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EMERGING PROPOSALS FOR TENURE GOVERNANCE IN SMALL-SCALE FISHERIES IN SOUTH AFRICA

NOUVELLES PROPOSITIONS DE GOUVERNANCE FONCIÈRE DANS LE SECTEUR DE LA PÊCHE ARTISANALE EN AFRIQUE DU SUD

NUEVAS PROPUESTAS PARA LA GOBERNANZA DE LA TENENCIA EN LAS PESQUERÍAS EN PEQUEÑA ESCALA EN SUDÁFRICA

ABSTRACT

CUSTOMARY FISHING PRACTICES

LIVING CUSTOMARY LAW

GOOD GOVERNANCE

The advent of democracy in in 1994 catalysed a radical law reform process resulting in new forms of governance that sought to address past injustices. However, despite a progressive Constitution that requires the recognition of a range of socio-economic and environmental rights, and the recognition of living customary law, the small-scale fisheries sector continues to be marginalized; meanwhile decisions regarding rights of access to resources, and the use of these, remain centralized.
A new policy was gazetted in June 2012 but has yet to be given effect through implementation. During recent policy deliberation processes, small-scale fishers have referred to customary practices and taken

RÉSUMÉ

PRATIQUES DE PÊCHE COUTUMIER

DROIT COUTUMIER INFORMEL

BONNE GOUVERNANCE

L'avènement de la démocratie en Afrique du Sud en 1994 a déclenché un processus radical de réforme des régimes fonciers, visant à réparer les injustices passées. Cependant, malgré l'existence d'une constitution progressiste prônant la reconnaissance de toute une série de droits socioéconomiques et environnementaux, la pêche artisanale continue à être marginalisée et les décisions relatives aux droits d'accès et à l'utilisation des ressources restent centralisées. Une nouvelle politique a été promulguée en juin 2012 mais elle n'a pas encore été mise en œuvre. Les débats politiques récents ont fourni aux pêcheurs l'occasion de faire connaitre leurs propositions pour un nouveau système de gouvernance

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PRÁCTICAS PESQUERAS CONSUETUDINARIAS

LEY CONSUETUDINARIA VIVA

BUENA GOBERNANZA

El advenimiento de la democracia en Sudáfrica en 1994 impulsó un proceso de reforma radical que desembocó en nuevas formas de gobernanza con las cuales se buscó abordar el problema de las injusticias que habían sido cometidas en el pasado. Sin embargo, pese al establecimiento progresivo de una Constitución que exige dar reconocimiento a un conjunto de derechos socioeconómicos y medioambientales y a la «ley consuetudinaria viva», el sector de la pesca en pequeña escala sigue estando marginado; mientras tanto, las decisiones respecto de los derechos de acceso a los recursos y su uso se mantienen centralizadas.
En junio de 2012, una nueva política pesquera fue publicada en la gaceta oficial del Estado, pero esta política

inspiration from international policy instruments in articulating their vision for a new system of fisheries governance. This paper outlines the processes that have shaped tenure relations in the past and assesses the debates on 'good governance' that are influencing the emerging policy framework in South Africa. The authors argue that, if the twin objectives of social equity and environmental sustainability are to be achieved, constitutional recognition of 'living customary law' is central to fisheries governance. Drawing on insights from local case studies, the authors suggest that an understanding and utilization of the 'emancipatory potential' of living customary law can guide and enhance the interpretation of new governance proposals outlined in the small-scale fisheries policy. It is suggested that this could be used to facilitate forms of tenure governance that are locally appropriate, legitimate and sustainable.

de la pêche, celui-ci devant à la fois s'appuyer sur leurs pratiques coutumières tout en s'inscrivant dans les principes des instruments politiques internationaux.
Ce document rappelle les processus qui ont façonné les relations foncières au fil du temps et mesure l'importance du débat sur la 'bonne gouvernance' dans l'élaboration des nouveaux cadres politiques en Afrique du Sud. Les auteurs estiment qu'une reconnaissance constitutionnelle du « droit coutumier informel » est indispensable pour réaliser le double objectif d'équité sociale et de durabilité environnementale en matière de gouvernance de la pêche. Les études de cas locales montrent à l'évidence le rôle que peut jouer le « potentiel d'émancipation » du droit coutumier informel pour bâtir une nouvelle gouvernance de la pêche artisanale. Les enseignements tirés de ces études de cas pourraient être mis à profit pour créer des régimes fonciers localement appropriés, légitimes et durables.

