

Emerging proposals for governance of tenure in small-scale fisheries in South Africa

Paper prepared for the

**Governance of Tenure for Responsible Capture Fisheries
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1. Introduction

The advent of democracy in South Africa in 1994 precipitated a law reform process and subsequently new forms of governance emerged that sought to address past injustices and give voice to marginalized communities. However, despite a progressive constitution that requires the protection and respect of a range of socio-economic and environmental rights, and the recognition of living customary law¹, the traditional small-scale fisheries sector in this country continues to be marginalized. The constellation of power relations arising from the legacy of colonial and apartheid fisheries and conservation shaped and continue to shape the governance of marine resources in this country. Decisions regarding rights of access, use of resources and institutions for management of marine resources remain centralized and a powerful, market-based ideology influences the governing system in favour of commercial fishing interests.

Increasingly, traditional small-scale fishing communities in South Africa have voiced their protest against this system of fisheries governance. These fishers argue that the past and current policy regimes failed to acknowledge their pre-existing tenure rights and practices, thus undermining the basis of socio-ecological relations in coastal communities. Yet despite this erosion of customary rights, local, customary forms of tenure persist and it is increasingly apparent that a de facto, plural system of fisheries governance exists. South Africa's new fisheries legislation, geared towards commercial interest, overlaps systems of customary 'living' law along the entire coastline. This new statutory framework has failed to recognize these local systems of fisheries tenure².

Small-scale fishers have recently successfully challenged the existing fisheries regime and in 2007 the Equality Court of South Africa ordered the Minister to develop a new policy that would accommodate the 'socio-economic' rights of these fishers (*Kenneth George versus the Minister 2007, EC 1/05*). A draft policy has been prepared and is currently under review. During the policy deliberation processes, small-scale fishers have referred to customary practices in demanding recognition of their rights as well as summoned inspiration from international policy instruments in articulating their vision for a new system of fisheries governance. The proposed small-scale fisheries policy is informed by normative human rights principles and customary practices.

Outlining the processes that have shaped tenure relations in the past, detailing some of the forms of tenure that continue, this paper traces the debates on what constitutes 'good governance' that are influencing the policy framework that is emerging in South Africa and discusses the principles articulated in the new policy that are of relevance to tenure governance. We argue that the

¹Living customary law is the term used by the Constitutional Court in South Africa to refer to customary law that is "actually observed by the people who created it", as opposed to "'official' customary law that is the body of rules created by the State and legal profession" (Bennett 2008:138). Living customary law is a 'manifestation of customary law that is observed by rural communities, attested to by parol. Although the term 'living customary law' gives the impression of a singular, unified legal system being the referent, this term actually points to a conglomerate of varying, localised systems of law observed by numerous communities' (Mnisi 2007).

²Contrary to the growing trend internationally to recognise customary systems of marine tenure (Johannes 2002, Cinner and Aswani 2007), South Africa has ignored customary systems of tenure in this context. This is despite the fact that it is estimated that approximately 21 million people are impacted by the legislation pertaining to customary law in this country (Love 2008: xii).

constitutional recognition of 'living customary law' is central to governance of tenure if the objectives of social equity and environmental sustainability are to be achieved. Given the diverse cultural background of fishers in South Africa and the unique nature of each local fishery system, this customary law framework must be utilized to interact effectively with the new policy framework created for the governance of fisheries in South Africa. In understanding living customary law as a complex system, our conceptualization of customary systems does not rely on tradition as a defining element, but rather sees tradition as part of a continuum of practice that evolved and continues to evolve as communities adapt to the changing circumstances of scarce resources, new state imposed management regimes, new market pressures and changing needs of the community. While a narrow interpretation of the Constitution provides an imperative to recognize the rights deriving from customary law, we argue that the recognition of living customary law should extend further to give substance and content to the good governance of tenure of small-scale fishing communities.

2. Background and historical overview of marine governance systems in South Africa

South Africa has a very diverse coastline, stretching 3000 km from its north western border with Namibia to its border with Mozambique along the warm Indian Ocean coast. This varied bio-physical context has shaped socio-ecological relations along this coast for millennia. The systems of tenure that have developed along the coastline differ considerably from region to region due to the different histories of the peoples of the region and the distinctive ways in which their customary legal systems interfaced with colonial and apartheid governance. Kolbe (1705 in Thomson and Wardlaw 1913) indicates that when the Dutch arrived at the Cape in 1652 they observed that the local indigenous Khoisan residents at the Cape were expert anglers and used hand held rods, nets and spears. The early indigenous inhabitants of these coastal regions were largely nomadic pastoralists and herders, “hunter-fisher-gatherers” who migrated seasonally along the Cape coast and inland (Parkington 1977). Little is known of their local marine tenure relations. Portuguese mariners exploring the far eastern coast bordering Mozambique noted in 1554 that the local Tembe-Tsonga people used a sophisticated system of fish traps in the Kosi estuary and there is evidence that the customary tenure system that is deeply embedded in local social relations remained largely unchanged until very recently (Kyle 1999, Peschak 2005).

There is archeological evidence of pre-historic shore-based harvesting and consumption of shell-fish along the entire coastline (Clark *et al.* 2002) and pre-colonial consumption of certain fish species in several regions (Deacon and Deacon 1999), however South Africa does not have a lengthy history of indigenous, boat-based harvesting of marine resources. Since the 1600's however an artisanal, boat-based small-scale fishery has emerged along the Western seaboard shaped by the influences of Malay slaves brought to the Cape, European sailors and the local indigenous Khoi-san peoples who had extensive knowledge of the coastal waters, albeit shore-based. Responding to the demand for fish from the Dutch controlled colonial station at the Cape, fishing communities sprung up along the Western Cape coast (Van Sittert 1992, Dennis 2010). These early fishing settlements were soon subject to the fisheries governance arrangements of the Dutch as early as 1652 when van Riebeeck announced that “no fishing and no thawing of nets therefore, shall be allowed except by consent of the Commander after having consulted with the Council” (Thompson and Wardlaw in Dennis 2010: 18). Notwithstanding this early attempt at regulation, it appears that local customary rules of access and use soon evolved in response to the contours of local fishing practices, closely entwined with the net of social relations that spanned these early settlements.

By the late 1800's fishing had become an established way of life for many coastal dwellers and a complex array of marine tenure arrangements had emerged in the coastal and estuarine waters of the Cape (Van Sittert 1992). Fishers gained access rights to resources as individual members of local fishing communities as well as through their membership of crew systems where they received a share of the catch (Van Sittert 1992). These tenurial arrangements were a hybrid mix of local rules that were gradually overlaid with Colonial and later provincial administrative regulations (Van Sittert 1992).

In contrast to the Cape, where the fishers became subject to the reach of the fisheries management of the colonial authority, the majority of the coastal communities along the eastern seaboard of the

country continued to access and use marine resources in accordance with the African customary legal systems that predominated in these parts of the country. As such, rights to access and use these resources were embedded in local social relations that varied greatly along the coastline. Within this context, rights emerged through systems of shared access and use within membership of specific groups. Rights may have been held at different levels (individual, household or community), but were always nested within the context of the group. These rights were a function of one's membership of and status within the group and as such were governed by the layered mechanisms for decision-making and accountability that mirrored the layered nature of the rights (Okoth-Ogenda 2008 in LRC 2011a). In many of these systems of living customary law, tenurial rights to marine resources appear to be inextricably linked to relations of land tenure which provide the social and institutional frame for marine resource tenure relations, rather than the existence of distinctive fisheries institutions and processes (Sunde 2011)³.

