CUSTOMARY GOVERNANCE AND EXPRESSIONS OF LIVING CUSTOMARY LAW AT DWESA-CWEBE: CONTRIBUTIONS TO SMALL-SCALE FISHERIES GOVERNANCE IN SOUTH AFRICA

Jacqueline Sunde

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DECLARATION

I declare that

"Customary Governance and Expressions of Living Customary Law at Dwesa-Cwebe: Contributions to Small-scale Fisheries Governance in South Africa"

is my own work, that it has not been submitted for any degree or examination in any other university and that all sources I have used or quoted have been indicated and acknowledged by complete references.

Signed ……

Supervisor: Associate Professor Merle Sowman (University of Cape Town, South Africa);

Co-supervisor: Associate Professor Maarten Bavinck (Director of the Centre for Maritime Research (MARE), University of Amsterdam, Netherlands).

ABSTRACT

Jacqueline Sunde

Customary Governance and Expressions of Living Customary Law at Dwesa-Cwebe: Contributions to Small-scale Fisheries Governance in South Africa

Customary systems of marine resource governance have gained increasing attention internationally in the past three decades. Notwithstanding this, and despite the Constitutional recognition of customary governance and customary law in South Africa, the post-apartheid legislative reforms in the fisheries sector have failed to recognise customary systems of marine resource governance. Drawing on a case-study of the Dwesa-Cwebe community in the Eastern Cape, South Africa, this research aimed to describe and understand the customary marine resource governance system of this community and its relationship to living customary law. It explores how this customary system of marine resource governance has interfaced with statutory and other systems of law in the past and how it continues to develop in the current context.

The findings from this research highlight the distinctive nature of the customary system of marine resource governance practiced by the community of Dwesa-Cwebe and their expressions of living customary law embedded in this governance system. The nature of this system is foundationally different to that of a Western statutory governance system. This customary system of governance has interacted with the statutory system for over a century, in part distorted by this system but retaining its integrity. In the context of the Constitutional recognition of customary systems of governance and customary law, this governance system now requires understanding and recognition in a new system of marine resource governance in South Africa. This thesis explores the contribution that this system of customary governance can make towards promoting socially just small-scale fisheries in South Africa. It argues that harmonisation of the statutory and customary system of marine resource governance demands an approach to governance theory and practice that is able to imagine an alternative 'ecology of governance'.

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ACRONYMS AND ABBREVIATIONS

AA	Administrative Area
ANC	African National Congress
ARDRI	Agriculture and Rural Development Research Institute
CBD	United Nations Convention of Biodiversity
CBNRM	Community-based Natural Resource Management
CBO	Community-based Organisation
CC's	Conservation Committees
CC	Community Committee
CMT	Customary Marine Tenure Systems
CPA	Common Property Association
DAFF	Department of Agriculture Fisheries and Forestry
DDG	Deputy Director General
DEA	Department of Environmental Affairs
DEAET	Department of Economic Affairs, Environment and Tourism
DEAT	Department of Environmental Affairs and Tourism
DLA	Department of Land Affairs
ECNC	Eastern Cape Nature Conservation
ECOSOC	Economic and Social Council of the United Nations
ECPB	Eastern Cape Parks Board
ECPTA	Eastern Cape Parks and Tourism Agency
FAO	Food and Agricultural Organisation of the United Nations
ICSF	International Collective in Support of Fishworkers
IDP	Integrated Development Plan
ILO	International Labour Organisation
ISER-HSRC	Institute of Social and Economic Research and Human Sciences Research Council
IUCN	International Union for the Conservation of Nature
JMC	Joint Management Committee
KZN	KwaZulu-Natal
LRC	Legal Resources Centre
MCM	Marine and Coastal Management

MLRA	Marine Living Resources Act 18 of 1998
MPA	Marine Protected Area
NEMA	National Environmental Management Act 107 of 1998
NGO	Non-Governmental Organisation
NTT	National Policy Task Team
SDC	Sustainable Development Consortium
SFTG	Subsistence Fisheries Task Group
SSF	Small-scale Fisheries
TRALSO	Transkei Land Service Organisation
UN	United Nations
UNEP	United Nations Environment Programme

CHAPTER ONE: INTRODUCTION

1.1. Introduction

The coastal margins of the sea have inspired human imagination and shaped the contours of human image-in-nature since time immemorial (Gillis 2012). Patterns of use and material culture are etched in the bedrock of coastal shores; mythical stories traverse the centuries and leave layers of memories. Ancient texts and artifacts in museums attest to the close link between the cosmologies, cultural traditions and customary systems of marine resource use and governance of many communities. This transitional zone of social-ecological interaction has shaped and continues to shape human spirit, culture and identity in myriad ways. Whilst in some countries the range of meanings attached to the sea and coast has been largely subsumed by economic values within the age of modernity and capitalist exploitation, many cultures retain customary practices that reflect the central place that the sea and coastline have in the symbolic and material content of their lives and livelihoods (Johannes 1978, Ruddle 1988, Cordell 2000, National Oceans Office 2004, Gillis 2012).

The expression of these diverse attachments and the associated evolution of distinctive patterns of marine resource use and governance, finely woven into social organisation, cultural and economic relations, is visible in many coastal communities around the world in vastly different contexts from India (Bavinck 2001, 2005), Senegal (Dieng and Ndiaye 2012), the Philippines (Capistrano 2010), Madagascar (Rakotoson and Tanner 2006) and Australia (Petersen 2005), to the Caribbean (McConney 2003), with a particularly rich texture of such patterns continuing to be made visible in the Pacific (Johannes 2002, Aswani 2005, Govan *et al.* 2009, Vierros *et al.* 2010). These customary marine resource use and governance practices and the spiritual, cultural and livelihood values embedded in them are evidenced in a range of spatial, temporal, technical, social and legal norms and rules. In many of these customary systems rights to access and use resources are derived from customary law (Ruddle 1998, Hviding 1998, Johannes 2002, Australian Institute of Aboriginal and Torres Islander Studies 2006, Clarke and Jupiter 2010).

Modern fisheries governance has been slow to express an interest in customary marine resource use and governance systems. It was only in the final quarter of the last century that research started describing these practices and directing specific attention to customary systems of marine governance from the perspective of fisheries management (Johannes 1978, McCay and Acheson 1987, Cordell 1989). These systems are still relatively under-researched and many are undocumented. Instead, mainstream marine science and conservation literature has reflected a bias towards a western, economically-orientated paradigm with preconceived notions of what constitutes law, property rights and management (Ruddle 1998, Hickey 2006). The imposition of this paradigm in fact contributed towards the demise of many such customary systems (Pinkerton 1989, Johannes 2002).

In South Africa extensive archeological, material and ethnographic evidence attests to the importance of the coastal zone and marine resources in the histories and practices of coastal dwellers in pre-colonial and colonial times (Parkington 1997, Whitelaw 2009). Little is known about the customary practices of these early coastal dwellers however the majority of the African population continues to live in accordance with some variation of customary law (Mnisi 2009:2). A considerable proportion of those living under customary law and on communally owned lands live in the coastal zone in the former African homelands referred to as Bantustans.[1]

As noted by the Constitutional Court in South Africa:

> *Originally, before colonisation and the advent of apartheid, this land was occupied and administered in accordance with living indigenous law as it evolved over time. Communal land and indigenous law are therefore so closely intertwined that it is almost impossible to deal with one without dealing with the other" (Tongoane 2010* Quoted in Wicomb and Smith 2011: 432)[2].

[1] The term Bantustan refers to the areas designated for African residence by a combination of racially based Native Administration laws from 1913 onwards and apartheid-based legislation introduced in 1951. The history of these laws is outlined in Chapter Four.

[2] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

Yet despite the continued importance of customary law in the everyday lives of many of its citizens, there has been no scholarship on customary law in relation to marine resources and how this shapes the use and governance of marine resources in this country. Notwithstanding the fact that customary governance is recognised in the Constitution through its recognition of the institution, status and role of traditional leadership and customary law (Constitution of South Africa 1996), the post-apartheid processes of reconciliation, land restitution and redress have not addressed the impact of apartheid on customary marine resource governance systems. The importance of these systems in the social, cultural, economic and political context of many coastal communities thus remains invisible and unknown.

Drawing on empirical research from a case study of the Dwesa-Cwebe MPA community on the east coast of South Africa, this research aims to develop an understanding of the customary marine resource governance system of this community and its relationship to customary law. It will explore how this customary governance system has in the past and continues to interface with statutory law. It will use this understanding to explore the contribution that recognition of these customary marine resource governance systems can make towards promoting a socially just system of small-scale fisheries governance in South Africa.

This thesis focuses on 'governance'. Whilst there is no one definition of governance, a common element is the emphasis in governance placed on the "interactions and processes which occur between a diverse group of actors, including non-state actors" (Sowman and Wynberg 2014:6). As noted in the following chapter, the use of this term and its associated meanings is highlighy contested (Sowman and Wynberg 2014), particularly in the context of neo-liberal interpretations of government and governance. Aware of the dangers of using this term, this thesis draws on the definition of governance by Kooiman and Bavinck (2005) that "Governance is the whole of public as well as private interactions taken to solve societal problems and create societal opportunities. It includes the formulation and application of principles guiding those interactions and care for institutions that enable them" (Kooiman and Bavinck 2005:17). The term 'governance' is used and deliberately distinguished from 'management' to indicate the "interactions among structures, processes and traditions

that determine how power and responsibilities are exercised, how decisions are taken and how citizens or other stakeholders have their say" (Borrini-Feyerabend *et al.* 2013:11). It is regarded as inclusive of management which refers more specifically to the steps that are taken to implement governance[3]. Governance is also considered inclusive of tenure in this thesis which is a specific term that has gained prominence in the resource governance literature. Tenure refers to how access is granted to rights to use, control and transfer resources, as well as associated responsibilities and restraints placed on that use. Tenure systems "determine who can use which resources, for how long, and under what conditions" (FAO 2012: iv).

A range of terms is used in the literature to refer to customary marine resource use and governance systems and their associated customary laws (Johannes 2002, Aswani 2005, Cinner *et al.* 2012). Initially referred to as 'traditional marine tenure' (Johannes 1978) and 'sea-tenure' (Cordell 1989), the term customary marine tenure systems (CMT) is now used regularly in fisheries governance and management literature to refer to this broad range of customary practices and systems of access, use and management whereby communities "perceive, define, delimit, own and defend their rights" (Ruddle and Akimichi 1984 in Aswani 2005:289). In some contexts the term 'indigenous system' is used specifically to denote use and governance by the first peoples or indigenous inhabitants of a country or region (Perry 2011)[4].

As with 'customary governance', there is no universal definition of 'customary law' (Perry 2011:5). Customary law evolves and is derived from "social practices considered to be obligatory by the communities in which they operate" (Bennett 2008:138). Bavinck *et al*. (2014), writing about fisher law in South Asia and South Africa, take a similar approach to the definition of customary law. As will be outlined in Chapter Two, in South Africa, the term 'living customary law' is distinguished from 'customary law'. Living customary law is used 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). This term has been

[3] Where the term 'management' is used in a particular reference or set of references this term has been maintained in the text.

[4] Within systems of comparative and international law the terms 'aboriginal' and 'indigenous' have both been used and it is commonly accepted that they are used interchangeably (Lehmann 2004:86).

confirmed and used by the Constitutional Court (*Richtersveld* 2004, *Bhe* 2005, *Shilubana* 2009)[5]. 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 in Sunde *et al.* 2013:120).

The term 'systems' is used rather loosely in the fisheries and conservation literature on customary management systems and is seldom defined. Its meaning in this thesis is drawn from Giddens (Giddens 1979, 1984). Giddens defines systems as the "situated activities of human agents" and "the patterning of social relations across space-time" (Giddens 1984:25). The repetition of certain social practices gives rise to rules or norms. These norms, together with the resources available in the social and natural environment, make up the social structures within which the systems are located. Individuals and groups draw on these sets of norms or rules, together with resources, to reproduce social systems. In this way, "social structures are both constituted by human agency, and yet at the same time are the very medium of this constitution" (Giddens 1979:121). This understanding and use of the terms 'system' and 'structure' is explained further in Chapter Two in relation to the literature on the nature of customary systems of law and the institutions and authorities that constitute and are constituted through these systems.

1.2. Revitalization and recognition of customary systems of marine resource use and governance

Over the past four decades a series of legal challenges such as *Calder (*1973*)* and *Van der Peet (*1996)[6] in Canada and *Mabo (*1992*)*[7] in Australia placed the issue of the origin of rights to resources and their relation to aboriginal or customary systems of law before the courts and precipitated legal interrogation of the status of customary law and the relationship between customary practices, customary laws and culture (Walters *et al.*

[5] *Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC), Bhe and Others v Magistrate, Khayelitsha and Others 2005 (10) SA580 (CC), Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).*

[6] *Calder v. British Columbia (Attorney General) [1973] S.C.R. 313, [1973] 4 W.W.R. 1.*
R. v. Van der Peet, [1996] 2 S.C.R. 507.