aún no ha entrado en vigor. Durante la celebración de las recientes deliberaciones, los pequeños pescadores se han referido a las prácticas consuetudinarias y se han inspirado en instrumentos internacionales para articular una argumentación con vistas a la creación de un nuevo sistema de gobernanza del sector pesquero.
Este artículo bosqueja los procesos que han configurado las relaciones de tenencia en el pasado y aborda los debates sobre la buena gobernanza que están influenciando la construcción del marco de políticas en Sudáfrica. Los autores sostienen que para lograr los objetivos hermanados de la equidad social y de la sostenibilidad ambiental, es necesario dar reconocimiento a la ley consuetudinaria viva como elemento central de la gobernanza pesquera. Cimentándose en los estudios de caso locales, ellos sugieren que la comprensión y utilización del «potencial emancipador» de esta ley pueden guiar y mejorar la interpretación de las nuevas propuestas de gobernanza recogidas en la política que reglamenta la pesca en pequeña escala; y proponen que esto facilitaría la creación de modalidades de gobernanza localmente idóneas, legítimas y sostenibles.

INTRODUCTION

The advent of democracy in South Africa in 1994 precipitated a law reform process resulting in new forms of governance 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 customary law, 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 have shaped, and continue to shape, the governance of marine resources in the 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 (Van Sittert *et al.*, 2006).

Increasingly, small-scale fishing communities[2] in South Africa have protested against this system of fisheries governance (Masifundise, 2003; Jaffer and Sunde, 2006). These fishers argue that 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. Despite this, local customary forms of tenure persist and it is increasingly apparent that a de facto, plural system of fisheries governance is in place. South Africa's fisheries legislation overlaps with systems of 'living' customary law along the entire coastline. 'Living 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)[3].

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(Bennett 2008: 138)

2 In the context of South Africa 'small-scale fisheries' includes a continuum of fishers from artisanal, small-scale commercial fishers to those fishing as a means of subsistence.

3 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, localized systems of law observed by numerous communities. (Mnisi, 2007).

Small-scale fishers have successfully challenged the existing fisheries regime, such that 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[4]. A new policy has recently been gazetted (DAFF, 2012) but has yet to be implemented. During the policy deliberation processes, small-scale fishers have referred to customary practices in demanding recognition of their rights, and have taken inspiration from international policy instruments in articulating their vision for a new system of fisheries governance (Masifundise, 2010).

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This paper assesses the debates on what constitutes 'good governance' that are influencing the emerging policy framework in South Africa. The authors argue that, if the objectives of social equity and environmental sustainability are to be achieved, the constitutional recognition of 'living customary law' is central to governance of tenure. The concept of 'tenure' has often been restricted to discussions on the rules relating to the access, use and management of land and land-based natural resources. Increasingly, however, its applicability to the relations and practices governing certain aspects of marine resource use has been recognized (Johannes, 1992; Aswani, 2005; Cinner and Aswani, 2007; FAO, 2012).

The constitutional recognition of 'living customary law' is central to governance of tenure

The concepts used in this paper draw on the FAO working definition of 'tenure' as rules invented by societies to regulate behaviour. The rules of tenure define how rights to land and other natural resources are assigned within societies. They define how access is granted to rights to use, control and transfer these resources, as well as associated responsibilities and restraints. In simple terms, tenure systems determine who can use what resources, for how long, and under what conditions (FAO, 2011:1).

In this paper the concept of customary tenure systems follows the interpretation of the South African Constitutional Court as regards 'living customary law'. This is a system that does not rely on tradition for its definition but rather sees tradition as one aspect of the community's current practice. Living customary law has evolved and continues to evolve as communities

4 *Kenneth George v. the Minister.* 2007, EC 1/05.

adapt to the changing circumstances of scarce resources, new state imposed management regimes, new market pressures and the changing needs of the community. While a narrow interpretation of the Constitution provides an imperative to recognize the rights derived from customary law, the authors argue that the recognition of living customary law should extend further, to give substance and content to the good tenure governance of small-scale fishing communities. Drawing on fieldwork conducted in three customary fishing communities during the period November 2010 to June 2012 (Sunde, 2010a; Sunde, in preparation 2012), the authors suggest that the expressions of living customary law evident in these and other fishing communities highlight the potential that customary tenure systems have to give effect to a commitment to good governance. The importance of ensuring that these systems are understood and that they then inform management processes is also emphasized.