By the 1890's, the provincial authorities had begun to issue various fisheries proclamations that shaped tenurial rights, restricting the type and quantity of species harvested and the gear used, assuming and asserting the legitimacy of a statutory presence within tenurial relations. Due to the difficulty of enforcing these regulations in communities far from the main towns many customary practices remained largely unaffected and hence a de facto plural fisheries governance system gradually emerged. Whilst rules of access to and use of resources located within systems of customary law were not explicitly recognized in the various fisheries ordinances of this period, neither were they extinguished. Reference was made to customary fishing rights in the case of *Van Breda and Others versus Jacobs* in the Appeal Court in 1921 where the judge recognized that both parties to the action had operated within a prior fishing custom that regulated the rights of the parties in terms of recognized fishing grounds and practices. Archival evidence suggests that the provincial fishery authority in the Cape respected the Van Breda judgment and its confirmation of the existence of fishing grounds and practices sanctioned by customary law and this case informed the subsequent approach to the management of net fishing up and down the coast for several decades (Sunde 2010)⁴.

From the mid 1930's however, the authority to manage fisheries shifted from the provinces to the State as the State attempted to gain a measure of control over the lucrative and rapidly expanding commercial fishing sector, located along the Western seaboard. The Sea Shore Act of 1935 recognized the State President as the 'owner of the sea shore and the sea' (Sea Shore Act of 1935)⁵. Fisheries management has remained a national mandate since this time with very little devolution of responsibility. The State fisheries authority thus inherited a very complex small-scale fisheries system: a growing small-scale artisanal, largely boat-based sector on the northern and western seaboard, with vestiges of customary practices shaping the fishery notwithstanding the

³The history of these varied African customary systems of marine resource use has not been systematically documented in South Africa to date and to a large extent understanding of these systems is dependent on the rich literature from the land sector in order to understand the features of customary tenure within living customary law (Smith and Wicomb 2010a and 2010b, Claassens and Mnisi 2009, Claassens and Cousins 2008).

⁴Notes from the Fisheries Advisory Board on Regulations Regarding Netting. Cape Archives PAN 24 A120/B/192 (1).

⁵This act and subsequent acts make no reference to the extinguishment of pre-existing customary rights and hence in accordance with existing case law on extinguishment (*Reg. v. Sparrow* 1990; *Mabo v. Queensland* 1992 and *Alexkor Ltd & another v. Richtersveld Community & others* 2003) these rights remain intact and compatible with regulation under state law.

introduction of modern state fisheries regulations and a predominantly shore-based subsistence sector along the remainder of the coast, operating within well established African customary legal systems, with a set of entitlements and layered decision-making structures that differed vastly from statutory notions of the origins of rights and authority.

3. Tenure systems: past and present

3.1 Systems of tenure in the Western and Northern Cape

As noted above, the Union government of South Africa inherited a very diverse set of tenure relations in the small-scale fisheries at the turn of the last century. Scholarship on the historical development of different tenurial rights in South Africa is very limited however the expression of tenure relations is evidenced in archival material that records the many conflicts that arose between different groups and communities of fishers as well as in the conflicts that have erupted between coastal communities and conservation and fisheries management authorities (Van Sittert 1992).

In the Western Cape distinctive tenure rules and patterns emerged as use of and competition over marine resources intensified with the growing commercialization of the fisheries. Local fishing communities defended their traditional fishing grounds against new comers, in so doing giving expression to a range of customary rules regarding entry (who may fish), spatial rules (where they might fish) and gear related rules (what sort of nets and boats were permitted). Inshore fishers in Table Bay, Mossel Bay and Kalk Bay all asserted their tenure rights and fought to ban the new steam trawlers that arrived at the Cape after 1890 (Van Sittert 1992:79). The clashes between local beach-seine net fishers of St Helena Bay and the Italian immigrant set net fishers have been well documented from archival material by Van Sittert (1992). The beach-seine fishery appears to have given rise to the recognition of individual rights, held by an individual boat owner, located within and protected by a self defined community-based system that was embedded in the social and economic relations that emerged between the local fishers, the fishers and the boat owners for whom they crewed and the land owners upon whose land they lived. A collective system of rules appears to have been established on the basis of a combination of the fishers' use of particular nets, their traditional fishing grounds and their knowledge of the resource.

There is little evidence as to how decision-making was managed within these local customary systems in the Cape, or what mechanisms existed for dispute resolution. Oral evidence suggests that the socially nested nature of rights provided the basis for both decision-making amongst a group at the lowest level as well as for the imposition of sanctions. Decisions were taken by the local fishers, in the context of their relation to one another (pers.comm Informant 3 Langebaan 2011). When this mechanism failed, sanctions were imposed by the group in an informal way.

From the 1930's onwards statutory interventions shifted the locus of governance firmly in favour of the state (Van Sittert *et al* 2006). The Sea Fisheries Act of 1940 aimed to industrialize the inshore fisheries and increase the competitiveness of white fishers in the market. A series of state interventions in the 1940's⁶, facilitated access to finance, infrastructure and boats for white fishers. Simultaneously, a series of regulations and prohibitions placed increasing restrictions on

⁶ Fisheries Development Bill (1943) and then the Act (1944), followed by the Crayfish Export Control Act (1944).

subsistence and artisanal fishers in the Western and Northern Cape, and brought them under the control of the industrial sector, steadily eroding the customary access and use rights of these local fishers. The industrial sector came to dominate the fisheries in these two provinces, pushing the local practices of these fishing communities to the margins and rendering them near invisible. In this sense, the shadow of customary practices is often only visible through the prohibitions and limitations on subsistence rights that are evidenced in a host of Provincial and National ordinances and proclamations.⁷

These statutory limitations on fishing communities' access to marine resources went hand in hand with a range of apartheid legislation which further eroded the land-sea linkages that lay at the heart of many coastal communities' tenure security. In terms of the Group Areas Act of 1966 many coastal areas were declared "whites" only and restrictions were placed on access to the beach for Black persons. As a result of this racist legislation many fishers were dispossessed of their direct access to their traditional fishing grounds and landing sites, making their access to resources extremely difficult, if not impossible. Many of them were forcibly removed from their homes adjacent to the sea and relocated away from the coast. This impacted their access to the material basis of their livelihoods and culture, their collective identities as fishers and their sense of place.

These race based removals primarily impacted coastal communities living in the Northern and Western Cape. In the Eastern Cape and KwaZulu Natal the Group Areas Act did impact some communities however as large sections of the coastline in these two provinces had been designated 'Bantustans'⁸ in terms of various pieces of racist legislation the impact differed. In these two provinces small-scale fishing communities had no legal status during this period and their tenure rights were not recognized (Sowman et al 2006). Many continued to harvest illegally according to their customary systems of tenure, running the risk of being caught (Harris *et al* 2007).

3.2 Living customary law

In these systems of living customary law that have prevailed in the traditional authority areas of the country, albeit in evolving forms, and despite their lack of recognition by the state, marine resource tenure systems appear to have been inextricably linked to land tenure systems. In such living customary systems, several key characteristics identified by anthropologists and land tenure experts are applicable to fisheries and provide important pointers towards good governance of tenure⁹:

⁷ These included restrictions such as prohibitions on the sale of rock lobster for 'own' use, bag limits for the catching of rock lobster for 'own use' restriction of the landing of rock lobster to specific landing sites and the buying and selling of rock lobster was restricted to two designated, white owned companies.

⁸ The term used to refer to the areas reserved for residence for African persons during Apartheid.

⁹ (Cousins 2008, Bennett 2008, Okoth-Ogendo 2008, Comaroff and Roberts 1981, Comaroff and Comaroff 2009).

3.2.1 Tenure rights to access and use of resources are a function of membership of, and the relations within, the group.

Tenure relations are often kinship based but in some instances are derived through other social ties, affiliations to a group and its political authority or transactions of various kinds (Cousins 2008: 111; 129). In Dwesa-Cwebe for example, the right to harvest mussels from the inter-tidal zone is based on membership of a locality, which in turn is defined through land tenure in this locality. Access to land in this area is based on a range of social relations including agnatic kinship, friendship, a history of common employment and common membership of church institutions (Fay 2005). The social boundaries of these groups are not fixed and tenure rights may change as they adapt to changing circumstances as is evidenced in Kosi Bay where the proximity to the Mozambican border and the influx of migrants from Mozambique, many of whom also speak Tsonga, has allowed the system to adapt to grant tenure rights to these Mozambicans (Sunde 2011).