[7] *Mabo and others v. Queensland (No. 2) [1992] HCA 23; (1992) 175 CLR 1.*

2000, Williams 2003, Nettheim 2003, Daly 2005, Capistrano 2010). These cases drew attention to the previously neglected issue of customary systems of natural resource governance in general and to land and fisheries management in particular. In 1989 the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples (Convention No 169), came into effect and raised awareness of the status of customary rights. Article 8 (1) provides that "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws" (Convention No 169 in Bennett 1996:25). Indigenous peoples and local communities began to organize at a global level and advocated strongly for the recognition and protection of their customary rights to land and other natural resources, their rights to their free expression of their culture as well as for acknowledgement of the important role that they play in protecting biodiversity (Bennett 1996, Jentoft *et al.* 2003).

This mobilization gained momentum at the Rio Earth Summit in 1992, which identified the need to recognise the rights of indigenous peoples and local communities and included specific reference to traditional, small-scale fishers (UN ECOSOC 1992)[8]. Shortly afterwards the United Nations Convention of Biodiversity (CBD) entered into force and confirmed the importance of customary systems of natural resource use and traditional knowledge (UNEP 1992).

Clearly influenced by, and simultaneously influencing these international instruments as well as in response to on-going struggles at home, communities in post-colonial contexts, such as those in Canada, Australia and New Zealand, Melanesia and the Pacific, began articulating the need for recognition of their customary practices within the post-colonial re-organisation processes (Cordell 1991, Graham and Idechong 1998). In many indigenous and local coastal communities, customary rights to marine resources, including coastal land, sea territory and to marine living resources were embedded in the customary laws of those communities (Walters *et al*. 2000, Johannes 2002, Williams 2006,). The recognition of customary marine resource rights was thus closely tied to the recognition of customary law. In colonial and post-colonial contexts, customary law struggled for recognition alongside the law of the colonizers. The most common approach of colonizing regimes was to subject indigenous communities to the law of the

[8] In particular, Chapter 17, Section 79-81, Agenda 21 UN ECOSOC 1992.

conquering power (Bennett 1996:26). As noted by Cordell (1991), the struggles for recognition of their customary rights 'in law', was, for many indigenous peoples, essentially a struggle "to reconcile legal interests in collision" (Cordell 1991: unpaginated).

These legal matters raised the issue of the status of aboriginal title and law and brought the debates about customary systems of resource use and ownership into the arena of the then already well-established debates on legal pluralism (Cordell 1991, Williams 2006)[9].

Legal pluralism refers to the "co-existence of multiple legal systems within a given community or socio-political space" (Merry 1988, Benda-Beckmann 2002 in Tamanaha *et al*. 2013:1). Anthropologists, legal theorists and philosophers who have studied a vast range of "semi-autonomous social fields" in varied cultural contexts have grappled with how to conceptualize the existence of these parallel socio-legal systems, to decide if they are 'law' and what status they should have in law and in systems of resource management and administration (Moore 1973, 2005). A central tension in these discussions is the nature of the recognition of customary law as a source of law, its relationship with common law and statute and how it is recognised in and harmonized with national legal systems (Graham and Idechong 1998, Williams 2006, Dawson 2008, Makgill 2011).

1.3. The interface of customary, statutory and other systems of law

Developments in international law and policy have interfaced with national and local level definitions and recognition of customary law. International law played a significant role in influencing the jurisprudence recognizing native and aboriginal title in both Australia and New Zealand (Nettheim 2003 and Williams 2003), prompting changes in fisheries policy and marine resource governance generally to accommodate aboriginal title. More recently, a range of international legal and policy initiatives have further expanded the focus on customary practices and rights to natural resources and

[9] The terms 'aboriginal title' and 'aboriginal law' are used to refer to customary title and law in Canada and Australia.

inspired advocacy actions by indigenous peoples and local fishing communities for the recognition of their customary governance systems. The Durban Accord and Plan of Action which emerged from the World Parks Congress in 2003 focused on the rights of indigenous peoples and local communities and heightened focus on customary rights calling for "reviews of conservation initiatives including innovative and traditional/customary governance types" (Colchester *et al*. 2008:1). This focus on customary systems of governance lies at the nexus of multiple disciplinary perspectives and reflects synergies across a range of natural resource governance fields all seeking ways to respond to the different systems of law shaping access to and use of natural resources.

The recognition of customary systems of governance at international level was further strengthened by the United Nations Declaration on the Rights of Indigenous Peoples, which, building on the earlier work of the International Labour Organisation (ILO) Convention No 169, finally came into effect after a lengthy process in 2007. This Declaration articulates a legal and environmental basis for recognizing and protecting customary rights and systems of law (Bennett 1996, Westra 2008). Many activists and scholars of indigenous rights have observed a subsequent "resurgence of the politics of indigeneity" and new strategies of cultural representation have emerged (Eythorsson in Jentoft *et al.* 2003, Comaroff and Comaroff 2009). Rouland (1994) in Williams (2006) observes the 'recuperation' and 'reinterpretation' of customary laws. Zerner (2003) notes that customary communities in many parts of the world have begun to articulate their claims to natural resources in new ways in response to the space that has opened up in international law and policy as well as through the networks of activism that have been established amongst community-based and non-governmental organisations.

Influenced by this growing awareness of the importance of customary systems of natural resource use over the past three decades, there has been an increase in calls for the recognition and accommodation of customary systems within fisheries and marine conservation governance frameworks (Ruddle 1998, Johannes 2002, Zerner (ed) 2003, Davis and Jentoft 2003, Cinner and Aswani 2007). This call has arisen from very diverse quarters: in response to a range of protest and legal actions, as well as from research and governance initiatives at varying levels (ICSF 2009, FAO 2013). In the face of the

international crisis in fish stocks (Pauly *et al.* 1998), and a realization that there needs to be a reassessment of traditional fisheries management and approaches to understanding change and sustainability (Charles 2001 and Berkes *et al.* 2003) there is new interest in and scholarship on customary fisheries practices and how these intersect with modern fisheries governance and management frameworks (Bavinck 2005, Aswani 2005, Cinner and Aswani 2007, Cinner *et al.* 2012). The place of customary systems in community-based natural resource management (CBNRM) has received specific attention (Kuemlangan 2004, Clarke and Jupiter 2010).

As a result of this scholarship and the local and international advocacy actions of communities, understanding of customary systems of marine resource use and governance has deepened, enabling a more nuanced and critical assessment of their legal status and their contribution to sustainable use and conservation (Kuemlangan 2004, UNEP 2009). This has facilitated their recognition within the legal and administrative systems of many countries, for example Australia (National Oceans Office 2004), New Zealand (Williams 2006) and many Pacific Island states (Graham and Idechong 1998, Vierros *et al.* 2010, Cuskelly 2010). Notwithstanding this however, many fishing communities around the world continue to experience marginalization of their customary laws, cultures and practices (Zerner (ed) 2003, Davis and Jentoft 2003, Sowman *et al.* 2014b). Many customary communities are being squeezed from the waters and coastline they depend on for their lives and livelihoods by development, tourism, energy and conservation initiatives and their tenure rights and customary systems of governance are often undermined (FAO 2013). Recently, international institutions providing guidance on governance of marine and coastal resources urged States to recognise customary systems of natural resource tenure, their indivisibility from basic human rights, and their importance in seeking protection of biological biodiversity and sustainability for future generations (FAO 2012, UNEP 2012).

Local fishing and coastal communities have engaged with this changing policy and legal environment and have adopted a range of strategies for recognition of their customary law and practices, within the borders of the fisheries and marine governance sector and beyond, as part of the global movement for the recognition of cultural and indigenous governance rights (Jentoft *et al.* 2003, Perry 2011, Kothari *et al.* 2012). This translation

of local customary struggles into transnational and transcultural languages of law and resistance has pushed the boundaries of customary law and extended the space for the expression of customary law in many countries (de Sousa Santos and Rodriegues-Garavita 2005, Griffiths 2011), including that of South Africa, where this research was undertaken.

1.4. Claims to custom, culture and customary law along the South African coast

In the past decade and a half, small-scale fishing communities[10] in South Africa have begun to demand recognition of their customary practices, citing 'custom' and 'tradition' as well as summoning international, state and constitutional law as the basis for their preferential treatment in the allocation of rights to resources (*Kenneth George 2010,*[11] Sunde *et al.* 2013). This expression of the plural nature of their claims to marine resources has been mirrored in their response to the imposition of statutory legislation governing the use and conservation of marine resources over the past century. Small-scale fishers have, in most instances, continued to harvest these resources, despite running the risk of being fined for illegal fishing (Harris *et al.* 2007, Hauck 2009, Sunde *et al.* 2013). They have consistently voiced their belief that they have pre-existing customary rights to these resources that have been neither extinguished by new statutes nor erased with the passage of time (Sunde *et al.* 2013).

The history of marine governance in South Africa, like that of its terrestrial counterpart, is closely entwined with the political economy of land and natural resource use. The implementation of colonial and apartheid legislation and policy, resulting in the dispossession of a significant proportion of the population from secure tenure to land and other natural resources has been well documented (Palmer *et al.* 2002, Claassens and Cousins 2008, Sowman *et al.* 2011). During the past 100 years, 23,17% of the coastal zone has been declared protected space, much of this including adjacent

[10] The term 'communities' is used in this instance to refer to both geographical communities that share common interests in coastal waters and marine resources and regard themselves as a community as well as communities of interest that have historically targeted particular marine species and regard themselves as a distinctive group with common interests. The term 'small-scale' encompasses all those fishers on a continuum from subsistence, artisanal, traditional to those referred to as small-scale fishers (DAFF 2012).

[11] *Kenneth George and others versus the Minister EC 1/2005, 2010.*

intertidal, estuarine and marine resources (Sink *et al.* 2012:143). These designated 'Marine Protected Areas' (MPAs), with concomitant exclusionary statutory rules, regulations and new institutional arrangements have, in many instances, been imposed on coastal communities (See Figure 3, Chapter Four). As will be discussed further in Chapter Four, the drive to expand the conservation estate, particularly through the use of no-take zonation within MPAs, in line with the CBD protected area targets, continues to influence both conservation and fisheries management policy. Statutory frameworks for the governance and management of marine living resources have failed to recognise and accommodate customary systems of use and governance.

Prior to 1994 South Africa's marine and fisheries management regime reflected white, commercial interests, and small-scale fishers were largely excluded from the fishing rights regime (van Sittert *et al.* 2006, Sowman 2011). The commercial fishing industry and accompanying administrative infrastructure was based in the Western Cape, the heart of the export-orientated industry, and much of the policy and legislative framework was geared towards this sector. African and coloured fishers were, in general, not permitted to operate their own enterprises for commercially valuable species[12]. In practice most of these fishers were forced to work for white-owned companies, catching a small amount of fish on the side for their own consumption. This small-scale fisheries comprised a diverse group, ranging from those who relied on local fish for basic food security to those who fished for their own consumption but who also caught for the local market, albeit on a small-scale and usually as part of white-controlled enterprises. The majority of the former category was located in KwaZulu-Natal and the Eastern Cape, many of them living in the areas formerly reserved for African residence known as 'homelands' or 'Bantustans' (See Figure 1 overleaf), whilst those engaged in small-scale commercial fishing predominated in the Western and Northern Cape (Branch *et al.* 2002).

[12] The term 'Coloured' was the term used by the State to describe persons of mixed racial origin.

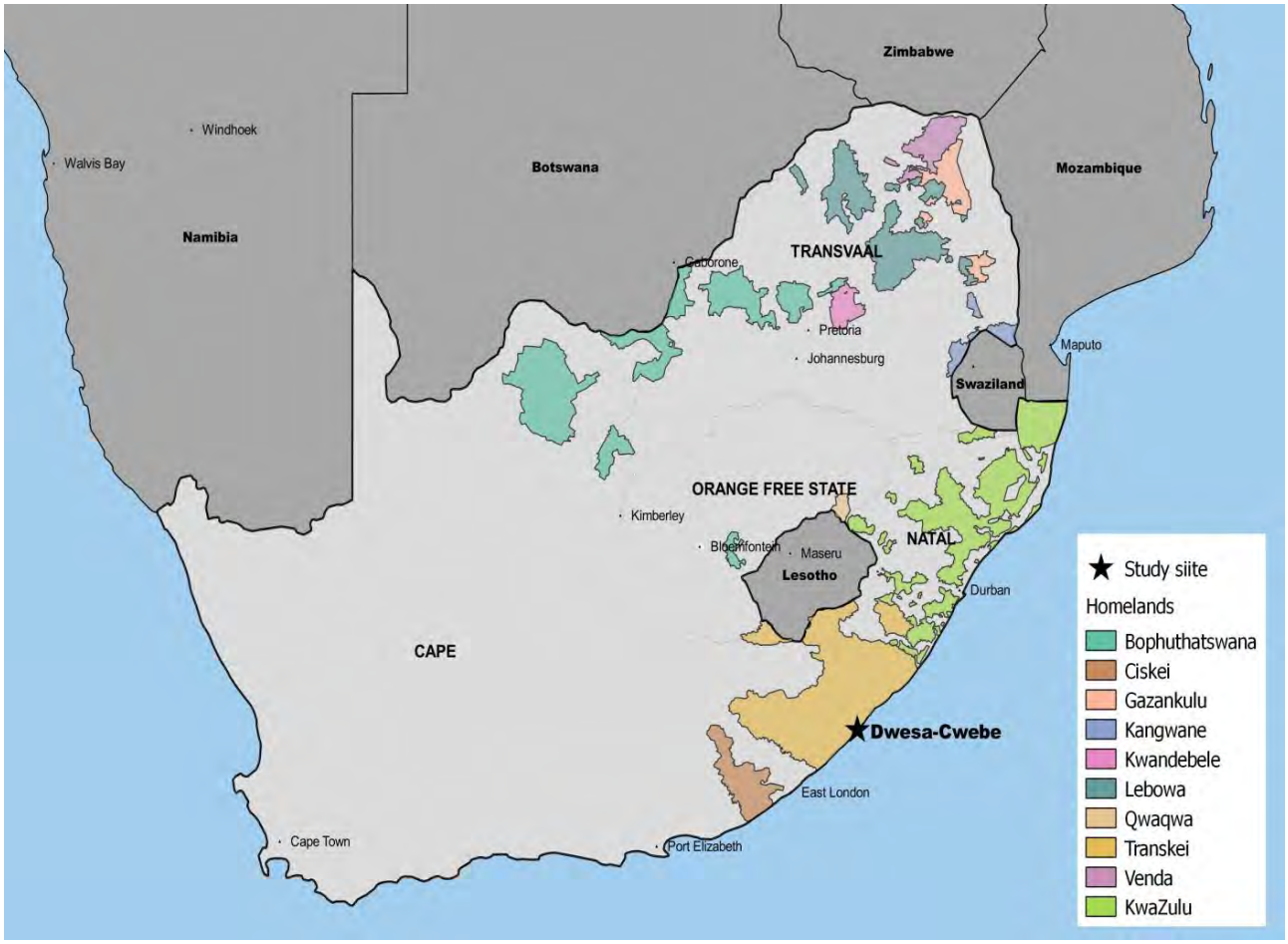

Figure 1: Map showing the former African homelands or 'Bantustans'.