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BACKGROUND AND HISTORICAL OVERVIEW OF MARINE GOVERNANCE SYSTEMS IN SOUTH AFRICA

The systems of fisheries tenure that have developed along the South African coastline differ considerably from region to region, on account of 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. There is archaeological evidence of pre-historic shore-based harvesting and consumption of shellfish along the entire coastline (Clark *et al.*, 2002) and pre-colonial consumption of certain fish species in several regions (Deacon and Deacon, 1999). However, very little is known of the customary tenure systems of these pre-colonial coastal dwellers.

Since the 1600s, an artisanal, boat-based small-scale fishery has emerged along the western seaboard. The system was shaped by the influences of Malay slaves brought to the Cape, European sailors, and the indigenous Khoisan peoples who had extensive knowledge of the coastline. Responding to the demand for fish from the Dutch controlled station at the Cape, fishing

communities sprung up along the Western Cape coast (Van Sittert, 1992; Dennis, 2010). As early as 1652, these fishing settlements were soon subject to the fisheries governance arrangements of the Dutch, 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 1800s, fishing had become an established way of life for many coastal dwellers. From archival work conducted on the fisheries (Van Sittert, 1992), it can be ascertained that a complex array of marine tenure arrangements emerged in the coastal and estuarine waters of the Cape. In contrast to the Cape, the majority of the coastal communities along the eastern seaboard[5] 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 (Hammond-Tooke, 1974; Hunter, 1936). By the 1890s, the provincial authorities had begun to issue various fisheries proclamations that shaped access rights, restricting the type and quantity of species harvested and the gear used. Many customary practices remained largely unaffected and hence a de facto plural fisheries governance system gradually emerged, in part because of the difficulty of enforcing these regulations in communities far from the main towns.

Taking into account systems of customary law, rules relating to the use of resources and access to these resources were not explicitly recognized in the various fisheries statutes of this period, but neither were the rules extinguished. Reference was made to customary fishing rights in the case of *Van Breda and Others v. Jacobs* in the Appeal Court in 1921. 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: its confirmation

5 The term 'eastern seaboard' refers to the section of the coast in Figure 1 covering the now established Eastern Cape and KwaZulu-Natal Provinces. The term 'western seaboard' refers to the coastline of the Northern and Western Cape provinces as indicated in Figure 1.

of the existence of fishing grounds and customary practices informed the subsequent approach to the management of net fishing up and down the coast for several decades (Sunde, 2010b; 2012).

From the mid-1930s, the authority to manage marine 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 (Van Sittert, 1992). Fisheries management has remained a national mandate since this time, with very little devolution of responsibility.

TENURE SYSTEMS: PAST AND PRESENT

Systems of tenure in the Western and Northern Cape

At the end of the 19th century, the Union Government of South Africa found a very diverse set of fishing practices in the small-scale fisheries. There was a growing artisanal, largely boat-based sector on the western seaboard, and a predominantly shore-based subsistence sector along the remainder of the coast. In many instances these operated within well-established customary African legal systems, with a set of entitlements and layered decision-making structures that differed vastly from statutory ideas about the origins of rights and authority.

In the Western Cape, distinctive tenure patterns and rules 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 newcomers, and in so doing gave expression to a range of customs regarding territory, entry and gear. Inshore fishers in Table Bay, Mossel Bay and Kalk Bay (*see* Figure 1) all asserted their tenure rights, and fought to ban the new steam trawlers arriving at the Cape after 1890 from fishing in their waters (Van Sittert, 1992: 79).

Clashes between local beach-seine net fishers at St Helena Bay and the Italian immigrant set net fishers have been well documented from archival material by Van Sittert (1992). An interpretation of archival material on the negotiations between different groups of fishers in Langebaan in the 1920s, and between these fishers and the provincial fisheries authority, suggests that

Figure 1
Country map of South Africa showing the four coastal provinces and Marine Protected Areas (MPAs)

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 (Sunde, 2012).