3.2.2. Rights are shared and relational, not absolute.

Cousins (2008: 129: 133) notes that rights are embedded in a range of social relationships and units including households, kinship networks and various levels of 'community'; the relevant social identities are multiple and overlapping and therefore nested or layered in character. For example, individual rights within households, households within kinship networks, kinship networks within local communities. Whilst the male head of household within Kosi may be considered the 'owner' of a fish trap, and as such has 'individual' rights, this status is entirely derived from his clan relationship which is nested within his household, which in turn is nested in a distinctive clan system upon which the 12 villages surrounding the Lake have developed (Sunde 2010b). In this way, **tenure is characterized as being simultaneously communal and individual in character and may have both individual and communal features.** Common property rights and different forms of individual property rights under community norms can both be accommodated. Bennett has observed that rights can be seen as 'a system of complementary interests held simultaneously' (Bennett 2004:381). The relational component provides a framework for local, horizontal accountability between users that is not present in current statutory systems of individual rights.

3.2.3 The systems of rights that emerge are a function of and operate in social and political environments¹⁰.

In Kosi Bay, tenure rights have historically been derived from membership of a particular clan, living adjacent to the lake. This clan is part of the larger Tembe-Tsonga people, living under the authority of the Tembe chief. Rights to access and use the fishery resources of the Lake are derived from the authority of the *Nkosi*, which is devolved to the local *Induna* or headman. This authority is symbolically acknowledged annually when the whole community of fish trap owners participate in a fish drive and present the *Nkosi* with fish that they have caught. The communal, relationship content of their tenure rights is reinforced through the practice of collectively ploughing each other's lands immediately prior to the fish drive (Sunde 2010b). The content of the right is related to access to the resource although the territorial boundaries may change. This aspect has been

¹⁰ (Cousins 2008: 128).

most clearly evidenced in traditional authority areas such as Mkambati where statutory intervention has changed the territorial boundaries however communities continue to assert their rights to harvest resources (Sunde and Isaacs 2008).

3.2.4 The system of administering rights within living customary systems is nested within layered communal systems and is negotiated in changing political and social settings or environments.

In many traditional authority areas, rights are administered by a sub-headman, acting at local village level, however he is advised by a group of elders from this village and his authority to make decisions is entirely derived from this group of elders not from an authority derived from the *Nkosi*. For example, in Dwesa-Cwebe, the *Nkosi* is merely informed of developments and actions, his permission is not sought. The particular power and authority of this *Nkosi* is linked to the role that he has historically perceived to have played in negotiations with the State over the communities' dispossession from their land (pers.comm Informant 1 Dwesa-Cwebe, Sunde 2011). In some instances, the administration of rights is located at the level of the users. For example, women harvesting mussels at Dwesa-Cwebe report that they have a system of rules amongst themselves that relate to how they conduct themselves when they go to harvest mussels. Mutually agreed upon rules include the following: The women decide together if conditions are suitable for harvesting, they go to harvest in a group in order to help one another, the women who are identified as the fastest harvesters are delegated to do all the actual harvesting, slower women are then delegated to clean and carry the mussels. The harvest is shared equally amongst the women, irrespective of the task that they have performed (pers.comm Informant 2 Dwesa-Cwebe, Sunde 2011). This layer of administration is further embedded in the local institutions of tenure that exist at household level, based largely on kinship membership, as well as sub-ward level where membership derives from a combination of kinship as well as other social ties. The sub-headman and a group of household heads have authority at this level of administration however it would appear that it is rare for the administration of mussel harvesting, which is a gender specific role, to ever require intervention at this level. To date the women report that they have not required explicit rules related to sanctions nor have they had to enforce any rules related to entry and exit as they have not perceived any internal threats to their tenure. Threats to their tenure have come from external sources: the imposition of a no- take MPA along the coastline where they have traditionally harvested and their subsequent restriction to a smaller area for harvesting. To date the women's response has been to harvest one area more intensely, to take increased risks in harvesting in deeper waters and to risk harvesting within the boundaries of the MPA despite this being considered illegal by the authorities. The women question the logic of the MPA boundary as they believe that spreading their effort across a larger section of the coastline, as they used to do, was more sustainable. They also believe that mussels grow better when regularly harvested. They do however acknowledge that the mussels that they are now able to access are smaller and they are not able to access the quantities that they have previously harvested (pers.comm a range of Informants, Dwesa-Cwebe Sunde2011).

3.2.5 Dispute resolution processes are embedded in local layers of accountability

In systems of living customary law disputes are resolved at different levels, depending on the level at which the right is vested and the extent to which the dispute impacts other levels. In many communities traditional leaders, both the *Nkosi* and the headmen, continue to play an important role in dispute resolution related to land and to other natural resources such as water

(Kapfudzaruwa and Sowman 2009: 690). Claassens has noted that “in most areas decisions concerning the deprivation of rights must first be debated at various levels, for example at clan and village level, and finally at a *pitso*, or general meeting of the entire community” (Claassens, 2010:17). The layered nature of rights gives rise to a similarly layered system of institutions for accountability and dispute resolution. “Leaders are forced to take into account the views and deliberations of other levels of authority which provide people with alternative forums in which to express their views. The power of different levels in the traditional hierarchy expands and contracts depending on the confidence people have in leaders at the different levels” (Claassens, 2010:18).

3.2.6 Rights and their administration are evolving, not fixed.

Recent studies of communal land tenure systems in the Dwesa-Cwebe area suggest that considerable variability and flexibility in tenure systems and the need for a nuanced approach to tenure governance that is practice rather than rules based (Fay 2005:1).

The devolution of administration of rights appears to facilitate flexibility and enhance ability to adapt to changing circumstances. For example, the local headmen and male owners of the Kosi Fish traps have granted permission for a young widow to use her deceased husband’s fish trap because they are aware of the fact that her son is too young to take over the ownership and use of his deceased father’s trap and the household is in dire need of access to fish for their basic household food security (pers.comm informant 1 and 2 Kosi Sunde 2010b). This shift in the gendered basis of the local rules was unusual but held legitimacy with the other male trap owners as they said “we know the needs of this household” (pers.comm Informant 2 Kosi Sunde 2010b).

In these living customary systems, the community or group does not base its rules on legislation or derive them from external regulatory frameworks; rather the rules emerge from the cultural and social context. Different from statutory and common law legal systems, the rules are not separate from the social, economic and political spheres of the community. They were and are all part of the community’s system of engaging with and adapting to their immediate life world. In this context, focusing on only one level, such as the chieftaincy, is likely to skew the relative balance of power between different layers, create tensions and conflicts over jurisdictional boundaries and resource use, and undermine the flexibility and downward accountability of administrators to rights-holders (Cousins 2008:126).

Section 4. Privatisation, legal reforms and the consolidation of individual tenure

As early as the 1930s the State introduced the individual quota system as a mechanism for allocating tenure rights to high value species, located predominantly on the western seaboard, and this enabled a steady privatisation of the marine commons as a select group of commercial companies gained control over the most lucrative resources through this quota system. Significantly, this statutory system ushered in a new approach to governance that was no longer directly coupled to local systems of decision-making and accountability. Instead, the ‘governing system’ was now firmly removed from the ‘system to be governed’ (Jentoft et al 2007:610). In contrast to the dynamic nature of living customary law systems, the state imposed fixed rules and regulations upon the fishers which reflected the alliance between the State and white capital during the Apartheid years.

Following the end of Apartheid and the election of a democratic government in 1994, there were high hopes that the legal reforms of the new state would usher in a new, democratic paradigm for governance of marine resources. In terms of the South African Constitution fisheries governance is a national competency and this constitutional mandate is located within the Department of Agriculture, Forestry and Fisheries. Governance functions are centralised however in one province, (KwaZulu Natal), certain aspects of management such as permit regulations, monitoring and compliance have been contracted to the Provincial department of conservation since the early 2000's.