In 1994, at the outset of democracy in South Africa, the small-scale sector reflected a spectrum of customary fishing practices, ranging from the fish trap fishers of the northern KwaZulu coast, operating within a traditional authority regime to the descendants of Khoisan fishers and pastoralists net fishing on the Olifants river in the northern reaches of the Western Cape (Sunde *et al.* 2013). The latter have been required to operate within provincial and more recently, national fisheries management regulations for nearly a century. In many instances, the imposition of a statutory regulatory scheme has undermined, although not extinguished many aspects of the customary use and governance systems that have historically shaped the use of marine resources in these provinces (Sunde *et al.* 2013).

The emergence of democracy ushered in new promises that the interests of small-scale fishers would be addressed and it was anticipated that the new fisheries legislative and policy framework, designed to transform the industry and access to the coast and its

resources, would recognise the historical rights of this small-scale sector (Isaacs 2004, Witbooi 2006). On the contrary, the interests of industrial capital and labour held sway in the legal reform processes and the traditional small-scale sector was once again marginalized in the development of the Marine Living Resources Act (MLRA) of 1998 and the new policy for the allocation of rights introduced in 2005 (van Sittert *et al.* 2006). The MLRA failed to include small-scale, artisanal fishers in its ambit, limiting fishing to three groups, namely commercial, recreational and subsistence only. The policy rights regime further entrenched this exclusion, prioritizing the commercial, export-orientated sector.

The MLRA made no provision for the recognition of pre-existing customary fishing rights in terms of the Constitutional recognition of customary systems of law. There was no language for customary marine resource governance systems in the post–apartheid fisheries policies. Similarly, the legislation developed to recognise the restitution rights of those who lost land due to discriminatory practices post 1913, the Land Restitution Act 22 of 1994 (Department of Land Affairs 1994), failed to secure redress for coastal fishing communities. Both of these policy domains were silent on the issue of the recognition of pre-existing rights to marine resources. Although several post-apartheid land claims lodged in terms of the Restitution Act have been for land adjacent to the coast or estuaries in communally owned areas, to date no Settlement Agreements have enabled the *de facto* recognition of customary rights to marine resources[13]. None of the coastal communities who voiced their rights to marine resources in the immediate post–apartheid period lodged specific customary marine resource claims as part of the official post-apartheid restitution claims process. They believed that the land claims processes coupled with the reform processes that were underway to transform fisheries governance would ultimately lead to the restoration of their rights of access to the land upon which they and their forebears had lived and the adjacent waters upon which they depended for their livelihoods and expression of their culture. Coastal communities' land claims were ultimately framed around their loss of land within the dominant narrative of property, that is, property equated with land.

[13] For example the communities of Vaalplaas (Sunde 2003), Dwesa-Cwebe (Commission on Restitution of Land 2001), St Lucia (Walker 2005), Ebenhaeser and Covie (Williams 2013).

This occurred despite the fact that the property clause in the Constitution explicitly states that property is not limited to land. The historical documentation for these claims notes the existence of a lengthy history of marine resource use and the impact of the dispossession of resources on the communities' culture and livelihoods (Sunde *et al.* 2013).

The development of customary marine resource use and governance narratives and the emergence of languages of dispossession and repossession of natural resources has been the subject of considerable international scholarship in post-colonial contexts (Zerner (ed) 2003, Williams 2006). In post-apartheid South Africa, the Truth and Reconciliation Commission in South Africa was the primary space and means for retribution and healing but issues of dispossession of land and other natural resources were largely de-linked from this process. Healing was narrowly defined, disembodied from the social-cultural and material relations within which this loss had been experienced (Krog *et al.* 2009). It was assumed issues related to the loss of land would be dealt with by the Land Claims Commission (Walker *et al.* 2010). There was silence about where the issues related to the loss of livelihoods and sense of place associated with the coast would be heard.

In recent years the strength of claims to customary rights has increased, gaining ground through the international policy developments described earlier as well as in response to the jurisprudence emerging from the Constitutional Court that affirms and gives substance to the recognition of customary law (Sunde *et al.* 2013). The Constitution of South Africa (1996) recognises customary law as an independent source of law. Section 211 (3) states that "the Courts must apply customary law when the law is applicable, subject to the Constitution and any legislation that specifically deals with customary law" (Constitution of South Africa 1996). Section 39 confirms that the Bill of Rights 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" (Constitution of South Africa 1996). In the space that the Constitution has opened up, fishing communities have begun to assert their rights and claims in the name of equity, culture and custom (*Kenneth George 2010*). This raises a number of questions about the nature of these customary claims in South Africa. What is

the nature of customary marine resource use and governance? What is the relationship between customary marine resource use and governance systems and systems of living customary law? How have customary systems of marine resource use and governance interfaced with statutory law in the past and how do they continue to interface with statutory and other systems of law? How might systems of customary marine resource governance contribute to socially just small-scale fisheries governance in South Africa?

1.5. Rationale for this research focus

To date customary marine resource governance systems have been largely ignored in South Africa and there is no body of scholarship that has explored the relationship between customary marine resource use practices, customary marine resource governance and customary systems of law whereby customary rights are established[14]. There is little understanding of the nature and strengths of the customary governance systems of the communities who are making customary claims. The successive impacts of colonial and apartheid laws, conservation practices and land dispossession, coupled with the impact of a century of modern fisheries management practices have no doubt eroded and distorted customary systems of marine resource governance; however the need to explore these systems draws impetus from several perspectives.

Firstly, the South African Constitution, Section 211 (3) recognises and protects customary law in so far as it is consistent with the Bill of Rights. It also protects the right to culture (Section 31). There is thus a legal imperative to understand the nature of the relationship of these customary marine resource practices and governance systems to customary law. It is necessary to identify areas of convergence and divergence with the current statutory system so that if such customary use and governance systems retain legitimacy and relevance, appropriate mechanisms can be put in place to recognise and protect these systems and to facilitate their interaction with statutory governance processes.

Secondly, the failure of the current small-scale fisheries management system in South Africa is well documented (Sowman 2006, Raemaekers 2009, Hauck 2009, Sowman *et*

al. 2014). New approaches to governance that can help to resolve the current crisis and lack of legitimacy are urgently required. The new small-scale fisheries policy recognises customary rights but to date no mechanisms have been developed to give this provision substance and to operationalize these rights through governance arrangements such as co-management. There is thus a need to elucidate the nature of these customary governance systems and the principles and processes that underlie them, and their contribution towards future governance and management.

Thirdly, lessons from customary law and jurisprudence in other natural resource sectors, and insights from critical legal anthropology and legal pluralism suggest that new approaches to governance that recognise interlegality and the legitimacy of plural systems of ordering human interactions may offer new ways of thinking about rights to resources and innovative processes for balancing needs and adjudicating apparently competing claims (de Sousa Santos 2002, Eberhard 2006, Jentoft *et al.* 2009, Claassens and Mnisi 2009, Griffiths 2011). This potential for customary systems to contribute towards socially just governance of marine resources remains unexplored.

1.6. Research aim

Drawing on a case-study of the Dwesa-Cwebe community living adjacent to the Dwesa-Cwebe MPA in the Eastern Cape, South Africa, this research aims to describe and understand the nature of the customary marine resource governance system of this community and its relationship to living customary law. Further, it will explore how this customary system of marine resource governance has interfaced with statutory law in the past and how it continues to evolve in the current context. It will use this understanding to make recommendations as to how this customary governance system might contribute towards the new system of small-scale fisheries governance of marine resources in South Africa.

1.7. Research question

This research is guided by the following research question:

What is the nature of the system of customary marine resource governance at Dwesa-Cwebe MPA, its relationship to living customary law and how has it interfaced with statutory law?

This research aims to fulfill the following objectives:

1. To investigate and describe the customary marine resource governance system in the case study site selected;
2. To identify and analyse the historical, political and legal context in which this customary marine resource governance system has developed;
3. To contribute towards understanding the nature of the customary marine resource governance system and its relationship to living customary law;
4. To examine the way in which this customary marine resource governance system has interfaced with statutory law;
5. To identify how customary systems of marine resource use and governance might contribute towards promoting socially just governance of small-scale fisheries in South Africa;
6. To contribute to the development of theory on the relationship between customary systems of marine resource use and governance and living customary law within the context of contemporary small-scale fisheries governance in South Africa.

1.8. Scope and limitations of this research

This research presents a description and analysis of two in a constellation of seven communities living adjacent to the Dwesa-Cwebe Reserve and Marine Protected Area on the east coast of South Africa, (see Figure 2, Chapter Three). The seven communities are

collectively referred to as 'the Dwesa-Cwebe communities'[15]. Grounded in their narratives, gathered through a range of research methods during the period February 2011 – December 2012, this research aims to characterize and understand the nature of customary marine resource use and governance practices in the context of the Constitutional recognition of living customary law and the new small-scale fisheries policy.

Limited to these two communities as representative of the Dwesa-Cwebe system, this research does not presume to be representative of other customary communities elsewhere along the South African coastline. The research explores the nature of the Ntubeni and Hobeni past and present marine resource governance practices and reflects on their interpretations of the meanings attached to this marine resource use and governance. Ruddle (1998), Hviding (1998) and Cordell (1991) amongst others note that the customary marine tenure systems are embedded in social, economic, political and cultural relations. This echoes the nature of customary systems of land tenure (Cousins and Claassens 2006, Okoth-Ogenda 2008). The embedded nature of these systems inevitably broadens the scope of any exploration of these systems, demanding an expanded notion of 'law'. As such, a study of living customary law demands a trans-disciplinary approach that is able to draw on insights from a range of socio-legal, cultural, political and economic fields and disciplines (Rosen 2006, Eberhard 2009, Jentoft 2011). Although the research explores the relationship between customary marine resource practices and living customary law, it does not presume to draw conclusions on the legal status of these specific communities' customary claims.

Whilst the importance of studies on customary systems of marine resource governance from the perspective of their contribution towards the ecological sustainability of marine resources is argued in the literature and is critical for future research (Cinner and Aswani 2007, Cinner *et al.* 2012), this thesis does not aim to assess this aspect of these systems.

[15] A description of these two communities, the history of this aggregation of these seven communities, their identity as one community and the contested nature of the concept of 'community' in this context is discussed in Chapter 3.

1.9. Structure of this thesis

This **Introductory Chapter** locates customary systems of marine resource governance within the context of contemporary themes in fisheries and marine resource governance and legal pluralism, thereby providing an introduction to the theoretical basis of the thesis that is presented in Chapter Two. This discussion is located within the context of indigenous peoples and local communities' national and transnational social and political movements and their demands for the recognition of their customary systems of natural resource governance and law. It introduces the aim, objectives and rationale for the research and outlines the key research question that has informed the research that follows.

Chapter Two presents and explores the primary theoretical frameworks and ideas influencing this research, namely that of critical legal pluralism, complex systems theory, political ecology and interactive governance. An overview of current theoretical and legal thinking on the nature of customary natural resource governance systems both internationally and in Africa is presented, and the implications of recent jurisprudence on the recognition of living customary law is reflected.

Chapter Three presents the methodology underpinning this research, outlines the methods used and discusses the specific challenges in conducting research on customary governance systems and laws. The chapter discusses some of the ethical challenges that a transdisciplinary and 'critical activist-scholarship' (Hale 2008) catalyse, when the researcher herself is located within the transitional zone of academic-activist waters.