A series of state interventions in the 1940s aimed to industrialize the inshore fisheries and increase the competitiveness of white fishers in the market by facilitating access to finance, infrastructure and boats (Van Sittert, 2002). Simultaneously, a number of regulations and prohibitions placed increasing restrictions on subsistence and artisanal fishers in the Western and Northern Cape, and brought them under the control of the industrial sector, eroding the customary rights of access and use of these local fishers.

The industrial sector came to dominate the fisheries in these two provinces, pushing the local practices of these predominantly black fishing communities to the margins and rendering them near invisible to the formal legal system.

Living customary law

In the Eastern Cape and KwaZulu Natal, large sections of the coastline were designated part of the apartheid 'Bantustans', the areas reserved for residence of African people during Apartheid. These areas were governed by tribal authorities and supervised by government commissioners. In these two provinces, however, where customary tenure systems predominated, fishing rights derived from these systems were not recognized (Sowman, *et al.*, 2006). Many fishers continued to harvest according to these customary practices, running the risk of being caught (Harris *et al.*, 2007). In these systems of living customary law, tenurial rights relevant to the use of marine resources appear to have been inextricably linked to relations of land tenure which provided the social and institutional framework for marine resource tenure relations, rather than the existence of distinctive fisheries institutions and processes (Sunde, 2011a)[6]. 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 local systems of shared access and use within membership of specific groups. 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-Ogendo, 2008).

In the customary systems that have generally prevailed (albeit in slowly evolving forms) several key characteristics identified by anthropologists and land tenure experts also apply to fisheries (Cousins, 2008; Bennett, 2008; Okoth-Ogendo, 2008), of which the authors list five here.

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

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

Tenure relations are often kinship-based but in some instances are derived from other social ties, affiliations to a group and its political authority, or other transactions of various kinds (Cousins, 2008: 111; 129). For example in Dwesa-Cwebe, the right to harvest mussels from the inter-tidal zone is based primarily – but not solely – on membership of a locality, which in turn is defined through land tenure in this locality. The social boundaries of these groups are not fixed and tenure rights may change as they adapt to changing circumstances. There is evidence for this in Kosi Bay, where the proximity to the Mozambique border has allowed the system to adapt sufficiently to grant tenure rights to the Mozambicans, who are often from similar linguistic communities (Sunde, 2010a).

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Rights are shared and relational

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. While the male head of household within Kosi Bay may be considered the 'owner' of a fish trap, and as such has 'individual' rights, these rights are 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, 2010a). 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 are both accommodated in a customary system. Bennett has observed that rights can be seen as 'a system of complementary interests held simultaneously' (Bennett, 2008: 381). This relational component provides a framework for local, horizontal accountability between users that is not present in current statutory systems of individual rights.

The system of administering rights within living customary systems is nested within layered communal systems

In many traditional authority areas, rights are administered by a sub-headman acting at local village level. He is, however, advised by a group of elders from the village and his authority to make decisions is entirely derived from this group of elders. For example, interviews with residents in Ntubeni, Dwesa-Cwebe reveal that the Chief, known as the *Nkosi,* is merely informed of developments and actions and his permission is not specifically sought. 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.

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 among themselves that relate to how they conduct themselves when they go to harvest mussels. This layer of administration is further embedded in the local institutions of tenure that exist at village level, where membership derives from a combination of kinship and other social ties. The sub-headman and a group of household heads have authority at this level of administration. It would appear, however, that it is rare for the administration of mussel harvesting, which is a gender-specific role, to require intervention at this level. Interviews with female harvesters indicate that they have not needed explicit rules relating to sanctions, nor have they had to enforce any rules relating 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 (personal communications of female Ntubeni harvesters, 2011).

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. 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, 2011:190). 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, 2011: 190).

Rights and their administration are evolving, not fixed

In these living customary systems, the community or group does not derive rules from external regulatory frameworks; rather, the rules emerge from the cultural and social context. Differing as they do 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 circumstances. The devolution of administration of rights to the level of primary users appears to facilitate flexibility and enhance people's 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, contrary to tradition. They are aware of the fact that her son is too young to take over ownership and use of the trap, but the household is in dire need of food. A local leader acknowledged that this shift in the gender bias of the local rules was unusual, but was seen as legitimate by the other male trap owners: "we know the needs of this household" (personal communication of a Kosi Bay fisher, 2010a).