In 1998 the Marine Living Resources Act (MLRA) 18 of 1998 was introduced to protect and manage marine living resources. In order to give effect to the right to equality as contained in Section 9 of the Constitution, the MLRA aimed to “restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry” (DEAT 1998). Following the introduction of the MLRA, the Branch responsible for fisheries management introduced a series of different policy mechanisms in order to allocate tenure rights in the inshore fisheries. An individual permitting system was introduced in 1999, followed by a new process of rights allocations in which the state allocated ‘limited commercial’ rights for four years to selected individuals and registered associations through a rights application verification process. The rights application process was very complex and discriminated against fishers with low levels of literacy, the verification process was not regarded by the fishers as legitimate and the appeal processes were complex and costly (Masifundise 2005). Many traditional small-scale fishers were excluded or did not get access to what they perceived as their traditional fishing grounds. Of particular concern was the fact that no rights were allocated in KwaZulu Natal and Eastern Cape. In these provinces the State continued to issue annual permit exemptions. In 2006 the Department again allocated individual, commercial rights, de-coupled from any community-based context for decision-making or accountability (DEAT 2006). Annual exemption permits continued to be allocated in the other two provinces.

Several potentially transformatory components of the MLRA have not been realised through the interpretation of the legislation in the current rights allocation policy. Section 19 of the MLRA makes provision for the creation of a ‘subsistence fishing area’ with exclusive access to identified fishers. However this provision has never been implemented. Further, the MLRA made provision for a Fisheries Advisory Committee which would enable representation of fishers however this mechanism for facilitating participation of the fishers in governance has also not been realised. In addition to the failure of the new rights allocation policy to recognise the rights of traditional fishing communities, the approach to management of the fisheries in terms of this statutory framework has further dispossessed small-scale fishing communities of their tenure rights. This is most visibly demonstrated through the aggressive drive to establish no-take marine protected areas. To date 21% of the coastline has been declared Marine Protected Area and in many instances coastal communities have lost much of their access to their traditional fishing and harvesting grounds as a result of this policy (Sunde and Isaacs 2008). As Figure 1 below indicates, a considerable portion of these MPAs are along the eastern seaboard, where customary communities predominate.

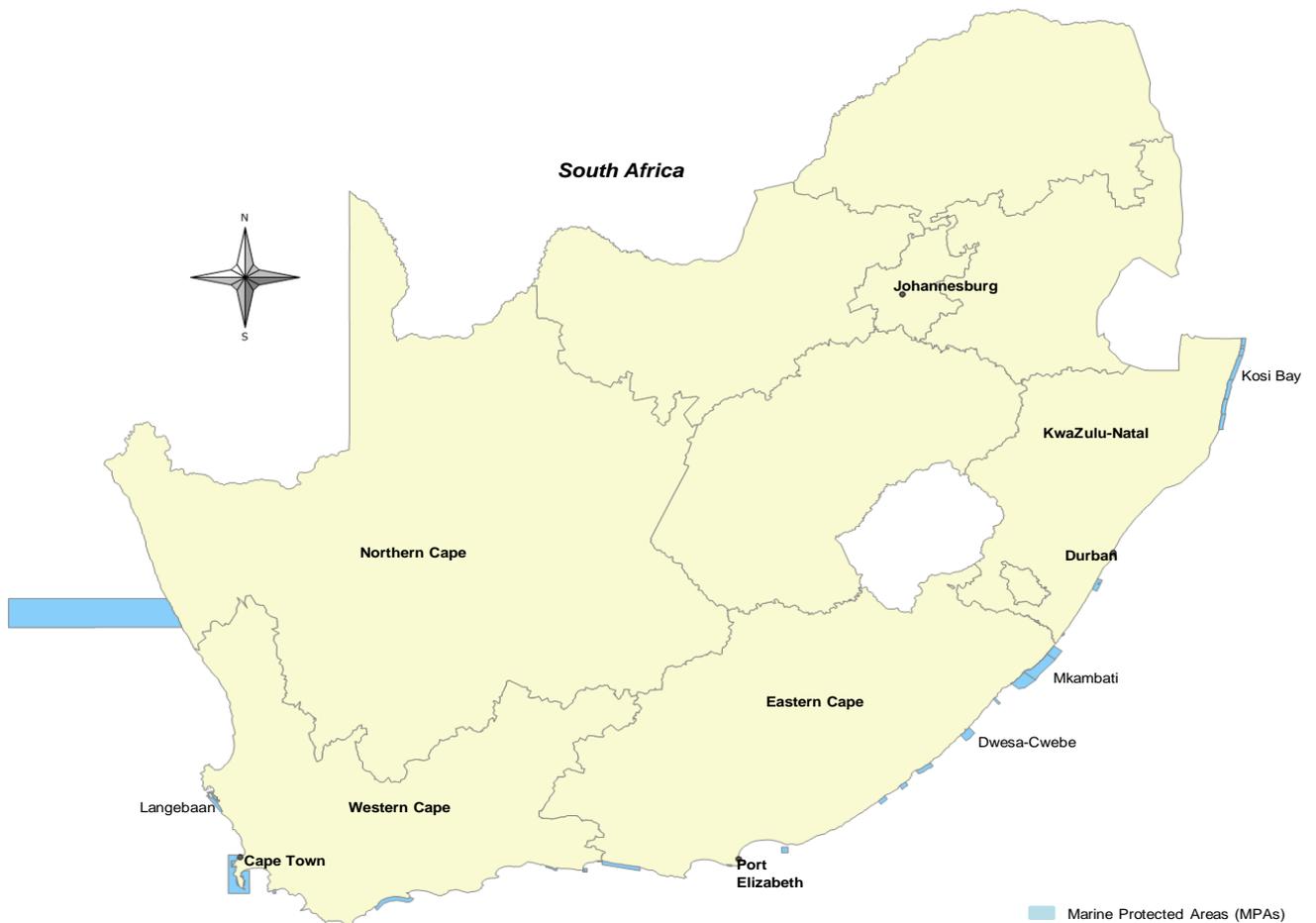


Figure 1: Country map of South Africa showing the four coastal provinces and Marine Protected Areas.

The State has taken a decision that where land dispossessed during Apartheid had been placed under conservation status, the land claims would be recognised but this land would be retained under conservation status (DEAT 2002 in Walker 2009:232). The State has entered into co-management agreements with these local communities however in most instances, because the MPAs comprise predominantly ‘no-take’ areas and the communities are prohibited from accessing the resources upon which they have traditionally depended they do not see the benefits of participating in a ‘co-management’ relationship with the State. In the case of Mkambati MPA in the Eastern Cape, the traditional authority in the area has argued that the state failed to consult him and has refused to support co-management. Although fishers are aware of the governing regulations regarding no-take zones, they continue to harvest and use the notion of *ukjola*¹¹ (Kepe 1997 in Sunde and Isaacs 2008). In most cases, the fishers are not arrested as the civic organizations and tribal authorities tend to support *ukjola*, a process of legitimizing customary rights.

¹¹ “This is a local term that refers to locally legitimized “stealing” of a resource, based on historical claims to it, that predate the existing legislation (Kepe, 1997:53)”.

In response to the failure of the new policy to accommodate their rights, the fishers of the Western and Northern Cape embarked on a series of advocacy actions to raise awareness about their marginalization and to advocate for a more equitable policy (Masifundise 2006). The ongoing discrimination against the rights of these traditional small-scale fishers, resulted in protest action (Sunde, 2003; Isaacs, 2006); legal action by a group of traditional fishers against the Minister responsible for fisheries management at the time (K George and others vs. the Minister of Environmental Affairs and Tourism, 2005) and increased disregard for statutory rules and regulations (Hauck and Kroese 2006; Hauck 2009; Sowman et al. 2008 in Sowman 2010).