Chapter Four provides an overview of the development of marine and coastal conservation and fisheries governance in South Africa and the interface between systems of living customary law and statutory law as they have evolved in this context.

Chapters Five to Chapter Eight present the findings from the case study, arranged under thematic headings. Using the lens of the customary, these chapters describe the history of two communities within the larger Dwesa-Cwebe communities, the subsequent dispossession of the land and coast upon which they depend for their livelihoods and their struggles to re-claim this territory. It discusses their customary system of marine resource use and governance within the broader social and cultural

relations within which they are embedded that are both constitutive of and constitute their customary law and culture.

Chapter Five presents the histories, customary marine resource use and cosmology of the Dwesa-Cwebe communities. It describes the interface between their customary system of marine resource governance and that of the pre-colonial and apartheid state, from the early settlement of the area that now comprises Dwesa-Cwebe to the first democratic elections in 1994.

Chapter Six This chapter describes the Dwesa-Cwebe communities' post-democracy struggles for recognition of their customary rights and for the return of their land and access to the coastal forest and marine resources upon which they have depended.

Chapter Seven characterises the customary system of marine resource use and governance of the Hobeni and Ntubeni communities and the expressions of living customary law within this governance system.

Chapter Eight explores the concept of law, at the interface between customary and statutory systems of governance as expressed in Dwesa-Cwebe MPA. Using a court case as a prism for viewing the interaction of the customary and statutory systems of law, 5this chapter explores the two very different worldviews and legal systems as they come face to face in the court room, highlighting the challenge of recognising living customary law, on its own terms*, "in its own setting" (Shilubana 2008)*[16].

Chapter Nine This chapter discusses the findings of this research. Theoretical insights on the nature of the customary system of marine resource governance and its relationship with living customary law are discussed in the context of the literature review in Chapter Two. The implications of these findings in terms of a contribution towards socially just contemporary small-scale fisheries governance in South Africa is explored. Insights for the theory of governance of marine resources are highlighted.

Chapter Ten In this concluding chapter an overview of the aim, research question and objectives of the research is presented. The methodology and research process is outlined and a summary of the key research findings and the conclusions drawn from the research are presented.

[16] The judgement in *Shilubana (Case CCT 03/07 [2008] ZACC 9 para [44])* noted this requirement of recognising living customary law *"in its own setting".* This phrase is used throughout this thesis with reference to this judgement.

CHAPTER TWO: THEORETICAL FRAMEWORK FOR EXPLORING CUSTOMARY SYSTEMS OF MARINE RESOURCE GOVERNANCE

2.1. Introduction

The theoretical terrain of customary marine resource governance systems reflects diverse disciplinary influences as well as the shifting significance of 'the customary' in the theory of modern marine conservation and fisheries governance. It is also a marker of the status of customary law in different legal and political contexts and how this has changed historically as it has interfaced with other systems of law. This chapter outlines the contribution of different bodies of knowledge to the theoretical understanding of customary marine resource governance systems and customary law that guided this research process.

2.2. What are customary systems of marine resource governance?

In the 1970s and early 1980s accounts of customary systems of marine resource governance emerged from different parts of the world, within very different fisheries systems. Cordell, undertaking fieldwork in Brazil reported "an intricate, locally sanctioned system of proprietary rights to fishing spots extending over near shore and estuarine waters" that he referred to as 'sea tenure' (Cordell 1973 in Cordell 2000:1). Johannes (1978) studying Oceania, observed that the peoples of this region had devised a range of measures to regulate their own fisheries (Johannes 1978:350). These included systems of tenure rights, including measures such as the right to limit and exclude access of other fishers from that area, closed seasons and closed areas, holding fish in enclosures and bans on taking small individuals. Sanctions could be applied to punish offenders. Many restrictions were linked to taboos and ritual practices. The system was also flexible in that arrangements could be made with neighbouring tenure holders to ensure the redistribution of harvesting rights where and when needed (Johannes 1978:351). Key to these local systems of management was the fact that they were located within systems of customary law. Many of the features of these systems whereby social order was maintained were subsequently echoed in the path-breaking work of others who have documented customary marine resource use and governance

practices in different parts of the world including Ruddle and Akimichi (1984) and Ruddle (1988) in Japan, several others working in various parts of Oceania (Hviding 1996, Aswani 1999, Johannes 2002), as well as in Indonesia (Bailey and Zerner 1992, Harkes and Novaczek 2002, Zerner 2003), India (Bavinck 1998, 2001, 2005, Australia (Palmer 1985, Petersen 2005), Nietschmann (1972) in the Central Americas and Brazil (Diegues 1988, Cordell 1989). This body of literature includes both systems of customary governance arising out of long standing systems of what can be termed customary law, as well as practices that gave rise to local systems of law of more recent origin, such as the systems of norms and rules evidenced by Acheson (1987) and Cordell (1989) which had emerged out of practices within relatively more recently constituted groups of fishers. It includes customary systems in both the North and the South, although experiences from the developing countries and small-island states in the South dominate the literature.

Ruddle and Akimichi (1984) defined these systems as shared norms and practices, recognised by a group of people or particular community of people, whereby they give meaning to and "perceive, define, delimit, own and defend their rights" (Ruddle and Akimichi 1984 in Aswani 2005:289). More recently Aswani (2011) refers to these systems as "Customary governance and management (CM) systems". Aswani defines them as "cultural and historical practices designed to regulate the use of, access to, and transfer of resources locally, and they are informed by indigenous ecological knowledge and embedded in customary land- and sea-tenure institutions" (Aswani 2011:1).

A wide range of customary marine resource governance systems exists throughout the world, each distinctive social context giving rise to a unique constellation of local level institutions, norms and rules. In most instances these local level institutions and associated rules and rights are "defined in terms of customary law" (Ruddle 1988:356) and management systems in the aquatic domain mirror the systems on land (Ruddle 1988:355). Local governance institutions are closely associated with local traditional authorities.

Ruddle (1993), observing systems in the Pacific, was one of the first writers to highlight the 'embeddedness' of customary systems within socio-economic relations. Much of his

research emphasised that “traditional sea tenure and the exercise of fisheries rights closely reflect social organisation and local power structures” and that “such systems are dynamic, historically conditioned and deeply embedded in larger political, economic and social realms” (Ruddle 1993:354).

Ruddle observed that contrary to the perception of many resource economists in the West, these customary governance systems were not based on open access or an absence of property rights. However, he noted that the word "owners" in much of the property rights literature was also misleading, because it indicates a possessive and dominating relationship, rather than the sense of being part of the land or the reef (Ruddle 1988:355). In the world view that prevailed in this cultural context, human-culture-nature relations were seen in a mutually constitutive way. “The entire physical, economic, and spiritual life of some communities is centred on the natural resource assemblage and the resource space belonging to that community” (Ruddle 1988:355). This integration of the customary system of use and the prevailing cosmology of a marine culture has been observed by several researchers and the links with ancestral and sacred practices highlighted (Davis 1984, Cordell 2000, Berkes *et al.* 2000, Hickey 2006). Several authors (Ruddle 1996, Johannes 1978) commented on the flexible nature of customary systems and Ruddle noted that “customary law may well provide a more flexible resolution, that allows for the expansion and contraction of physical, social and resource boundaries” (Ruddle 1996:11).

Cinner and Aswani (2007) provide a useful synthesis indicating the range, flexibility and varied use of customary rules and norms. Customary marine use and governance systems may include the following restrictions:

1. ***Spatial Areas closed to fishing*****.** These can be temporary or permanent. They might arise due to reactive events such as a death in the village or declining catch. They may have sacred significance.

2. ***Temporal closures***. Restricting fishing/harvesting activities during specific days, week, months, etc. Dates may be highly flexible and reactive to events (e.g.

price fluctuations for commercial species, spawning aggregations) rather than set dates.

3. ***Gear Prohibitions***. Restricting certain harvesting technologies or techniques. A range of means might be adopted to facilitate this restriction for example, a system might limit the use of certain gears to certain classes or caste of fishers (Bavinck 2005), rights to certain gears might be inherited or they might only include owners of gear and exclude non owners.

4. ***Effort limits.*** These determine who can harvest certain species, use certain gears, fish certain areas, etc. The norms and rules determining who is permitted are often based on initiation rights, lineage, class, caste or gender.

5. ***Species prohibitions***. Prohibiting the consumption of certain species. This may include lineage-related dietary restrictions and species-specific bans. Certain species may be caught or killed, but not eaten.

6. ***Catch restrictions:*** Restricting the quantity of a harvest. Often social norms are present that stress the avoidance of waste.
   (Adapted from Cinner and Aswani 2007:203).

Whilst the word 'rules' is used in the international literature, it must be noted that this may or may not approximate the actual meanings and function of the measures used by certain cultures and local communities to determine their access and use of resources and may be too limiting. For example, the taboos of the island peoples of Melanesia were more than just 'rules' in the Western sense of the word but were first and foremost a system of honouring the ancestral spirits of the people (Hickey 2006, Govan *et al* 2009).

The cumulative theoretical understanding of the nature and dynamics of these systems has been elaborated over the past four decades in an iterative way, with scholars and researchers incorporating varying theoretical and conceptual influences from different disciplines, paradigms and world views along the way. Within the social sciences,

disciplines such as anthropology and cultural ecology were strongly influenced by the ideas of functionalism in the 1950s and 1960s. There was a tendency to view societies as functionally integrated, not only internally but as also functionally integrated with their environment. "Social structure and institutions, such as traditional authority and ritual, were seen as maintaining this functional adaptation" (Leach *et al* 1999:230). Traces of this functionalism are apparent in the early work on customary marine governance systems and the nature of the societies in which they were studied, however this functionalism gradually gave way to a more nuanced understanding of systems and their structural interactions. Several authors have emphasised that most customary systems of resource governance aim to regulate and control the use of marine resources and are not necessarily designed as conservation measures although they might have conservation outcomes (Johannes 1978, Berkes *et al*. 2000, Govan *et al* 2009, Aswani 2011).

2.3. Understanding the source and nature of rights in customary marine resource governance systems

As the pioneering research on customary systems around the world was being undertaken in the 1980s, the ideas of institutional economics came to permeate a great deal of research in the field of natural resource management and fisheries management in particular (Berkes 1986, McCay and Acheson 1987). Much of this research responded as critique to the dominant political economic thinking on natural resource economics in the West which had been shaped by Hardin's 'Tragedy of the Commons' perspective (Ciriacy-Wantrup and Bishop 1975 in Schlager and Ostrom 1992, Berkes 1986, McCay and Jentoft 1998). In 1968 Hardin proposed a model for understanding of human behaviour in relation to natural resource use, arguing that the actions and decisions of individuals, whilst seemingly rational at individual level, accumulate at collective level to be irrational for the group as they inevitably lead to over-use and exploitation of resources, thereby threatening the sustainability of the commons for all (Hardin 1968 in Berkes 1986, Schlager and Ostrom 1992). Hardin located the solution to this dilemma in the rationality and logic of institutional economics, in the need for well-defined property rights which would create limits and impose externalities on resource use. The impact of this model, and the interpretation and image of property rights upon which it

was based, has been profound and long lasting, continuing to influence current debates in fisheries management and conservation (McCay and Jentoft 1998, Hara 2003).

Up until the 1970s the perception existed in Western fisheries management circles that most marine resources that were not owned by the State or private individuals were 'common property' and a situation of 'open access' prevailed (Ciriacy-Wantrup and Bishop 1975). In regions where indigenous peoples and local communities claimed customary marine tenure rights, their systems of property rights received little attention. This characterisation of coastal fisheries resource access and ownership rights shifted however when Ciriacy-Wantrup and Bishop (1975) suggested a definition of 'common property' to refer to arrangements in which "far from being 'everybody's property', common property means that "potential resource users who are not members of a group of co-equal owners are excluded" (Ciriacy-Wantrup and Bishop 1975 in Berkes 1986:216). Bromley elaborated this distinction and distinguished between property and property rights. He argued that common-pool resources can be owned and managed as government property, private property, community property, or owned by no one and hence *res nullius* (Bromley 1991:1-2).

Drawing on this conceptualisation as well as on the empirical work that was beginning to document customary norms and rules in various parts of the world, Schlager and Ostrom (1992) motivated a number of critical differentiating elements involved in the management of common pool resources with regard to 1) the type of rights, 2) the source of the rights claimed and 3) the levels of action undertaken by a group of users to organise their rights (Schlager and Ostrom 1992:249). They observed that fishers develop norms and rules to co-ordinate their activities and facilitate working relationships amongst themselves. They identified five different kinds of rights including:

(i) Access—the right to enter a specified property,
(ii) Withdrawal—the right to harvest specific products from a resource,
(iii) Management—the right to transform the resource and regulate internal use patterns,
(iv) Exclusion—the right to decide who will have access, withdrawal, or management rights, and

(v) Alienation—the right to lease or sell any of the other four rights (Schalger and Ostrom 1992:249-250).