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PRIVATIZATION, LEGAL REFORMS AND THE CONSOLIDATION OF INDIVIDUAL TENURE

In the 1930s the State introduced the individual quota system as a mechanism for allocating access rights to high value species, predominantly located on the western seaboard. This enabled the steady privatization of the marine commons as a select group of commercial companies gained control over the most lucrative resources through this quota system (Van Sittert, 2002). 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. In contrast to the dynamic nature of living customary law systems, the state imposed fixed rules and regulations upon the fishers that reflected the alliance between the State and white capital during the Apartheid years. This primarily impacted the small-scale, artisanal fishing communities in the Western and Northern Cape, while some shore-based customary fishing continued in the other two coastal provinces.

This statutory system ushered in a new approach to governance that was no longer directly coupled to local systems of decision-making and accountability

With the election of a democratic government in 1994 there were high hopes that the legal reforms of the new state would lead to a new paradigm for governing marine resources. In 1998, the Marine Living Resources Act (MLRA) was promulgated to protect and manage living marine resources. Following the introduction of the MLRA, the Chief Directorate that was responsible for fisheries management at the time – then the Department of Environmental Affairs and Tourism (DEAT), now the Department of Agriculture, Forestry and Fisheries (DAFF) – introduced a series of different policy mechanisms to allocate tenure rights in both the inshore and off-shore fisheries. A system for individual permits was introduced in 1999 for the subsistence sector, 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.

The rights application process was very complex and discriminated against fishers with low literacy levels. Furthermore, the verification process was regarded as illegitimate by the fishers, and the appeal processes were complex and costly (Masifundise, 2005). Many traditional small-scale

fishers were therefore excluded from gaining access to resources, or to what they considered to be their traditional fishing grounds. In 2006 the department again allocated individual, commercial rights, de-coupled from any community-based context of decision-making or accountability (DEAT, 2006). 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 actions to advocate for a more equitable policy (Jaffer and Sunde, 2006; Isaacs, 2006). A group of traditional fishers embarked on legal action against the minister responsible for fisheries management (*K. George and others vs. the Minister of Environmental Affairs and Tourism,* 2005).[7]

In May 2007, an order of the Equality Court[8] 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 finalized (*Kenneth George vs. the Minister*, EC1/05). A National Task Team (NTT) was appointed in 2007 and included representatives from government and fisher communities in all four provinces, as well as researchers, Non-Governmental Organizations (NGOs) and Community Based Organizations (CBOs). Its brief 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. A key issue emanating from this series of meetings was the demand from fishers for an alternative approach to the governance of tenure, one that resonated as a 'community-based approach' that recognized their pre-existing customary rights (Masifundise, 2010).

7 Throughout this period annual individual exemption permits continued to be allocated in the other two provinces.

8 The 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.

TOWARDS AN ALTERNATIVE APPROACH TO GOVERNANCE OF TENURE

The call for a new approach to governance has been based on extensive discussions with fishers at local level on what would constitute 'good governance' of small-scale fisheries (Masifundise, 2010). These debates and discussions have been influenced by the knowledge that the tenurial landscape in South Africa today is a confused mix of community systems that have suffered to a greater or lesser degree from the imposition of conflicting 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, communities have little trust in externally imposed measures that claim to be 'equitable, 'sustainable', 'participatory' and 'accountable', because of their past experiences of discrimination. This is the context within which South African fishers have advocated for a recognition of communities as responsible for their own systems of governance.

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This call resonates with much of the theoretical work undertaken over the past two decades on governance of small-scale fisheries. Many studies have explored the characteristics of marine resource use and management systems, in order to assess where these appear to contribute to more sustainable and equitable outcomes (Ostrom, 1990; Berkes *et al.*, 2003; Aswani, 2005; Cinner and Aswani, 2007; McConney and Charles, 2009; Sowman, 2011). This body of work has highlighted the importance of the nature of social organization at local level in shaping sustainability outcomes (Ostrom, 1990, 2008; Berkes *et al.*, 2003; Armitage, 2008), and the 'design principles' that increase resilience and adaptability to environmental change, in turn strengthening the potential for increased efficiency and equity (Kooiman *et al.*, 2005; Sowman, 2011).