Research with communities along the entire coastline (Faasen 2006, Sunde and Isaacs 2008, Hauck 2009, Sunde 2010, Williams 2010, Isaacs 2010) has highlighted the fact that many of these small-scale fishing communities have continued to operate within a plural legal context; one imposed by a statutory legal framework as well as one grounded in local 'living' customary law, that gives expression to their sense of entitlement. In the words of a fisherman from Langebaan

“we have two fishing systems, one in which we fish by day and one in which we fish on the margins, by night” (pers.comm: Respondent 3 Langebaan 2011).

This argument was used in the public interest litigation against the Minister in which the fishers stated that the Minister had failed to recognise their customary rights and as such had violated their fundamental rights as enshrined in the Constitution (K George and others vs the Minister, 2005).

Section 5 A Sea Change – the new small-scale fisheries policy

An order of the Equality Court¹² in May 2007 required the Minister responsible for fisheries to develop a policy that would address the needs of this hitherto excluded group and provide 'interim relief' through access to marine resources until such time as the policy was finalised (Kenneth George versus the Minister EC1/05). Following the Equality Court order in 2007, the fisheries department hosted a National Summit on Small-scale Fisheries where key issues and concerns relevant to this sector were debated. The Summit delegates proposed the establishment of a National Task Team (NTT) to take the policy development process forward. This NTT was appointed in 2007 and included representatives from government and fisher communities in all four provinces, as well as researchers, Non Governmental Organisations (NGOs) and Community Based Organisations (CBOs). The brief of this Task Team was to develop a small-scale fisheries policy for South Africa that would address the socio-economic rights of this fisher group and ensure equitable access to marine resources. In the meantime, with support from NGOs and CBOs, fishers across the country were meeting and developing proposals for this new policy (Masifundise, 2010). A key issue emanating from this series of meetings was the demand from fishers' that their pre-existing customary rights to marine resources be recognised. Women from fishing communities argued strongly for a community-based system of tenure rights as they believed that the individual system

¹²The Equality Court denotes a sitting of the High Court of South Africa that hears matters argued in terms of the 'Promotion of Equality and Prevention of Discrimination Act' – the statute that gives effect to the equality clause of the Constitution. The Constitution provides for the creation of the Act as an expression of the central importance of equality to the South African Constitution.

of rights, devoid of community content, has undermined the social relations in their communities and contributed towards discrimination against women (Masifundise 2008).

A draft policy was finally released for public comment in September 2010 (DEAT 2010). The principles included in the new draft policy suggest a significant shift in approach to the small-scale fishery sector and its governance. Of fundamental importance and particular significance for a new system of tenurial governance are the following:

- it recognises the rights and needs of small-scale fishers and affords them legal protection;
- it recognises the interdependency of the social, cultural, economic and ecological dimensions of fisheries;
- it requires that these fishers be granted preferential access to marine resources especially where such communities have historically depended on marine resources; and incorporates a community-rights based approach to the allocation of marine resources;
- it promotes a community-orientated approach to fisheries governance, that is responsive to the local context;
- the policy adopts an adaptive co-management approach;
- it promotes the devolution of decision-making powers to local level institutions (subsidiarity principle), and
- the policy requires dispute resolution mechanisms to be established locally.

In essence, the new draft policy presents a call for the 'restitution' of a community-based property regime however the fishers' claims are now framed within the language of a complex net of customary law and aboriginal title¹³, statutory law derived from the South African Constitution, finely woven with a normative, international human rights and fisheries policy framework. In this regard the new draft is underpinned by a set of principles that have been influenced by principles contained in the Constitution as well as in several international and regional soft law instruments relevant to small-scale fisheries governance.¹⁴

¹³In a landmark land restitution claim in South Africa *Alexkor Ltd v Richtersveld Community* (2003) the concepts 'customary law interest' in land, customary law ownership, aboriginal title and aboriginal title rights were considered. This judgement has influenced subsequent approaches to living customary law claims.

¹⁴ These include the United Nation Convention on the Law of the Sea, FAO Code of Conduct on Responsible Fisheries, Convention on Biological Diversity, Southern African Development Community Protocol, UN Millennium Declaration, UN Declaration on the Rights of Indigenous People and more recently the Bangkok Statement (2010).

Section 6 Governance of the 'goods' or good governance? Towards a different approach to governance of tenure

The draft policy motivates strongly for a “paradigm shift” in small-scale fisheries governance towards a ‘community-based approach’ (DAFF 2010:34). This call has been based on extensive discussions at local level with fishers on what would constitute ‘good governance’ of small-scale fisheries. These debates and discussions have been influenced by the knowledge that the tenure landscape in South Africa today is a confused mix of community systems that suffered to a greater or lesser degree from the imposition of inappropriate regulatory systems, resulting in a de facto system of legal pluralism. Notions of what constitutes ‘governance’ and what might be ‘good’ are highly contested in this context in which, because of their past experiences of discrimination, communities have little trust in externally imposed measures of ‘equitable, effective and efficient’, ‘sustainable’, ‘transparent’ and ‘accountable’. This is the context within which South African fishers have argued for a re-cognition of communities as the owners of their own systems of governance.

International multi-lateral institutions such as the World Bank and the United Nations Development Programme have identified a range of normative principles framing ‘good governance’ including the allocation of secure rights to resources, participation in decision-making and management, transparency and accountability and the ‘rule of law’ (Parathasarathy 2005). The conventional model of ‘good governance’ advocated by international bodies such as these has tended to advance a very specific understanding of the ‘rule of law’ that is closely tied to the recognition of what is perceived to be ‘secure’ tenure rights within systems of statutory law (Parathasarathy 2005). What has become clear through the South African example of the exclusion of traditional small-scale is that despite a progressive Constitution that protects their rights, and a highly regulated, rights-based commercial fishery, the ‘rule of statutory law’ is not in and of itself a sufficient condition to secure the substantive rights of many communities. It is the interpretation of this law, within the context of power relations operating within systems of governance that inevitably shape the outcomes of fisheries governance. In the South African context, the power of both the commercial industry and the conservation lobby, backed by marine science, has enabled an interpretation of the balancing act between the ‘right to the environment’ and the other socio-economic and customary rights protected within the Constitution. In this context, the orthodox approach to ‘good governance’ interprets over-harvesting of resources as arising due to ‘weak governance’ and ‘tenure problems’ associated with lack of stability and lack of effective tenure systems, compliance, monitoring and enforcement. The management solution has been market-based individual rights, strict regulations and limits on harvesting for near shore fishers, with increased enforcement. In many instances, as noted above, a key management response to over-exploitation of resources and the need for biodiversity protection has been the imposition of no-take marine protected areas with no compensation for the coastal communities concerned for the changes to their tenure rights and their contribution towards protecting the marine environment for the ‘greater good’. The question thus arises, how can the commitments to the State’s obligations with regard to the “community rights based and ecological sustainability approach” in the new draft small-scale policy (DAFF 2010) be interpreted in a way that they are in compliance with

- a) international standards with regard to fishing communities and their participation in resource management, and

- b) Constitutional requirements for the protection of the environment and promotion of sustainable use of resources as well as the relevant social and economic rights?¹⁵
- c) Emerging international law principles and general tenets of African customary law that give content and describe appropriate process in the consent standard.¹⁶

Neither the current fisheries statutory legislation, reflected in the Marine Living Resources Act, nor the draft small-scale policy explicitly recognizes customary fishing rights however the new South African Constitution provides the legal framework for the recognition of fishing rights and rules developed in terms of customary law, in so far as these are consistent with the Bill of Rights.¹⁷ We argue that the interpretation of the principles contained in the new draft policy requires an elaboration of what ‘recognition of rights’ and ‘community-based governance’ would mean within this legal context¹⁸. A recasting of the demand for the recognition of fishing rights within the content of living customary law points towards alternative pathways for the governance of tenure in fisheries. The draft policy and the process of giving effect to this policy provide an opportunity to draw on the ‘emancipatory potential’ (Smith and Wicomb 2010b) of living customary law to create a new form of governance of tenure, one that is radically different to the past and current system in both content and process.