They classified these rights in terms of different levels of action. Operational level interactions refer to the development of specific agreed upon operational rules for access and withdrawal rights whilst collective action refers to collective agreements on the management, exclusion or alienation rights (Schlager and Ostrom 1992:250). They further observed that the source of the right varies. Influenced by the state-centred thinking at the time, they categorised rights as '*de jure'* if "lawful recognition by formal, legal instrumentalities" however they noted that "property rights may also originate amongst resource users" (Schlager and Ostrom 1992:254). Overlapping and even conflicting rights might exist in a given area. Significantly, Schlager and Ostrom noted that in many instances where research had documented local fishers having *de jure* user and claimant rights, *de facto* proprietary rights were commonly perceived as legitimate within that local community (Schlager and Ostrom 1992:254). Benda-Beckmann (1995), and subsequently Meinzen-Dick & Pradhan (2002: 5), provide evidence of what was termed 'forum shopping', where users of natural resources might draw on a range of different sources of legitimacy to justify claims or avoid enforcement.

Researching the different local level institutions and rights that groups established to manage common-pool resources, Ostrom (1990), developed a framework of principles reflecting institutional regularities in systems. These 'design principles include (1) clearly defined boundaries (2) the development and enforcement of rules that limit resource use; (3) congruence between rules and local conditions (i.e. scale and appropriateness); (4) resource users have rights to make, enforce, and change the rules; (5) individuals affected by the rules can participate in changing the rules; (6) resources are monitored; (7) the presence of accountability mechanisms for those monitoring compliance with the rules; (8) sanctions that increase with repeat offenses and in congruence to the severity of such offenses (graduated sanctions); (9) the presence of arenas for discussion and agreement such as conflict resolution; and (10) the degree to which they are nested within other institutions (Ostrom 1990 in Cinner *et al.* 2012:279). These design principles have informed a great deal of the subsequent theoretical and empirical work on systems and institutions of natural resource use and

governance across both the natural and social sciences (Ostrom 1990). Agrawal (2001) subsequently elaborated on Ostrom's principles, identifying 30 key variables that inform the institutional robustness of local institutions. Cinner *et al.* (2012), working in Indonesia, Papua New Guinea and Mexico, have deepened the understanding of design principles in customary institutions and their ability to respond to common pool resource challenges.

2.4. Shifts in thinking on social organisation, social order and relations of power

The influence of new perspectives in critical social theory since the 1980s is visible in the shifts in thinking on communities and local institutions within the work on customary law and governance (Benda-Beckmann *et al.* 2009). The work of Giddens in the 1980s on systems and structuration highlighted the role of agency in social relations and the structuring of institutions. In addition, Foucault's ideas on the diffuse nature of power and the mechanisms of power (Foucault 1978, 1991), led to new explorations of the ways in which systems were established and the internal and external mechanisms and processes whereby they might be changed, including through 'technologies of power' (Dean 1996). Foucault observed that "power is everywhere" and operates through discourse, knowledge and 'regimes of truth' (Foucault 1978). He contributed towards a broader understanding of the term government through the concept of 'governmentality' (Foucoult 1991) which included the practices through which people are governed and govern their own conduct. These practices include the activities of the state and other actors.

Within the natural resource governance sector as a whole there was a gradual recognition of the need to understand the workings of power and authority in relation to the concept of 'community' in a more nuanced, historically and politically located way (McCay and Jentoft 1998). The recognition of the embeddedness of social relations and the need to incorporate an understanding of power and agency in fisheries systems interactions was later emphasised by McCay and Jentoft (1998) in their seminal paper on communities. Building on post-structuralist and post-modernist understandings of how structures of power and authority are legitimated, scholars in the field of political

ecology extended the work on natural resource use to exploring how groups with common interests use representations of 'community' in legitimating their claims to natural resources (Leach *et al.* 2002, Zerner 2003a and Brosius *et al.* 2005). There was increased awareness of the ways in which discourses about 'nature' and communities' relationship with the marine and coastal environment are culturally constructed, symbolically and materially, and how seascapes, coasts and coral reefs are "sites with histories, both human and natural" that have been "made, shaped, modified and cared" for by different peoples (Zerner 2003a:7). Understandings of the distinctive patterning of the systems and institutions of these communities thus took on new meanings. Scholarship within political ecology and studies of post-colonial systems of natural resource governance more generally have contributed extensively towards understanding how mechanisms of power operate within and between local and global institutional spaces and systems (Ferguson 1990, Zerner 2003a, de Santos Sousa and Rodriegues-Garavito 2005, Brockington *et al.* 2008). Ferguson (1990), drawing on Foucauldian ideas on governmentality, explores how discourses of power operate through governance processes such as development projects, de-politicising resource regimes through rendering them technical. Similarly, Li (2007), drawing on Foucault's understanding of the workings of power, and emphasizing the reflexive nature of power, identifies the 'strategies of power' that operate in governance processes and projects. Spiertz notes that people will call on a range of strategies to give substance to their claims and "*Which specific repertoire, in which specific case, people will orient themselves to, will mostly be a matter of expediency, of local knowledge, perceived context of interaction, and power relations*" (Spiertz 2000, quoted in Meinzen-Dick & Pradhan 2002: 5).

2.5. Interactive governance theory

Transdisciplinary scholarship on governance in the 21st century has contributed to a re-conceptualisation of the notion of government. This has included the broadening of the normative concept of government tied to the nation state to one that recognises the plurality of governance actors, state and non-state, public and private, involved in the act of governance at different levels (Kooiman and Bavinck 2005, Benda-Beckmann *et al.* 2009, Comaroff and Comaroff 2009, Jentoft 2011). This shift has been facilitated by

the recognition of the plurality of legal and normative systems that are engaged in governing activities at different levels (Benda-Beckmann *et al.* 2009), how they interact across different scales (Wiber and Bull 2009), and interface in different ways across 'porous' boundaries (de Sousa Santos 2006, Griffiths 2011). This scholarship has led to new theoretical understandings of governance, what constitutes governance and governance practices and the relationship between law and governance (Kooiman *et al.* 2005, Benda-Beckmann *et al.* 2009, Comaroff and Comaroff 2009). In this regard it has enabled insights into different dimensions of governance and how these are constituted. Eberhard argues that in recognising the plurality of actors, "'Governance' emancipates the shaping of our living together from the state monopoly and from the legal paradigm in its strict sense" (Eberhard 2006:77). However, not withstanding this emancipatory potential, many have commented on the dominance of normative conceptions of governance, particularly under neoliberalism, and the implications of this where the power between actors remains unexplored. As observed by Comaroff and Comaroff (2009), and of particular relevance to this thesis in exploring the relationship between law and governance, "in the dialectic of law and governance, neoliberalism has emerged triumphant" as "it has hidden its ideological scaffolding, reducing government to, and representing it as, technical management" (Comaroff and Comaroff 2009:41).

Recognition of the co-existence of multiple and at times overlapping property institutions and rights regimes requires theoretical frameworks that can accommodate this plurality *and their interface* (Meinzen-Dick and Pradhan 2002). For this reason, much of the literature examining the institutional structures and processes in customary systems and their interface with statutory governance has found synergy with perspectives on 'interactive governance' (Jentoft *et al.* 2009, Jentoft 2011). One of the reasons for this is that it articulates with an understanding of the 'polycentric' nature of governance and of the potential for the simultaneous existence of multiple systems of social ordering (Kooiman *et al.* 2005, Benda-Beckmann *et al.* 2009, Bavinck *et al.* 2013).

'Interactive governance' introduces a revised understanding of both the reach and nature of governance, noting the fact that a wide range of actors is involved in governing activities, 'beyond 'government' (Bavinck *et al.* 2013:12). This interactive

perspective on governance proposes that society is comprised of a large number of governing actors, who are constrained or enabled by their surroundings (Bavinck *et al.* 2013:11) and bring a range of principles and values to governance interactions (Mahon *et al.* 2005). This approach conceptualises a dialectical interaction between what is called the "governing system" and the "system to be governed" in that "social frameworks within which actors operate, including culture, law, politics and economics, but also natural conditions such as geography and ecosystems" are continuously subjected to changes made by social actors whilst these actors are "at the same time being subjected to their influence"(Kooiman and Bavinck 2013:11).

In situations of legal pluralism, governance is increasingly complex (Jentoft *et al.* 2009:29). Jentoft explores the potential for interactive governance to accommodate legal pluralism and vice versa (Jentoft 2011). He notes that by identifying the system to be governed and the governing system, interactive governance highlights the contradiction that the system comprising those actors who have the power to govern and determine what has value, is located 'within' the governing system itself. Likewise, from a legal pluralism perspective, law itself plays an important part in creating, producing and enforcing meanings of concepts such as 'justice', authority and rights, and in instantiating notions of legality that may be involved by different social actors in their construction of hegemonic and counter-hegemonic discourses (Jentoft 2011:164).

The 'Interactive Governance' approach and the vast collection of academic papers published using this approach in the context of fisheries systems has extended understanding of the governance of fisheries providing both a deep theoretical exploration of fisheries governance as well as an applied guide to how this approach can inform the range of actors involved in everyday fisheries governance (Kooiman *et al.* 2005, Symes 2006, Bavinck *et al.* 2005, Bavinck *et al.* 2013). The framework provided by these authors conceptualises governance as comprising various 'orders of governance' and 'governance elements, instruments and actions' (Kooiman *et al*. 2005). Governance modes may differ from those that are characterised by self-determination, those that emphasise co-management to those that are hierarchical and state-centric (Kooiman and Bavinck 2005).

2.6. Alternative ecologies, cultures and counter-narratives

The danger that those 'inside' the governing system will impose a particular knowledge or value system on others has been raised in critiques of theoretical paradigms that impose Western models of law and governance on customary systems, at odds with local cosmologies, custom and practices (Techera 2008, Ruddle and Davis 2012, de Santos Sousa 2008). These critiques highlight the inadequacy of dominant conceptual tools for analyzing customary systems and understanding change processes and points to the necessity of ensuring that conceptions of 'governance' and 'interactive governance' do indeed make visible power differentials between different systems.

The lens through which many customary systems of law and governance have been studied has largely been a Western inspired 'rules-based' one, where researchers have started out with an a priori assumption that the existence of rules and institutions for enforcing these rules was the yardstick for assessing the status, nature and future value of such systems (Comaroff and Roberts 1981). The meanings of these customary marine systems for local communities often extend way beyond these more scientific-technological issues which have come to dominate discussions about the 'value' and usefulness of customary marine governance systems for future conservation and fisheries management (Ruddle 1996, Cordell 2000). Bavinck (2005:818), quoting Zerner (2003a), notes that "radically different cultural logics and imageries form the substratum of relationships to land, self, history, and resources''. These critiques emphasise the underlying cosmologies, philosophies and knowledges that shape how different communities interpret the relationship between human beings and nature and how these inform a wider range of socio-ecological interactions (Ruddle and Hickey 2008, Nursery-Bray and Rist 2009, Davis and Ruddle 2012). They draw on the substantial body of anthropological and sociological scholarship exploring the construction of different ecologies and cultures (Descola 2006, Escobar 2008, de Santos Sousa 2008) and the way in which state governance and conservation discourses have interfaced and continue to interface with these cultures (Brockington *et al.* 2008, Fairhead *et al.* 2012). Ruddle and Hickey (2008) argue the need to develop appropriate ways of assessing customary systems and their contribution to conservation. They are very critical of a tendency in some of the literature on indigenous culture and custom

that describes indigenous communities has having a unique relationship with nature, one predicated upon an assumption of resource stewardship and sustainability. Some scholars have noted that some communities have used the interest in customary systems and their potential contribution towards biodiversity conservation strategically as counter-narrative to the dominant assumptions that their systems are not as robust as systems developed with 'science-based' knowledges (Fairhead *et al.* 2012). These counter-narratives, asserting social justice claims, challenge the more instrumental approach of much of the literature on customary institutions and the dominance of Western, neo-liberal, normative approaches to governance in much of the scholarship on governance (Davis and Ruddle 2012, Sowman and Wynberg 2014).

2.7. The legal basis for customary claims

The re-discovery of customary systems of governance of marine resources in many parts of the world (Zerner 2003, Techera 2008) and the assertion that these systems are embedded in customary law (Ruddle 1998, Johannes 2002, Cinner and Aswani 2007) has raised questions regarding the legal basis and status of these customary systems of marine resource use and governance. Increasing claims from fishing communities for the recognition of their customary rights, recognition that their customs related to the use and management of marine resources are an integral part of many indigenous and local communities cultures (UNEP 2009, Wicomb and Smith 2011), coupled with the international recognition of customary tenure rights and customary law (FAO 2012), raises questions about the nature and status of customary law in relation to statutory law in different contexts and the implications of this for the governance of marine resources.

The quest to understand human expressions of law, law in its broadest sense, extend way back in history. Western philosophical, legal, anthropological and sociological theory reflects the many evolving understandings of law and varying attempts to define legality (Moore 2005:2). Comaroff and Roberts (1981) have argued that many of the early theorists were influenced by their own societies' legal institutions. Similarly, they argue that later scholars who came to study other cultures were also constrained by

dominant conceptions of law in Anglo-American legal theory at the time (Comaroff and Roberts 1981:6).

Two opposing strands of debate that have shaped interpretations of law for the past century can be traced back to the works of these early theorists. These include what is referred to as the "rule-centred" and "normative" approach opposed to the "processual" and "interpretive" approach to understanding social interactions (Comaroff and Roberts 1981:5).