The authors argue that a recasting of the demand for recognition of fishing rights within the context of living customary law points to alternative paths for the governance of tenure, in those communities that have customary systems. The development of a new policy provides an opportunity to draw on the 'emancipatory potential' (Smith and Wicomb, 2010a) of living customary law to create a new form of tenurial governance, one that is radically different

to the past and current system in both content and process.[9] This potential of living customary law is evident in locally grounded and articulated customary tenure systems. These systems develop through the dynamic expression of context-specific interactions between social, ecological and economic relations, regulated through a range of local level accountability mechanisms.

What would 'recognition of rights' mean for the governance of tenure within this legal context? First, an interpretation of the principle of 'recognition of rights' would require 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, and that the origin of these rights, and the community's right to their culture, is inextricably linked to their systems of customary law. 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 collective rights and securing control over resources might mean for these communities (Davis and Jentoft, 2003). In many instances these struggles have resulted in significant judgements about their customary rights.[10]

An interpretation of the principle of 'recognition of rights' would require the recognition of pre-existing rights in terms of customary law

The authors suggest that the recognition of customary tenure and of customary law as a source of tenure rights should extend to the recognition of customary governance systems. Thus, in addition to compliance with constitutional requirements, together with international norms on fishers' rights to participate in fisheries management, it would require that the policy be implemented in compliance with emerging principles of international law and general tenets of African customary law that require inclusion of other principles and procedural rights. These include recognition of and integration

The recognition of customary tenure and of customary law as a source of tenure rights should extend to the recognition of customary governance systems

9 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, 2010a, 2010b; Claassen and Mnisi, 2010; Claassen, 2010).

10 For example, the 2009 ruling of the African Human Commission in favour of the Endorois people of Kenya set an important precedent. 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 that they did not fully understand the process (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Endorois Welfare Council v. Kenya*, 2009).

of indigenous and local knowledge, recognition of customary institutions and practices, and free and prior informed consent when changes to tenure rights are being proposed (Legal Resources Centre, 2011b). These guiding principles pertain to any decision about customary property rights and the development or change of resource use affecting rights to common property.

Second, this recognition of rights extends to the recognition of rights lost resulting from past discrimination. The property clause in the South African Constitution provides guidance in this regard.[11] The land tenure reform provision in 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.*' Property is not limited to land in this context. This clause, in subsection 8 of the Constitution, 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. Reform of tenure in fisheries systems may include:

- Recognition of customary 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 resulting from past discriminatory laws and practices

Third, turning to an interpretation of the term 'community-based governance', the authors argue that good governance of tenure requires that local fishing communities themselves define their own rules of governance. The authors suggest that this conceptualization of a 'community-based approach' needs to include the local, layered processes of rulemaking, rights recognition, accountability and dispute resolution as reflected within systems of living

This conceptualization of a 'community-based approach' needs to include the local, layered processes of rulemaking, rights recognition, accountability and dispute resolution as reflected within systems of living customary law

11 Meetings for rights holders affected directly; input and meetings by rights holders and stakeholders affected by indirect and/or cumulative impacts; reporting about meetings and other expressions dealing with the issue of consent; facilitation and conciliation to seek consent, and equality of arms in negotiations and preparation of binding agreements.

customary law. Thus, governance of tenure comprises the recognition of rights and their administration. Indeed, the authors have argued that customary law is an inextricable aspect of the 'functioning' of customary communities: it is therefore impossible to separate the rights arising from the law without also recognizing the community's governance systems.

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A fourth aspect requiring consideration is the role of the state. While the authors have argued that the community should be allowed to develop and continuously adapt its own systems of tenure, there does need to be evidence of a successful negotiation between state law and customary/local/community law. In terms of Section 24 of the Constitution, the role of the state is to regulate the ownership and use rights of communities in terms of reasonable state law in order to secure ecological sustainability, but also 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 tenurial governance as noted above therefore centres on engaging in a participatory process to identify resource allocations and use outcomes. 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 community articulation of these outcomes, and how they might be achieved. It then becomes a conversation with the state, in the context of the broader national need, rather than a top-down imposition of rules that starts with the global and national but denies the local.