What would this interpretation of the ‘recognition of rights’ include from a governance of tenure perspective? *Firstly*, the policy requires the recognition of pre-existing rights in terms of customary law. This would include recognition that many communities had access to and control over near-shore marine resources through collective forms of tenure. Internationally the struggles of indigenous peoples and customary communities have helped to deepen the interpretations of normative human rights principles to elaborate on what ‘recognition of rights’ and securing ‘control’ over their resources might mean for indigenous and customary communities. In addition to the principles outlined above in the new draft policy, emerging international law and general tenets of African customary law points to the inclusion of other principles and procedural rights such as recognition of and integration of indigenous and local knowledge, recognition of customary institutions and practices and free and prior informed consent (FIPC) when changes to tenure rights are being proposed (Legal Resources Centre 2011b). These principles are gradually being given legal and policy content through communities asserting and claiming their rights¹⁹. For example, In February 2010 the African Human Commission ruled in favour of the Endorois people of Kenya and set important precedent when it noted that consultation with the Endorois people regarding the establishment of a nature reserve on their land which led to their dispossession was not adequate and they did not fully understand the process. To have a process of consent that is fully informed

¹⁵ (Draft Policy for the Small-scale fisheries Sector DAFF 2010: 5).

¹⁶ See Legal Resources Centre 2011a and 2011b.

¹⁷ The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.⁴⁶ Our Constitution

“... does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].” Section 39(3) of the Constitution, South African Constitutional Court, *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), para.51, 62.

¹⁸ The content of this call for the recognition of living customary law draws extensively on the work undertaken by human rights lawyers, researchers and activists in the land sector and is informed by legal precedent in this sector (See Smith and Wicomb, 2009, Claassen and Mnisi 2009, Claassen 2010).

¹⁹ See amongst others Rights Group International on behalf of Endorois Welfare Council v Kenya (2010).

all individuals must be fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives (Centre for Minority Rights, 2010). We contend that these judgements on customary law have to be extended to the everyday management of fisheries and should inform the principles that guide governance of tenure. These guiding principles pertain to any decision about the disposal, development or change of resource use affecting access rights to common property and include the following²⁰:

- Securing the right for all members of communities to meaningful participation and to control access to their land and related marine resources;
- Ensuring that the requirements for community meetings and other expressions dealing with the issue of consent : how decisions are made, who calls for meetings and how in terms of customary law, and what default provisions exist if the process is not adequate or legitimate in terms of customary law are clarified?²¹
- Ensuring that impacts on the access rights of members of the community are avoided, or, where they cannot be altogether avoided, are minimised;
- Ensuring that adverse impacts shall not be distributed in such a manner as to unfairly discriminate against any affected person or member of the community, particularly vulnerable and disadvantaged persons including women and children.
- Confirming that decisions take into account the interests, needs and values of all affected persons and members of the community, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.
- Ensuring that decisions are taken in an open and transparent manner, and access to information is provided in accordance with customary law, custom and usage, and any relevant statute law.
- Ensuring that the use and exploitation of renewable and non-renewable natural resources is responsible and equitable, and takes into account the benefit of such use and exploitation by the community;
- Implementing a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- Ensuring that negative impacts on the social, economic, cultural and environmental rights of the community and its members are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

Secondly, the property clause in the Constitution can and we would argue should, deal with past discrimination.²² Thus it would include restitution of tenure rights lost due to past discrimination.

²⁰ See LRC 2011 and LRC 2011 (b). These principles give content and describe appropriate process to implement and apply the consent standard. These recommendations refer both to the emerging international law principles [Pringle 2001; Ruggie 2011] and general tenets of African customary law and are also derived and adapted from a range of national legislation including the National Environmental Management Act (1997) and Interim Protection of Informal Land Rights Act (IPILRA) 1996.

²¹ Meetings for rights holders affected directly; Input and meetings by rights holders and stake holders affected by indirect and/or cumulative impacts; Reporting about meetings and other expressions dealing the issue of consent; Facilitation and conciliation to seek consent, and equality of arms in negotiations and preparation of binding agreements.

²² The land tenure reform provision of the property clause is explicit: “a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled ... either to tenure which is legally secure or to comparable redress”. What does this mean for tenure reform in fisheries systems? Subsection (8) makes it clear that the property clause is not meant to limit or restrict the state to address past discrimination with regard to land related reform. Tenure reform of fisheries systems may include:

Thirdly, good governance of tenure requires that local fishing communities themselves define their own rules of governance. Within a living customary law approach to governance, several functions of governance are fused at local level, rather than alienating them from the users and use of the resource. The emphasis on 'local content' is thus most significant. This interpretation is supported in the draft policy through the call for a paradigm that "recognises and draws on age old local traditions and practices of harvesting and managing marine living resources amongst small-scale fishers" (DAFF 2010: 34). It draws attention to the processes at local level, located in the relations of fishers amongst each other and the systems of local law that emerge out of these relations, as is characteristic of systems of living law. It recognizes the centrality of the community of users in the following words:

"The policy proposes a shift away from past management approaches to one which emphasises [sic] community orientation and establishes mechanisms and structures for a community-based approach to harvesting and managing marine living resources by the sector and to the allocation of fishing rights to small-scale fishers. This is in line with the global trend which indicates a shift in the governance and management of fisheries to a broader approach that recognizes the participation of fishers, local stewardship, and shared decision-making."²³

We suggest that this conceptualization of a 'community-based approach', includes the local, layered processes of rule making, rights recognition, accountability and dispute resolution as reflected within systems of living customary law. Thus, tenure governance comprises the recognition of rights and their administration.

The *fourth* aspect requiring consideration is the role of the state. In the context of South Africa, where customary systems have become entwined with statutory systems to varying degrees in many communities, any approach that aims to recognize customary law requires an understanding how these parallel legal systems interface, how local 'living' law re-emerges at the nexus of this interface and influences tenure rules, issues of legitimacy, compliance and sustainability. It is faced with the challenge of interpreting how this local law might best be recognized and accommodated in a small-scale fisheries governance framework. Although examples of where statutory law is attempting to accommodate local customary law are rare, expressions of living law that reflects a 'mix and match' hybrid approach are emerging at very local level in practice. For example, in Stilbaai, local fishers have resisted the enclosure of the traditional stone fish traps within a no-take zone within the MPA and have instead advocated for a new tenure system that allows them to harvest harders, which they have traditionally harvested, whilst simultaneously maintaining this heritage resource (Mouton 2008). In the Langebaan MPA, a group of seven traditional net fishers who were excluded from the rights allocation process have opted to share three fishing permits

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- Recognition of fisheries practices and systems of communities with customary tenure systems and informal tenure systems
 - Support and maintenance of customary tenure systems
 - Redress and provision of tenure security which may include protection against unauthorized use where consent had not been given
 - Restitution for the loss of tenure rights due to past discriminatory laws and practices

²³DAFF (2010: 34, 45).

amongst themselves, devising a rotation system at local level in order to access an interim relief permit and maximize the benefits for the excluded fishers (Sunde 2011).