The rule-centred, 'structural' approach interprets social life as rule-governed and normal behaviour as the outcome of persons following the established normative precepts of their society. This perspective is associated with political theory that views control in society as contingent upon the existence of centralised authorities which formulate rules and ensure conformity with them (Comaroff and Roberts 1981:5). In contrast, the processual, also referred to as the 'actor-orientated' approach, interprets human actions as incorporating a degree of agency. This approach argues that human beings are located in networks of relations and reciprocities and that they will act in their own interests and the interests of others in so far as their cooperation is of interest to them. This perspective focuses on the dynamic of order in the social interactions between people in their everyday lives (Comaroff and Roberts 1981:5).

Drawing on studies of systems of normative ordering in different cultures, theorists have attempted to define "the legal" in some general, universally applicable way to accommodate these various approaches and dimensions. As noted by Moore, "these definitions are continually being revised and re-imagined, but none are altogether satisfactory" (Moore 2005:1-2). The seminal work by Comaroff and Roberts (1981) highlighted the fact that "rules did not always rule" and "social life is rule governed and yet highly negotiable" (Comaroff and Roberts 1981:3 in Moore 2005:353). They argue that "there is rarely (if ever) a separate class of legal norms, functionally and conceptually distinguished from other types of precept or as Bohannan (1957:58) noted "especially organised for jural purposes" (Comaroff and Simons 1981:9). Instead, drawing on their work in a Southern African system, they note that the stated rules constitute "an undifferentiated repertoire, ranging from standards of polite behaviour to rules whose breach is taken extremely seriously" (Comaroff and Roberts 1981:9).

The norms that are relevant to disputes do not constitute a separate *corpus juris* and "indigenous rules are not seen a priori as "laws" that have the capacity to determine the outcome of disputes in a straightforward fashion" (Comaroff and Roberts 1981:14). Their work reaffirmed existing doubts about the value of distinguishing "the legal" as a discrete field of enquiry and underscored the danger of assuming a clear distinction between "the political' and "the legal". Comaroff and Roberts argued that what is required is an approach to understanding these 'legal' and 'political' processes that locates them within the distinctive socio-cultural logic of each system (Comaroff and Roberts 1981). In this regard "law is so embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture" (Rosen 2006:xii).

2.8. Plural perspectives and legal pluralism

In line with the trends in social and political theory outlined in the section above, from the 1970s onwards perspectives on law were influenced by larger socio-political changes and thinking taking place, "agency came into its own" and "law began to be treated as a set of ideas, materials and institutions that were being used as a resource by people pursuing their own interests" (Moore 2005:352). As a result of the difficulty in accommodating different interpretations of what constitutes law in different contexts, the quest to find a universal definition of law has largely been abandoned. Most importantly, "what has been generally recognised is the fact that even in the West, formal, state-enforced law is by no means the only source of organised social order " (Moore 2005: 1). Significantly, whereas for centuries law had been thought of as a static body of rules, institutions and procedures, there was now a recognition that it was largely constituted through social processes and hence law is a dynamic, historical formation, which is shaped by and shapes economic, political and social process (d' Engelbronner-Kolf 2001:7). Cousins (1997) focusing on entitlements to land and natural resources in the South African context, and drawing on Falk Moore (1975) and Gore (1993), has argued the need for both a structural analysis of complexes of rule orders and a processual, actor-oriented analysis of struggles and action (Cousins 1997:61).

Legal pluralism was recognised as an analytical tool to understand "the possibility that within the same social order, or social or geographical space, more than one body of law, pertaining to more or less the same set of activities, may co-exist" (Benda-Beckmann 2002:7). Legal pluralism, as an 'orientating lens' (Comaroff and Comaroff 2009) and analytical concept, has in itself developed a plurality of interpretations over the past two decades (Benda-Beckmann 2002, Tamanaha 2007). Differences in approaches centre largely around two aspects. Firstly, "which criteria should give social phenomena the quality of being 'legal', and how do we distinguish such legal phenomena from other, non-legal ones?" (Benda-Beckmann 2002: 47) Secondly, scholars differ on whether or not state law is the referring legal system against which difference is constituted, referred to as a position of 'legal centralism' (Griffiths 1986:3 in Bavinck and Woodman 2009:195, Benda-Beckmann 2002).

Wary of calling all systems of norms 'law', several legal theorists have turned to a functional definition of law and the role of social institutions and their authority to monitor and enforce rules as a key defining factor, linking law directly to authoritative social control (Pospisil (1971) and Hoebel (1954) in Comaroff and Roberts 1981:8, Moore 1978). Moore argued strongly that for reasons of both analysis and policy, distinctions must be made that identify the provenance of rules and controls (Moore 2005:357 in Tamanaha 2007:394). She posited that law comprises "norms and rules in semi-autonomous social fields with the capacity to produce and enforce rules (Moore 1978:55). In contrast, Woodman observed, "law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control" (Woodman 1998 in Tamanaha 2007:393).

Approaches that emphasise rules and enforcement have been critiqued for the assumption that the linguistic, conceptual and institutional categories of Anglo-American law are applicable in other cultural contexts (Bohannan 1957, van Velsen 1969 in Comaroff and Roberts 1981:8). Several theorists have argued that the criteria used may be ethno-centric and distort the very system under exploration (Comaroff and Roberts 1981, Westra 2008).

Some scholars have argued against identifying specific defining criteria, such as the presence of institutions of authority or an enforcement body, on the grounds that this would then exclude certain systems of law historically and would exclude a number of systems that do not have centralised systems of authority (Woodman 2009 in Bavinck 2009). Focusing on the governance systems of indigenous peoples, Westra has argued that a positivist, state dominated interpretation of law has led to a distortion of the interpretation of natural law underpinning indigenous systems of governance (Westra 2008:58).

From an analytical perspective, Benda-Beckmann (2002) proposes that a more useful approach is to define what law is by identifying what social phenomena it includes. He then suggests using this conceptualisation to identify and analyse the distinctions between different manifestations of these phenomena, using a range of morphological variation or dimensions. He defines the social phenomenon that he refers to as 'law'. In this conceptualisation law is "objectified cognitive and normative conceptions for which validity for a certain category of people or territory is asserted." In this understanding, drawing on Berger and Luckmann's (1967, 1986) theory, "Cognitive conceptions state how things are and why they are what they are; normative conceptions state how things ought to be, must be or may be". He defines 'conceptions' as "a collective term that encompasses rules, principles, categories, concepts, standards, notions, schemes of meaning" (Benda-Beckmann 2002:48).

2.9. Customary law and living customary law

A variety of terms have been used to refer to the systems of law recognised and applied by distinctive communities ranging from indigenous law, native law, traditional law, unofficial law, informal law and folk law to customary law and more recently, 'living customary law' (D'Engelbronner-Kolf 2001:23, Bennett 2008:138, Perry 2011:75).

Definitions of customary law vary significantly from context to context. This is largely attributed to the fact that during the colonial periods of the 15th to 19th century the varying European colonial powers adopted different approaches towards extending their authority over the indigenous populations (Chanock 1985, Tamanaha 2007:382,

Benda-Beckmann and Benda-Beckmann 2011). Tamanaha (2007) summarises the general approach taken by colonial authorities noting that the initial approach was to leave indigenous institutions to function as they had been doing. When the colonising powers developed more specific interests in certain areas or resources they extended the "reach of the law" to customary law in three ways: through the codification of customary law, the application in state courts of unwritten law in a manner that resembled common law; and the creation or recognition of informal or 'customary' courts run by local leaders (Tamanaha 2007:383). Others writing on the mechanisms used in Africa specifically refer to the ways in which the powers and authority of the traditional institutions such as the chieftancy were strengthened (Mamdani 1996, Chanock 1985, Delius 2008).

The resulting legacy of customary law is a mix of interpretations, which draw on various degrees of 'customariness' in different legal contexts (Benda-Beckmann and Benda-Beckmann 2011). It has been defined as law that " emerges and evolves from the social practices that a given jural community eventually comes to accept as obligatory (Bennett 2006:641-642) and that it is "a customary mode of the production of law" Rouland 2001:1 in Perry 2011:77). As noted in the previous chapter, in some contexts, such as South Africa, 'living customary law' is distinguished from 'customary law' (Bennett 2008, Perry 2011, Benda Beckmann and Benda-Beckmann 2011:175). The ideas of Ehrlich (1936) have informed understandings of 'living law'. Through his concept of 'living law', Ehrlich differentiated between the norms of decision which are found in civil codes, judicial decisions and statutory enactments recognised by the legislative or judicial branches of government and the living law, which he recognised regulated the life of the people, albeit in unwritten form (d'Engelbronner Kolf 2001:22). The term 'living customary law' is now used in an extended conceptual and legal sense in certain countries, such as South Africa, where customary law is recognised as an independent source of law, but 'living customary law' should be differentiated from 'official' customary law (Bennett 2008:138). Contrary to common thinking, some scholars attribute the more recent use of the term 'living customary law' in countries such as South Africa not to Ehrlich's conception but to that of Holleman (1927), based on van Vollenhoven (1909, 1918 and 1931), who, studying Adat law in post-independent Indonesia, indicated the use of the term in the context of the recognition of

customary law as an independent source of law, differentiating clearly between the law used in the judiciary and that used by people in the villages (Benda-Beckmann and Benda-Beckmann 2011:168-169). They highlight the fact that van Vollenhoven, even earlier than Erhlich, emphasised the need to understand indigenous laws "on their own terms" (Benda-Beckmann and Benda-Beckmann 2011:175) and to avoid 'jamming' local concepts, principles and institutions into foreign legal terminology (Benda-Beckmann and Benda-Beckmann 2011:175). Van Vollenhoven considered this to be "'living law' (*levend recht*)" and, in his opinion, neither custom nor official recognition by the state was a defining characteristic of this law (Benda-Beckmann and Benda-Beckmann 2011:175).

2.10. Law in relation to governance

Emphasis in legal pluralism debates has shifted focus over the past decade from debates about what law is to understanding how different systems of semi-autonomous normative fields or rule-making systems interface. It is increasingly recognised that "the relationships between multiple legal orders do not consist merely of conflict; rather, they are dialectic, mutually constitutive, fluid, and contested" (Safarty 2007:441 in Perry 2011:74). The legal field is a "collage of obligatory practices and norms emanating both from government and non-governmental sources alike" (Griffiths 1983 in Moore 2005:357).

Attention has also turned towards understanding the relationship between systems of law and governance. "Law is a crucial aspect of governance, for governance encapsulates complex dynamics of shaping binding rules, procedures and behaviours in different social spaces'' (Engel and Olsen 2005 in Benda-Beckmann *et al.* 2009:3-4). Law is increasingly seen as a mechanism of governance as it "constitutes, organises and legitimises positions of authority of governance agents and governance activities" (Benda-Beckmann 2002 and Griffiths 2002 in Benda-Beckmann *et al.* 2009:4).

Transdisciplinary scholarship on governance (Benda-Beckmann *et al*. 2009, Comaroff and Comaroff 2009, Wilber and Bull 2009, Jentoft 2011) now recognises the plurality of governance actors, state and non-state, public and private, involved in the act of

governance at different levels. This has been facilitated by the recognition of the plurality of legal and normative systems that are engaged in these governing activities at different levels (Benda-Beckmann 2009, Griffiths 2011, Bavinck *et al*. 2013), how they interact across different scales and interface resulting in a situation of 'interlegality' (de Sousa Santos 2002).

Comaroff and Comaroff (2003, 2009) observe that a "culture of legality" seems to be infusing everyday life almost everywhere. They suggest that "we are entering a new order in which humanity knows itself by virtue of its r-i-g-h-ts" (Comaroff and Comaroff 2009:13). This increasing emphasis on legality is not only limited to public life but is evident in the relationships within and between a range of communities at different levels (Comaroff and Comaroff 2009:37). They argue that increasingly these different communities seek the power and authority to "exercise control over the lives, deaths and conditions of existence" of those who fall within their purview (Comaroff and Comaroff 2009:37). It is in this context that they understand the claims to and "re-invention of customary law" (Benda-Beckmann and Benda-Beckmann 2011:175).

A very small number of scholars have begun exploring the relationship between law and governance in interactive governance arrangements in a marine resource context in more depth (Wiber and Bull 2009, Jentoft 2013). This scholarship on governance and law that is emerging gives new emphasis to the need to understand the relations between different systems of normative ordering, how they interface, what 'continuities and discontinuities' exist between the new relations and networks of governance that are emerging and the power relations inherent in these relations. It prompts questions about the strategies that local communities use to position themselves favourably in terms of the rules of inclusion and the roles of exclusion that they themselves adopt to further their own interests (Griffiths 2011:193).

It is observed that within the marine science and fisheries governance literature, whilst there is recognition that the source of rights within customary systems of governance lie in customary law, there has been little exploration of the philosophical and socio-legal foundations of these customary systems of law. Westra (2008) traces the origins of

the philosophical principles based on the laws of nature that are foundational to the human rights claims of indigenous peoples to the thinking of ancient legal philosophers such as Aristotle (Westra 2008). Like Cornell (2008, 2009), she observes that the philosophical ideals upon which the customary law of these communities are based, lead these systems of law to have very different notions of law and 'the common good' to that of western law (Westra 2008, Cornell 2008).