The characteristics of living customary law referred to in Section 3 resonate with key insights from the international literature on the enabling factors that maximize opportunities for such a system of management to achieve sustainable and equitable management (Ostrom, 2008). However, tenure systems are not the outcome of neutral rules, but are shaped by power relations in communities. The existence of the characteristics identified above do not necessarily preclude abuses of power at local level. Evidence suggests, however, that they do open space for some of these issues to be contested

Tenure systems are not the outcome of neutral rules, but are shaped by power relations in communities

and resolved (Claassens and Mnisi, 2010). It is the very contestation itself that provides the emancipatory potential for living law, in conversation with the framework provided by the Bill of Rights and other human rights instruments, to create adaptive, robust systems of rules and associated actions that aspire to achieve the principles of good governance.

The community-based approach advocated in this paper therefore suggests that a process of 'good governance of tenure' in fisheries starts with the recognition of living customary law as providing 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). This process of local law-making would then be augmented with statute law derived from the Constitution.[12] A precondition to the involvement of statutory systems of regulation 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 western and African law and cosmology, this is no easy task. It requires a facilitated negotiation of shared understanding about the resources to be harvested, and the equity and sustainability outcomes that need to be achieved. It is only at this point that a participatory process of setting objectives for resource management can be considered.

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Based on the above, the authors suggest that a new small-scale fisheries policy should be read as prescribing not only the principles underpinning the governance of these fisheries but also the *outcomes* expected of communities in their governance of their own resource tenure: for example, gender equity, or sustainable use of the resource. These outcomes should be defined at the outset of the process to enable the community to adapt its rules so as to

12 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)). The Constitution '*... does not deny the existence of any other rights or freedoms that are recognized 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.

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

A SEA CHANGE – THE NEW SMALL-SCALE FISHERIES POLICY

A new policy was finally gazetted in June 2012 (DAFF, 2012). The principles included in it suggest a significant shift in approach to the small-scale fishery sector and its governance. Of particular significance for a new system of tenurial governance are the following principles and requirements:

- The policy recognizes the existence of any rights conferred by common law, customary law or legislation to the extent that these are consistent with the Bill of Rights (3.1(a)).
- It recognizes rights guaranteed by custom and law, and access to and use of natural resources on a communal basis, in so far as these are consistent with the Bill of Rights (3.11(b)).
- It requires that these fishers be granted preferential access to marine resources, especially where such communities have depended historically on marine resources (3.1(l)).
- It promotes a community-orientated approach to fisheries governance that is responsive to the local context (3.1(n)).

The current fisheries legislation reflected in the MLRA does not recognize customary fishing rights, hence the new policy has catalyzed a need to amend the MLRA in this regard (Legal Resources Centre, 2012). This need has also been given impetus by a recent court ruling recognizing that the Dwesa-Cwebe fishers have a system of customary rights. In 2010 three fishermen from Dwesa-Cwebe MPA were charged with intent to fish illegally in the MPA. The magistrate in the matter recognized that the fishing communities of Dwesa-

Cwebe had a customary system of resource use (*State v. Gongqose and two others*, E382/10). In his judgment in May 2012, the magistrate stated "[t]his custom of fishing has, subsequent to the enactment of the Marine Living Resources Act 18 of 1998, found itself in conflict with national legislation". He noted that the South African Constitution provides the legal framework for the recognition of fishing customs developed in terms of customary law, in so far as these are consistent with the Bill of Rights. As it was not within his powers as a magistrate to pass judgment on the constitutional validity of the MLRA, he was required to find the provisions of the Act in force and therefore to find the fishermen guilty in terms of the Act. He noted, however, that the constitutional validity of the Act in this regard was highly debatable. This matter will now be appealed in the High Court where the fishers will argue that the MLRA is unconstitutional and that, in accordance with the new policy, it must recognize their rights.

CONCLUSIONS

The development of a new policy for small-scale fisheries in South Africa has created an opportunity to interpret the emancipatory potential of living customary law to give substance to good governance of tenure. Emerging from a top down, state-centric system of governance within which many traditional fishing communities have been dispossessed of their use and access rights, these communities are arguing that past and current governance regimes have undermined their pre-existing tenure rights. Most significantly, the current regime has failed to recognize tenure rights and relations derived from living customary law. Instead, it has imposed a one-size-fits-all system of tenure governance, based on the allocation of individual rights, outside of a community frame of reference. A recognition of tenure rights systems derived from living customary law reveals several characteristics that collectively give content to the key principles enshrined in the Constitution, and in emerging regional and international norms and legal instruments.