Whilst we have argued that the community should be allowed to develop and continuously adapt their own systems of tenure there does need to be a successful negotiation of the interface between state law and customary/local/community law. In terms of the Constitution, the role of the state is to regulate the ownership rights of communities in terms of reasonable state law in order to secure ecological sustainability but this requires of the state to ensure that local coastal communities are not bearing the burden of conservation and that regulation is fair and equitable across all resource users. The role of the state in tenure governance, as noted above, thus centres on engaging in a participatory process to identify the community and resource outcomes upon which the consequences of governance will be measured. In this way, the state, in conversation with users of the resource, is able to assert the protection and promotion of the rights contained in the Constitution, including those of the environment. Here the State is able to draw on the Bill of Rights in the Constitution for guidance, in addition to the wide range of international legal and other instruments mentioned above. The contrast with the current tenure regime is that the process starts with one of community interpretation of these outcomes, and how they might be achieved – and then becomes a conversation with the State, in the enlarged context of the national need, rather than a top-down imposition of rules that starts with the global but denies the local. The community-based approach advocated in this paper thus suggests that a process of ‘good governance of tenure’ in fisheries starts with the recognition of living customary law as determinative in giving content to the local rules of resource access and use, including how to use these resources, to what extent and to what ends (Legal Resources Centre 2011a). It includes using local law to shape the local systems of decision-making and dispute resolution. This process of local law making would then be augmented with statute law derived from the Constitution that forms the legal environment for the emerging content of living local law²⁴. However a precondition to the involvement of statutory systems of assessment is the necessity of sharing information between the local community and the state in order to reach a negotiated set of outcomes. Given the very different epistemological basis of much of western and African law and cosmology, this is no easy task but requires a facilitated negotiation of shared understandings of approaches and knowledges about the resources to be harvested, as well as the social systems within which this use is located. It is only at this point, after this sharing of knowledge, that a participatory process of objective and standard setting for resource management can be considered.

What we suggest with specific regard to the South African situation and the current small-scale fisheries draft is that the draft be read as prescribing the *outcomes* expected of communities in their governance of their own resource tenure. The standards prescribing these outcomes (for example gender equity, sustainable use of the resource) should be implemented successfully so as to create the ‘consequences’ which would require the community to adapt its rules so as to ensure compliance with the expected outcomes. What the policy should not do, is prescribe how these governance systems should be constituted: that should remain the prerogative of the community. This understanding allows for appropriate governance systems to emerge at a local level and for the tenure rights of these communities to be secured not by the state granting those rights, but

²⁴ In the words of the Constitutional Court: The courts are obliged ... to apply customary law when it is applicable, subject to the Constitution (Constitution of South Africa, Section 39 (2)).

rather through the recognition of their existing rights as they emerge through dynamic, adaptive processes.

There are of course significant differences between the systems of state and customary law which cannot be glossed over, not least of which the fact that the former is to a great extent codified and hence fixed, while the latter is an adaptive system of (unwritten) rules. Wicomb (2010:3) has noted “State law cannot accommodate customary law by understanding it in terms of its own concepts of, for example, ownership thereby denying the customary law system its ‘otherness’. Worst still, state law often reduces its interpretation of customary law to a few common denominators and devises a workable relationship upon that basis. To be ethical, state law must be able to accommodate customary law *in its difference*.”

Conclusion

Governance of small-scale fisheries in South Africa is in transition. Small-scale fishers have argued that the past and current governance regimes have undermined their pre-existing tenure rights. Most significantly, the current regime fails to recognise tenure rights and relations derived from living customary law. Instead, it has imposed a top down, centralised system of tenure governance, based on the principle of the privatisation of the marine commons through the allocation of individual rights, outside of any community frame of reference. Whilst paying lip service to the principles enshrined in the Constitution, the policy has in fact failed to secure an equitable, fair and just system of governance. Instead it has little legitimacy and is perceived to be undermining both local rights and processes towards sustainable use of marine resources. Small-scale fishing communities have begun to articulate a new approach to governance, in which the interdependency between the social, cultural, economic and ecological components and well-being of their lives is recognised. This new paradigm is based on recognition of their rights to participate fully and effectively in governance of marine resources. The drafting of a new policy provides an opportunity to give content to this different approach to governance, one that draws on the ‘emancipatory potential’ of ‘living’ customary law coupled with emerging international human rights standards to secure a more democratic, legitimate and sustainable approach to governance of tenure in South Africa.

References

Bennett, T. 2008. Official' vs 'living' customary law: dilemmas of description and recognition. Claassens, A& Cousins, B. *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (pp. 138-153). Cape Town: LRC; UCT Press.

Cape Archives. 1921. Notes from the Fisheries Advisory Board on Regulations Regarding Netting .Cape Archives PAN 24 A120/B/192 (1).

Cinner, J. E and Aswani, S. Integrating customary management into marine conservation. *Biological Conservation* 140 (201-216).

Clark, B.M., Hauck, M., Harris, J.M., Salo, K., and E. Russell. 2002. Identification of subsistence fishers, fishing areas, resource use and activities along the South African coast. *South African Journal of Marine Science* 24: 425-437.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International. 2010. On behalf of Endorois Welfare Council v Kenya (2003) ACHPR as yet unreported.

Claassens, A. and Mnisi, S. 2009. Rural women redefining land rights in the context of living customary law. Unpublished paper. University of Cape Town. Cape Town.

Claassens, A. 2010. South Africa's post-apartheid experience of customary law: potential and problems for legal empowerment. Paper submitted to the International Development Labour Organisation (IDLO) in 2010.

Claassens, A and Cousins, B. 2008. (eds). *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. UCT Press, Cape Town.

Cinner, J. E. and Aswani, S. 2007 Integrating Customary Management into Marine Conservation. *Biological Conservation*. 140: 201 -216.

Comaroff, J.L. 1974. Chiefship in a South African homeland: a case study of the Tshidi Chiefdom of Bophuthatswana. *Journal of Southern African Studies*. Vol 1 (1): 36-51.

Comaroff, J.L. 1978. Rules and rulers: political processes in a Tswana chiefdom'. *Man (New Series)* 13: 1-20.

Comaroff, J. L., and Roberts, S. 1981. *The Cultural Logic of Dispute in an African Context*. Chicago: University of Chicago.

Comaroff, J. and Comaroff, J. 200. Reflections on the Anthropology of Law, Governance and Sovereignty. F. von Bnda Beckman, v. Benda-Beckmann, & E. J, *Rules of Law and Laws of Ruling: On the Governance of Law*.

Cousins, B. 2008. Characterising 'communal' tenure: nested systems and flexible boundaries. Claassens, A and B. Cousins. *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: LRC; UCT Press.

Deacon, H.J. and Deacon, J. 1999. *Human Beginnings in South Africa: Uncovering the Secrets of the Stone Age*. Cape Town: David Philip Publishers.

Dennis, T. L. *Perceptions of History and Policy in the Cape Agulhas Area: could History influence Policy on Small-Scale Fishing?* Unpublished MPhil Thesis submitted in fulfilment of the requirements to the MPhil (Coursework) degree in Land and Agrarian Studies at the Institute for Poverty, Land and Agrarian Studies, University of the Western Cape.

Department of Environmental Affairs and Tourism (DEAT). 1988. The Marine Living Resources Act 18 of 1998. Government Gazette, Pretoria.

Department of Environmental Affairs and Tourism (DEAT), 2006. General Policy on the Long Term Allocation of Commercial Fishing Rights. DEAT, Cape Town.

Department of Environmental Affairs and Tourism (DEAT), 2007. Memorandum of Agreement between Ls Lulama Xingwana In her capacity as the Minister of Agriculture and Land Affairs ("the DLA Minister") and Mr Marthinus van Schalkwyk in his capacity as the Minister of Environmental Affairs and Tourism ("the DEAT Minister"), document dated 13 April 2007.

Department of Agriculture, Fisheries and Forestry (DAFF). 2010. Draft Policy for the Small-scale Fisheries Sector in South Africa. Government Gazette, Pretoria.

Faasen, H. 2006. *Synergies between biodiversity conservation and sustainable rural development of adjacent communities: A case study of the Tsitsikamma National Park*. Thesis presented in partial fulfilment of the requirements for the degree of Master in Science in Conservation Ecology. Stellenbosch: University of Stellenbosch,

Fay, D. 2005. Kinship and Access to Land in the Eastern Cape: Implications for Land Reform. *Social Dynamics* 31(1):182-207.

