) of refugees and asylum seekers, and their ability to earn livelihoods in the country. This demonstrates a need for a more nuanced understanding of legal hegemony where some elements of the law are identified as playing a socially progressive and protective role, and others giving rise to oppressive or cruel outcomes.

Second, anti-hegemonic struggles need not always be in opposition to state, but can be carried out in concert with the state. The collective mobilisation against foreign shopkeepers involved the participation of a broad range of actors including local and senior state officials. Instead of the state, it was the country's court system and constitutional principles that were being tested. It is often politically expedient for state leaders to team up with dissidents to challenge constitutional constraints, especially when the rights being questioned protect vulnerable groups lacking significant economic or political power. Such joint battles may well encourage a broader rejection of the country's constitutional dispensation. As the country's Minister of International Relations and Cooperation Lindiwe Sisulu stated in relation to persistent black poverty in the country: "…it seems today we have legitimised wrongdoing under the umbrella of the rule of law". In her view black judges in the country can be likened to "House Negros" who are "worse than your oppressor" (Sisulu 2022). This pattern of counter hegemonic dissent may become more frequent given the rise of social and political polarisation and populist and nationalist politics arose the globe.

7. Conclusion

This paper analyses the legal consciousness of parties involved in the collective mobilisation against and regulation of foreign-owned small businesses in South Africa. It draws on qualitative field research in Cape Town to explore how South African retailers, community structures and police attempted to curtail and informally regulate Somali-owned businesses at local levels. It also examines efforts by South African retailers, political leaders and the state to challenge formal laws that enable asylum

seekers and refugees to work in the country. Those participating in informal regulation often reflected a legal consciousness narrative of "parallel to the law" where actors recognised community "laws" that operated alongside official ones. In contrast, efforts to formally regulate foreign-shopkeepers largely mirrored Halliday and Morgan's legal consciousness of "dissident collectivism".

Through analysing and reflecting on the above legal consciousness narratives, the case study sheds light on three important considerations that are pertinent to legal consciousness theory. First – and following the argument of Hertogh – the study highlights a need to better understand legal alienation and pluralism in legal consciousness studies. Second, it disrupts assumptions of counter-hegemonic action as *per se* serving the interests of justice. This is because many efforts to mobilise against and curtail foreign-owned small businesses in the country reflected a resistance towards progressive legal principles protecting marginalised groups. Third, the case study shows that dissident activism need not always be in opposition to the state. It could also encompass cooperation between state institutions and non-state political groupings to realise their shared desires. This was apparent in the many and diverse efforts made by state officials to show solidarity with South African retailers associations and meet their demands to curb immigrant enterprises. Thus far South Africa's courts have largely succeeded in stalling regulatory crack downs and challenges to the country's human rights framework – usually by relying on the right to dignity (*Minister of Home Affairs and Others v Watchenuka* case 2004, *Somali Association of South Africa* case 2014). Yet, it is still to be seen how long constitutional hegemony will last in a country facing acute poverty, unemployment, and inequality, as well as populist attacks on the judiciary and formal legality.

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