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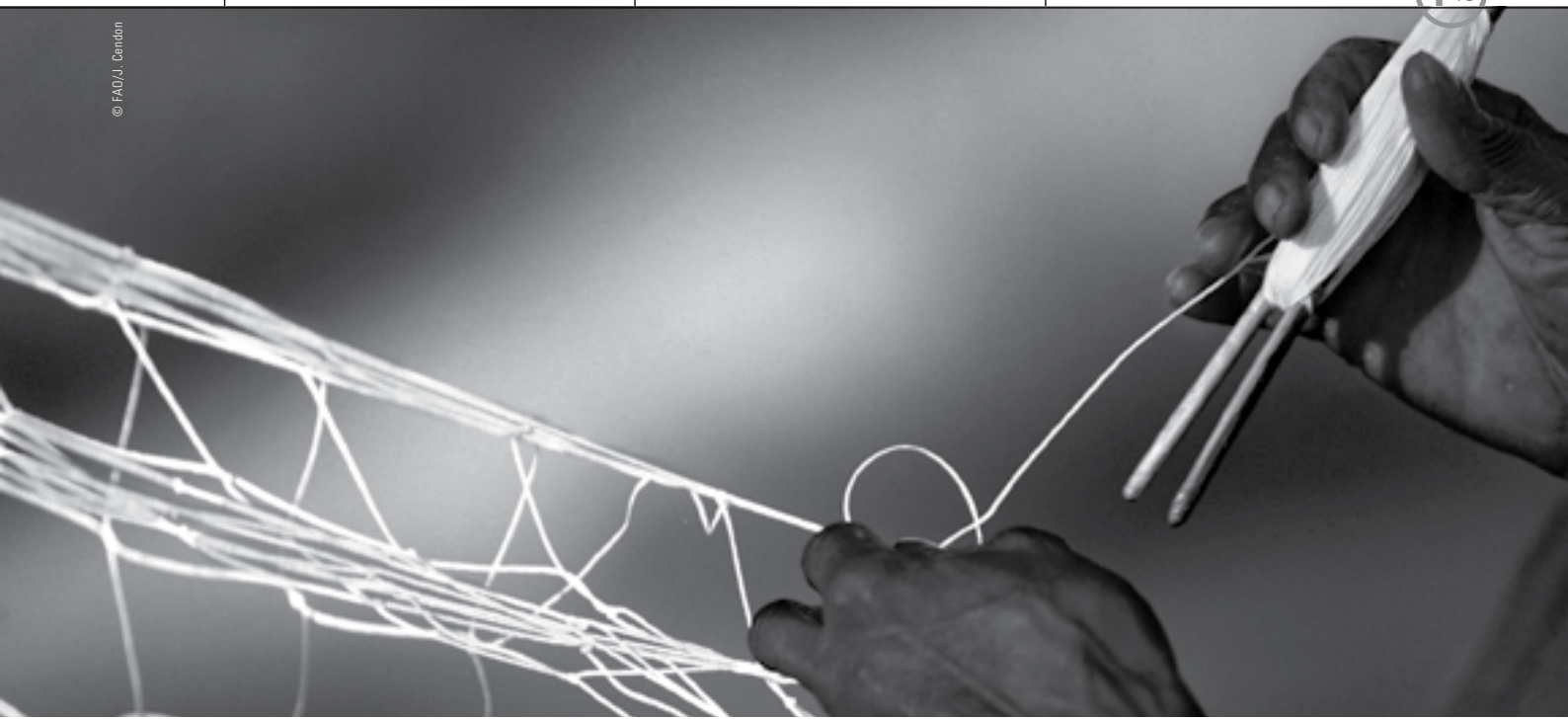

In these systems, access to the use of and governance of marine resources is interlinked and located within a complex mix of socio-ecological, economic and political relations. However, rather than restricting the space within which resource users can operate, research in several customary communities suggests that these nested relations appear to foster new freedoms. These freedoms enable a local responsiveness and adaptation to the changing socio-ecological context of marine resource use in many communities, creating space for the infusion of 'bottom-up' democratic practice and attention to local needs. The authors conclude that the challenge of developing good governance of tenure therefore requires a reinterpretation of what 'recognition of rights' means, and an engagement in weaving finely textured systems of living customary law as part of regional and international human rights norms and legal frameworks.

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