2.11. Understanding African systems of law and their interface with colonial and postcolonial statutory law

The ahistorical approach to law adopted by early legal theorists has gradually given way to recognition of the historically embedded nature of law. That "images of tradition compete and change, and different views are constantly taken of social continuity and the sources of authority" (Chanock 1985:3), has been illustrated very dramatically through revisionist histories of customary law in Southern Africa (Chanock 1985, Delius 2008). These histories infuse understanding of the dialectical workings of power and resistance in interpretations of histories, illustrating how "African legal conceptions, strategies and tactics are formed both by the impact of capitalism and by the interaction of the communities thus affected with the concepts, strategies and power of British colonial legal institutions" (Chanock 1985:4). The relationship between law and governance is clearly visible in the way that law articulated with systems of governance at different levels, operating as a mechanism of power. Chanock notes "The law was the cutting edge of colonialism, an instrument of the power of the alien state and part of the process of coercion. And it also came to be a new way of conceptualising relationships and powers and a weapon within African communities which were undergoing basic economic changes and conflicts. The customary law, far from being a survival, was created by these changes and conflicts. It cannot be understood outside of the peculiar institutional setting in which its creation takes place" (Chanock 1985:4).

The ideology of an established pre-colonial system of African customary law, with clearly defined boundaries, authorities and rules suited the approach of indirect rule adopted by the British in Central and Southern Africa during the 19th century. Historians have noted however that the period prior to colonialism in Africa was "a

period of intense conflict and very little in the way of political authority, systems of marriage, statuses of 'law' can be regarded as having been established in these circumstances" (Chanock 1985:10). Peires (2013) observes that in the context of the coastal regions of the Eastern Cape in South Africa, during the pre-colonial era, "there were no constraints of land, water and natural resources to tie traditional communities down, no territorial boundaries to constrain political expansion and innovation, no overarching national state to set out norms and standards or to transform in line with constitutional imperatives" (Peires 2013 unpaginated).

The imposition of Western understandings of rule, law and structures of authority, expressed through various colonial administrations throughout Southern and Central Africa, led to the assertion of politico-legal authority of the traditional authorities as recognised rulers over their people and to the fixing of territorial boundaries. Through this process of legitimation, the link between political authority and authority over land was reinforced by the colonial administration (Iliffe 1987 in Peters 2012:1-4, Delius 2008). Several African scholars have observed that the colonial interpretation of customary law fundamentally altered the basis of authority. Power was now shifted upwards and vested in 'chiefs' with authority over delineated territories, whereas previously it had been vested at local level amongst family and lineage elders (Chanock 1985, Ntsebeza 2008, Delius 2008). Assumptions about the meaning of property and the patterns of control and ordering of social relations around property and natural resource use similarly imposed Western based notions of ownership and property (Chanock 1991, Okoth-Ogenda 2008). Peters has argued that colonial and post-colonial reproduction of 'customary' tenure as not equivalent to property rights has misconceptualised the nature of property rights in Africa (Peters 2013). Many theorists on the governance of land and other natural resources have observed the way in which these colonial distortions of customary systems of land tenure have continued to shape government and development agencies' perceptions of tenure and natural resource governance in Africa (Okoth –Ogenda 2008, Cousins 2008, Ubink 2008, Sikor and Lund 2009, Peters 2013).

Chanock (1985), documenting the development of customary law in Central Africa in the colonial period, argues that the 19th and early 20th century was a period of great

change and conflict for African communities. Whilst the image of customary law projected to them by the British colonial administration was a distorted one, "Africans were the active users, not the passive recipients, of the new form, creating a customary law to deal with their new situation" (Chanock 1985:237). He suggests that many people adopted it "as a way of ordering their social and economic relations with others, and their relations with the colonial state because in the circumstances they found it to be the most advantageous instrument for translating their values and interests into power over others, of redefining, limiting and enforcing obligations. It is in this sense that law comes with the state to colonial Central Africa, both as an imposed form and as one logically adopted for use by many Africans" (Chanock 1985:236).

This perspective locates the more recent revival of interest in customary law in the context of African and cultural nationalism as a logical outcome of the power relations inherent in colonial and post-colonial governance where "certainty in a customary system becomes more necessary if it is to form the basis of a defence against challenge from an alternative legality" (Chanock 1985:77).

This revisionist perspective, coupled with post-Foucaldian interpretations of the diffuse nature of power, has given impetus to scholarship on systems of law, property and power in the context of natural resource governance in Africa. Within the context of this research on customary systems of marine resource use and governance, the work undertaken on the systems of land access, use and customary governance is most instructive (Berry 1989, Cousins 1997, Cousins 2007, Kepe 1997, Fay 2003, Peters 2004, 2013, Claassens and Cousins 2008, Sikor and Lund 2009). These authors posit a dynamic, historically contextualised interpretation of the roles played by the state and other actors at multiple levels in continuously redefining property rights according to power and authority and how different mechanisms of power (such as race, gender, territoriality, conservation) are used in this process.

Rights to resources originate in the patterning of common property processes and are recognised and institutionalised through social processes (Berry 1989, Meinzen-Dick and Pradhan 2002), thereby enabling people to make claims of varying strengths and legitimacy, on these resources (Ribot and Peluso 2003). However, 'struggles over

property are as much about the scope and constitution of authority as about access to resources' (Lund 2002 in Cousins 2007:282). They are simultaneously politically embedded as well as socially imbedded. Cousins illustrates the politically embedded nature of resource regimes with the example of South Africa, where he argues that state policies have "attempted to reconfigure the livelihood and land tenure systems of the indigenous populations in ways that served the interests of the dominant classes" (Cousins 2007:283).

The ways in which local communities have patterend their own systems of control of resources and how these have then interfaced with statutory systems results in what Cousins (1997) refers to as the "messy matrix" of both formal and informal institutions mediating access to and rights to resources (Cousins 1997:61). Kepe (1997, 1998) explores the informal institutions and customary practices of communities who have developed their own local norms in response to their exclusion and dispossession of access to natural resources in Mkambati Nature Reserve also along this Eastern Cape coastline. He identifies the practice of '*ukujola*' in this regard. *uKujola* is the term used by residents to refer to their locally legitimate harvesting of wild life resources based on their pre-existing historical rights, despite this being prohibited in terms of statute (Kepe 1997:52). Fay (2003), focusing on southern Hobeni in Transkei, contributes to a deepening of the understanding of institutions in relation to land reform, and in particular, to the evidence that social actors transform rules and institutions (Fay 2003:9). The very politically embedded nature of resource policies and tenure regimes, particularly in relation to authority and control over land resources has received attention recently in the context of the relationship between the ruling party and the traditional authorities post-apartheid (Cousins 2008, Claassens 2008, Ntsebeza 2008, Walker 2008). Several authors have explored this issue from the perspective of proposed legislation and policy on land reform and the powers and authority of traditional authorities (Cousins 2007, Claassens 2008, 2011). This work highlights the fact that uneven power relations exist within customary and statutory systems and in the relationship between customary and statutory systems (Claassens 2008).

2.12. Legal recognition of living customary law in South Africa

As a result of the history of colonialism and apartheid, South Africa has inherited an extremely complex legacy of interacting systems of law. As outlined above, different legal systems have interfaced historically, both shaping and being shaped by each other. The successive layers of distortion from these governance regimes and the narratives of legality that they gave rise to, together with the counter-narratives that have emerged against the dominance of these narratives, has left a deeply contested 'sea of laws'.

Addressing this legacy and the many varying ways in which different systems of law are given expression within a culturally diverse population has been a key aim of the Constitution and the judiciary in South Africa since 1994. The first democratic South African Constitution introduced in 1996 recognised statutory law, common law and customary law. It recognises customary law as an independent source of law. Section 39 recognises the rights and freedoms conferred on persons under customary law, in so far as they are consistent with the Bill of Rights (Constitution of SA, 1996, Section 39). South Africa has thus recognised a plurality of bodies of law in an effort to accommodate the recognition that at the time of the transition to democracy, more than half the population still lived under some form of customary law (Mnisi 2009).

The intent of the Constitution in recognising customary law has been given substance through the growing Constitutional Court jurisprudence on this issue over the past decade *(*Wicomb and Smith 2011). Claassens and Mnisi (2009) note that "issues concerning how the content of customary law should be ascertained are at the heart of the emerging jurisprudence about living customary law in the South African constitutional court. In a series of judgements, the nature of evidence required to prove customary law has been explored (*Bhe 2*005*, Shilubane* 2009*, Tongoane* 2010). The judgment in *Bhe* rejects "official customary law" as a "poor reflection, if not a distortion of the true customary law." It holds that "[t]rue customary law will be that which recognises and acknowledges the changes which continually take place" (*Bhe* 2005 in Claassens and Mnisi 2009:4).

The challenges involved in proving the existence of a system of customary law and rights associated with it have been highlighted in South African jurisprudence (*Richtersveld* 2003, *Bhe* 2005*, Shilubana* 2009) and echo similar challenges experienced in other countries (Williams 2006, Corrin 2011). The court determined in *Richtersveld (2003)* that the content of customary law must be determined with reference to both the history and the usage of the community concerned.

"'Living' customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community" (Richtersveld 2003:para 51).

In *Shilubana* 2008 the Court drew on these earlier judgements and confirmed that

"Like any other law, customary law has a status that requires respect. As this Court held in Alexkor v Richtersveld Community, customary law must be recognised as "an integral part of our law" and "an independent source of norms within the legal system."…" It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly" (Shilubana 2008: para 45).

'Living customary law' has gained attention in scholarship on customary law in South Africa. Bennett has observed that a communities' system of law is an integral component of their culture (Bennett 2006). Wicomb and Smith (2011) have explored the implications of recognizing living law as expressed in a communities' tenure system, as a right to culture. Several legal theorists have turned their attention towards the philosophies, values and norms underpinning expressions of living customary law and African jurisprudence (Mnisi 2009, Mokgoro 2011, Bennett 2011, Cornell and Muvangua 2012). The concept of *uBuntu* has been highlighted as one example of an ethical principle underpinning certain expressions of living customary law and one that is emerging through African jurisprudence (Cornell and Muvangua 2012). Translated literally it means "a human being is a human being because of other human beings" (Mokgoro 2012:317). *UBuntu* is simultaneously referred to as a foundational African

value and legal principle (Mokgoro 2011:1), a meta-norm (Bennett 2011:3), "an ancient principle of traditional African methods of government" (Froneman in Bennett 2011:6) and a philosophical ideal (Cornell 2012). It is interpreted as "a web of values that informs conduct, and fosters group solidarity – the knit between an individual and his or her community; and the interconnectedness of individuals within their communities" (Mogkoro 2011:1). In the words of Justice Mogkoro: "metaphorically, [*uBuntu*] expresses itself in *umntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities" (*S v Makwanyane* 1995 in Bennett 2011:5). Justice Langa extended this Constitutional Court interpretation noting that "it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all" (Bennett 2011:5). Cornell (2008), drawing on the path-breaking Constitutional Court judgement by Justice Sachs,[17] in which he argued that *uBuntu* places a responsibility on us to look beyond merely the legality of an issue, interprets Sach's judgement as highlighting the challenge of transforming the structure, institutions and culture of our post-colonial legal system, not merely focusing on the recognition of pluralism, 'lawfulness' and 'rights' (Cornell 2008). In addition, Cornell has argued that the nature of living customary law is distinctly different from other legal traditions in that it has its roots in the ancestors and this different symbolic order must be understood (Cornell 2008).

[17] *Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC),*

2.13. Searching for living customary law in the marine commons in South Africa

A growing body of literature is emerging on living customary law in the context of land tenure governance (Cousins 2007, Claassens and Cousins 2008, Wicomb and Smith 2011) however, there has been no systematic academic scholarship on systems of customary law within the marine and fisheries sector.[18] To date the most authoritative statement in South African law on customary fishing rights refers to the case of *Van Breda v Jacobs* (1921) heard in the Appeal Court in 1921 (*pers.comm* Smith 2009). This case involved beach-seine rights and customary fishing grounds in False Bay spanning many decades and generations (*van Breda versus Jacobs* 1921). This case established legal precedent on the issue of evidence of custom however it interpreted customary law in terms of the common law.

A few authors have referred to customary rights and customary practices of fishing communities in South Africa (van Sittert 2002, Hauck 2009, Williams 2013) and the pre-existing 'traditional' rights of fishing communities (Branch *et al.* 2002, Harris *et al.* 2007), however none of these writers have defined these terms or explored the systems of law operating in these communities. There has been no systematic research on systems of living customary law in relation to marine resources in Dwesa-Cwebe MPA however a rich body of literature and documentation exists on the histories and governance of natural resources in several communities along the Eastern Cape coast (Kepe 1997, Kepe *et al*. 2000, Emdon 2013) and within the Dwesa-Cwebe communities specifically (Terblanche and Kraai 1996, Palmer *et al.* 2002, Fay 2003, Ntshona *et al*. 2010). Fay (2003) has explored the interaction between the customary system of land tenure in southern Hobeni and the imposition of statutory regulations in depth, providing a particularly useful analytical approach to the very distinctive nature of the system of norms and rules in the context of Hobeni which he argues often deviate from normative conceptualisations of rules and patterns of tenure. The participatory research on tenure and livelihoods undertaken by Terblanche and Kraai under the auspices of the The Village Planner (Terblance and Kraai 1996, 2006) and subsequently by Fay (2003), Palmer *et al.* (2002), Timmermans (2004) has been used extensively as a

[18] Lehmann (2013) and Ferris (2013) have written on the recognition of customary rights to fish in the light of *State versus Gongqose* (2012), subsequent to this PhD research commencing. This case is discussed in Chapter Eight.

basis for further contributions to understanding governance processes surrounding land reform, conservation and development in the Dwesa-Cwebe communities (Ntshona *et al*. 2006, Palmer *et al*. 2006, Fay 2007, Matose 2009, Fay 2009, 2013). The original household survey undertaken by Palmer, Timmermans and Fay (2002) included questions pertaining to the use of marine resources for livelihood purposes. Shackleton *et al.* (2007) have extended understanding of the use of natural resources, including marine resources, in the livelihoods of the Dwesa-Cwebe communities.