Harris, J et al. 2003. The Sokhulu Subsistence Mussel-Harvesting Project: Co-management in Action. Hauck, M and Sowman, M. *Waves of Change*. University of Cape Town. Cape Town.

Harris, J.M., Branch, G.M., Clark, B.M., and S.C. Sibiya. 2007. Redressing access inequities and implementing formal management systems for marine and estuarine subsistence fisheries in South Africa. McClanahan, T., and Castilla, J.C. (Eds.). *Fisheries Management: Progress towards Sustainability*. Blackwell Publishing Ltd., Oxford, U.K.

Hauck, M. and M. Sowman. 2003. *Waves of Change: Coastal and Fisheries Co-management in South Africa*. Cape Town: University of Cape Town Press.

Hauck, M. 2008. *Rethinking small-scale fisheries compliance*. PhD Thesis, University of Cape Town, South Africa.

Jentoft, S, Thijs C. van Son & Bjørkan, M. 2007. Marine Protected Areas: A Governance System Analysis. *Human Ecology*. 35:611–622,

Johannes R.E. 2002. The renaissance of community-based marine resource management in Oceania. *Annual Review of Ecological Systems* 33: 317-340.

Kapfudzaruwa, F and Sowman, M. 2009. Is there a role for traditional governance systems in South Africa's new water management regime? *SA Water* Vol 35 No 5:683-692.

Kepe, T. 1997. Environmental entitlements in Mkambati: Livelihoods, social institutions and environmental change on the Wild Coast of the Eastern Cape. Research Report No. 1. Programme for Land and Agrarian Studies (PLAAS) School of Government, University of Western Cape. In Sunde, J and Isaacs, M. 2008. *Marine Conservation and Coastal Communities: Who Carries the Costs? A Study of Marine Protected Areas and Their Impact on Traditional Small-Scale Fishing Communities in South Africa*. International Collective in Support of Fishworkers: Chennai, India.

Kyle, R. 1999. Gillnetting in nature reserves: a case study from the Kosi Lakes, South Africa. *Biological Conservation* .Volume 88, Issue 2:183-192.

Laplante, L. J, and Spears, S. 2008. Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector. *Yale Human Rights and Development Law Journal*, 2008, 17-116.

Legal Resources Centre. 2011a. Submissions to the working group on extractive industries, environment and human rights violations in Africa. Legal Resources Centre, Cape Town.

Legal Resources Centre. 2011b. Submissions to the Special Rapporteur on the rights of indigenous people, Office of the United Nations High Commissioner for Human Rights, Special Procedures of the Human Rights Council, on *Natural resources extraction and development projects on or near indigenous territories*. Legal Resources Centre, Cape Town.

Love, J. 2008. Foreword. Claassens, A and Cousins, B. *Land, Power and Custom*. UCT Press, Cape Town.

Masifundise (MDT). 2005. Affidavit submitted in the matter of Kenneth George versus the Minister, EC 1/05.

Masifundise (MDT). 2010. *A handbook towards sustainable small-scale fisheries in South Africa*. Masifundise, Cape Town.

Masifundise (MDT). 2008. *Women's Net*. Unpublished pamphlet. Masifundise, Cape Town.

Mnisi, S. 2007. *[Post]-colonial culture and its influence on the South African legal system – exploring the relationship between living customary law and state law* Unpublished PhD dissertation, Oxford University.

Mouton, L. 2009. Fishing for a solution to preserve coast and traps. *The Herald*. 14 July 2009.

O’Faircheallaigh, C. 2008. Negotiating Cultural Heritage? Aboriginal-Mining Company Agreements in Australia. *Development and Change*, Vol 39 No 1: 25-51.

Okoth-Ogendo, H. 2008. The nature of land rights under indigenous law in Africa. Claassens, A and Cousins, B. *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: LRC; UCT Press.

Parathasarathy, D 2005. Taking Participation Seriously. A Critique of Good Governance. Eberhard, C. (ed), *Droit, gouvernance et developpement durable*, Paris, Karthala, Col. *Cahiers d’Anthropologie du Droit*: 307–21.

Parkington, J. 1977. Soaqua: Hunter-fisher-gatherers of the Oliphants river valley. *African historical demography*. University of Edinburgh. Centre of African Studies. Edinburgh.

Peschak, T.P. 2005. *Currents of Contrast: life in Southern Africa’s two oceans*. Struik. Cape Town.

Pring, George. 2001. The Law of Public Participation in Mining and Resources Development. *Mining Minerals and Sustainable Development (MMSD)*. December 2001, No 21a.

Ruggie, J. 2010. *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework*. General Assembly United Nations, A/HRC: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 31 January 2011.

Smith, H. and Wicomb, W. 2010a. Law as a complex system: facilitating meaningful engagement between state law and living customary law. Paper presented at the International Conference on Democracy, Human Rights and Social Justice in a New Global Dispensation 1-3 Feb 2010, Pretoria.

Smith, H and Wicomb, W. 2010b. Towards customary legal empowerment. Paper presented at conference of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), Johannesburg, 4 October 2010.

Sowman, M. 2006. Subsistence and small-scale fisheries in South Africa: A ten-year review. *Marine Policy* 30(1): pp60-73.

Sowman, M. 2010. New perspectives in small-scale fisheries management. Challenges and prospects for implementation in South Africa. *African Journal of Marine Science*. Submitted 2010.

Sunde, J. and M. Isaacs. 2008. *Marine Conservation and Coastal Communities: Who Carries the Costs? A Study of Marine Protected Areas and Their Impact on Traditional Small-Scale Fishing Communities in South Africa*. International Collective in Support of Fishworkers: Chennai, India.

Sunde, J. 2010a. *Transforming the governance of small-scale fisheries in South Africa: the contribution of customary law, institutions and practices*. Unpublished PhD proposal, University of Cape Town. Cape Town.

Sunde, J. 2010b. *Trapped... Traditional fishers of Kosi Bay*. Unpublished report, Environmental Evaluation Unit, University of Cape Town, Cape Town.

Sunde, J. 2011. *Dwesa-Cwebe scoping report*. Unpublished report, Environmental Evaluation Unit, University of Cape Town, Cape Town.

United Nations Environmental Programme (UNEP). 1999. Ad hoc open-ended inter-sessional working group on Article 8(j) and related provisions of the Convention on Biological Diversity November 2009. UNEP/CBD/WG8J/6/2/add/1. United Nations Environmental Programme. Montreal.

Thompson, W and Wardlaw, F. 1913. *The Sea Fisheries of the Cape Colony*. Cape Town: Maskew Miller.

Van Sittert, L. 1992. *Labour, Capital and the State in the St Helena Bay Fisheries C. 1856-C. 1956*. Thesis submitted for the Degree of Doctor of Philosophy, Department of History, University of Cape Town.

Van Sittert, L., Branch, G., Hauck, M., and M. Sowman. 2006. Benchmarking the first decade of post-apartheid fisheries reform in South Africa. *Marine Policy* 30: 96-110.

Walker, C. 2009. Land claims, land conservation and the public interest in protected areas. *South African Review of Sociology*, 39 (2): 232-242.

Wicomb, W 2011 *Law as a complex system: facilitating meaningful engagement between state law and living customary law*. Unpublished paper presented at the IASC Conference, January 2011. Hyderabad, India.

Case Law

Alexkor Ltd and Another v The Richtersveld Community and Others 2004 (5) SA 460 (CC).

Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC).

Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC).

Kenneth George versus the Minister 2007 (EC 1/05).

Mabo v. Queensland 1992 (1) 175 C.L.R.

Reg. v. Sparrow 1990 1 SCR.1075.

Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) (2005 (1) BCLR 1).

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC).

Tongoane and others v The National Minister for Agriculture and Land Affairs and others, 11678/2006 (NGHC October 30, 2009).

Van Breda v Jacobs 1921 AD. 331.