Sunde *et al*. (2013) draw on theoretical work done in the land tenure governance field on the key characteristics of African systems of customary tenure to explore marine tenure systems evidenced in the scoping studies conducted for this doctoral research. Drawing on Cousins' characterisation of land tenure systems (Cousins 2008), Sunde *et al*. (2013) highlight the following characteristics evident in these marine tenure systems:

1) Tenure rights to access and use of resources are a function of membership and the relations within the group; 2) Rights are shared and relational 3) The system of administering rights within living customary systems is nested within layered communal systems; 4) Dispute resolution processes are embedded in local layers of accountability; and 5) Rights and their administration are evolving, not fixed (Sunde *et al.* 2013:8).

2.14. Defining what constitutes 'law' and a 'system' of 'living customary law' for the purpose of this research

This study draws on the debates in legal pluralism over the past two decades to develop a definition of what constitutes law for the purpose of this research. As has been argued by (Benda-Beckmann 2002) and outlined above, this question has little utility beyond being a heuristic guide to discerning and analysing differences between different normative orders in a social field. The objective of this research is to undertake empirical research to understand a customary system of marine resource use and governance and to understand its relationship to living customary law. As such, this is essentially an empirical and analytical endeavour. The framework used for this PhD research draws on Benda-Beckmann's (2002) understanding of the scope of what law

includes for analytical and comparative purposes. It regards law as a social phenomenon comprising "objectified cognitive and normative conceptions for which validity for a certain category of people or territory is asserted" (Benda-Beckmann 2002:48). It includes "rules, principles, categories, concepts, standards, notions, schemes of meaning" (Benda-Beckmann 2002:48). For the purposes of this research, I extend Bennett's (2008:128) understanding of *living customary law* as "social practices considered to be obligatory by the communities in which they operate" (Bennett 2008:138) and, borrowing from Benda-Beckmann (2002), define it to include social practices for which validity is asserted by the communities in which these practices operate. This system of law is differentiated from pre-colonial customary law and the customary law as recognised and codified by the colonial administrators and courts. It is also different to that of the official customary law recognised by the apartheid government (Chanock 1985, Bennett 2008).

Whilst recognising the importance of analysing the authorities of social control with enforcement capacities in exploring the characteristics of customary law (Moore 1978, Bavinck 2005), I draw on the interpretation of institutions developed by Leach *et al.* (1999) and highlighted in the Southern African context by Peters (2002) and most importantly, in the Dwesa-Cwebe context by Fay (2003). This approach extends Weber's concept of institutions and authorities (1954) to include not only the enforcement of rules but also the practices whereby groups of people deviate from rules and validate their actions. In this conception of systems, which draws on Giddens (1984) understanding of systems, many "institutions are informal, and consist more in the regularized practices of particular groups of people than in any fixed set of rules; as such they are also dynamic, changing over time as social actors alter their behaviour to suit new social, political or ecological circumstances" (Leach *et al.* 1999:16). The approach proposed for this research is thus to include the presence of institutions and authorities as an analytic dimension of systems but to retain the possibility that rules may be tacit and institutions embedded, and rather to explore this from the perspective of the patterns of interactions and practices between community members and how these are expressed in and through different dimensions of governance. This will include how their interactions might negate the need for explicit rules, or maintain a

degree of flexibility as they negotiate and adjust to the interface of different systems and their legalities.

2.15. Conclusion

This chapter introduces the theoretical basis for the exploration of customary systems of marine resource governance. It identifies the key theoretical frameworks and bodies of literature influencing understanding of different characteristics of systems of marine resource governance, including approaches to conceptualising power, rights and rules and the institutions shaping these systems. In this Chapter I explore how ideas about social systems, law and power have developed. Perspectives on how legal pluralism and customary systems of law have evolved and continue to do so are outlined.

The interfacing of these bodies of literature, viewed from the perspective of governance and law within a distinctly African context, provides a theoretical framework for an exploration of customary systems of use and governance within the case study used in this research. Finally, in this chapter I explain the understanding of the concepts of 'law' and 'systems' that will be used for analytical purposes in this thesis to understand the nature of the customary system of marine resource governance and its relationship to living customary law.

CHAPTER THREE: METHODOLOGY

3.1. Introduction

The impetus for this research, the origins of the research question and the methodology that evolved are grounded in the struggles of small-scale fishing communities for recognition within the South African post-apartheid land and seascape. As a policy and advocacy researcher in a non-governmental organisation (NGO) working with small-scale fishing communities during the past decade, I was aware of the silence surrounding recognition of customary marine resource use and governance systems in South Africa. Contrary to international experience, there was no established body of literature on customary marine resource use and governance systems and government fisheries officials consistently refused to discuss the status of such systems. My own research, as part of a small, informal network comprising NGOs' and a community based organisation (CBO) working with several small-scale fishing communities in South Africa[19], revealed significant differences between fishing communities with regard to the nature of the claims that they made to customary rights as well as the social relations and structures within which they lived (Sunde 2003, Sunde and Isaacs 2008). Most significantly, many of them drew reference from customary norms and it appeared to me that these norms were shaping their perceptions of their entitlement to access marine resources, albeit in different ways.

In 2010 I decided to begin doctoral research on this subject in an attempt to contribute towards an understanding of the basis of these communities' customary claims. This PhD research thus arose out of my earlier policy and advocacy research work with coastal communities. There was a need for both documentation of customary practices and the development of a conceptual understanding of the nature of these practices and systems of governance to ensure that future fisheries governance could be based on principles of social justice, in keeping with emerging Constitutional jurisprudence on customary law and the right to culture in South Africa[20] .

[19] Namely the Legal Resources Centre, a public interest law firm and Masifundise, an NGO working with small-scale fishing communities and Coastal Links, a community- based network of fishing communities.

[20] *Alexkor v The Richtersveld Community and Others* 2004 and *Bhe and Others v Magistrate*, *Khayelitsha and Others* 2005.

This doctoral research was embedded in a larger research project conducted by the Environmental Evaluation Unit at the University of Cape Town on the Human Dimensions of Marine Protected Areas in South Africa. This research project comprised 5 case studies, two of which I undertook, namely those of Dwesa-Cwebe MPA and Langebaan MPA. The research undertaken for this thesis on customary systems of marine resource use and governance contributed towards developing an understanding of the nature of customary systems in South Africa and the development of a conceptual framework for understanding how customary practices, as key human dimensions, shape fisheries systems and the implications of this for the governance of MPAs. This thesis comprises the work undertaken in one of these case study sites, namely Dwesa-Cwebe MPA.

3.2. Research approach - Grounding theory in praxis

> "In any research project, researchers make philosophical assumptions and choices about a range of issues: these include one's approach towards the nature of reality, also referred to as (ontology), how he or she knows what they know (epistemology) the role of values in the research (axiology), the language of research (rhetoric) and the methods used (methodology)" (Creswell 2003 in Creswell 2007:16).

This research comprised a grounded theory, qualitative and engaged-scholarship approach to the study of the customary systems of marine resource use and governance of the Dwesa-Cwebe - fishing communities. A grounded theory approach, in which the intent "is to move beyond description and to generate or discover a theory, an abstract analytical scheme of a process" (Strauss and Corbin 1998 in Creswell 2007:63), was considered most appropriate as I hoped that an examination of the experiences of the two Dwesa-Cwebe communities with whom I conducted the research would inform the development of an analytical understanding of the nature of their customary system of use and governance, its relationship to living customary law and how it has interfaced with other systems of law. In such an approach, theory gradually emerges from the data through cycles of re-examination as understanding deepens and new insights emerge.

The choice of a grounded theory, qualitative, engaged-scholarship approach was informed by my aim to try and explicate the nature of customary systems of marine resource use and governance in the South African socio-legal context in order to contribute to their consideration in policy and governance processes. The research was influenced by my own experience of working with fishing communities that have been excluded from the new fisheries dispensation in South Africa. The experience of working with these communities in advocating for their rights strengthened my belief that there is a silence on customary governance systems in discussions about marine resource use and governance in South Africa. In the absence of a theoretical understanding of customary marine resource systems in general, and an understanding of the nature of the particular systems that exist in South Africa, there is a danger that the new fisheries governance system may at best ignore, at worst, extinguish these rights. The network within which I worked had identified the need to undertake research that would contribute towards understanding the nature of the customary practices that communities' referred to so that their status could be considered in the context of the Constitution and the new small-scale fisheries policy (*pers.comm* Henk Smith and Wilmien Wicomb 2009). As such, my prior and on-going work with these communities biased me towards a determination to document these practices and governance systems. However the precise nature of these practices and the implications of this for their legal status were unknown to me at the outset of the research. The consequences of this bias as the research process unfolded are discussed below.

Contrary to academic research that has its origins in research questions prompted by existing theoretical research, the need for academic research on this topic was identified within a context of community engagement. Having its origins in praxis has shaped the methodological frame of this research, its design and process. This does, and did raise complex questions of research epistemology and methodology and these have been consistent themes requiring close engagement throughout the entire research process. If one is conducting research, seeking new knowledge, but with such prior applied intent, how will this shape the knowledge that is generated? How will the researcher be sure that her methods are rigorous and her findings will stand up to scrutiny as an academic thesis? Questions related to the social justice concerns of

research and the implications of this for the generation of knowledge and the validity of the research have been debated from a range of perspectives in the social sciences (Stanley and Wise 1990, Hammersely 2000, Hale 2008). There is a very lengthy and established tradition of action research in the social sciences and research activists have argued the legitimacy and the necessity for research that contributes towards political goals (Hammersely 2000, Hale 2008). This research implicates the epistemological standpoint of the researcher. It suggests a different research paradigm and perspective on knowledge production (Cervone 2007).

Critical social theorists have challenged the positivist nature of Cartesian science and cast doubt on whether any knowledge can be considered 'objective' (Stanley 1990). Rather, they argue, all knowledge is socially constructed and interpreted and that research cannot pretend to be non-partisan (Fraser 1989, Reiter 2013). In particular, feminist critical theory and subsequently post-modern, post-colonial and post-structural theory have argued the situated nature of all knowledges (Harding 1987, Fraser 1989, Stanley 1990). Feminist research theory firmly placed the need to consider epistemology (how we know the world) and ontology (being-in the world) on the research agenda. In this regard, feminist research theory put the "process of knowledge production, in research and theorizing, *into its* product, (my emphasis) in the shape of written accounts of it" (Stanley 1990:4). It was influential in shaping much of the critical research theory of the past few decades and influenced a range of academic disciplines such as critical geography (Fuller and Kitchen 2004) and critical anthropology (Cervone 2007). It has brought about "ontological and epistemological shifts" which have continued to evolve (Stanley 1990:4). More recently there is renewed focus on these shifts, particularly emanating from academic-activist work with indigenous peoples and local communities. This is variously referred to as "critically engaged scholarship", "activist-research" and "activist-scholarship" (Arenas 2003, Cervone 2007 and Hale 2008, de Sousa Santos and Rodriegues-Garavita 2005). Arenas (2003), quoting Hale notes that "activist research does not advocate a divorce from the academy, but instead seeks a new relationship between activism and research. The result is, as Hale himself points out, a tense dual commitment. Having an accountability to both means precisely that the tension cannot be resolved; rather than seek a resolution between the terms, or choosing between them, this tension is seen as productive, a creative means by which to

make a difference. Hale pushes social scientists to engage and embrace the contradictions not as the limit but rather as the point of departure for activist research" (Arenas 2003 cited at http://www.clas.berkeley.edu/Events/spring2003/03-17-03-hale/index.html).

3.3. Research design: dialectic in process

As a white, English-speaking, urban-based South African, educated within a western-orientated system of education, I was aware of some of the contradictions inherent in my choice of topic and the limitations of my epistemic position, both as a white South African and as an activist-academic researcher. I naively believed that my understanding of the critical research theory literature and feminist and post-modern epistemology (Stanley and Wise 1990), would equip me to address these contradictions as they arose in my research study. Further, I believed that a grounded-theory, engaged-scholarship approach would enable the participants in my research 'to speak for themselves' through my data and in this way I could navigate my way through the sea of distortions that an ethnocentric perspective might give rise to. However, as the research project unfolded, each and every aspect of the assumptions referred to by Creswell (2003) cited above were challenged.

The first hurdle that I faced was a crisis of both 'ontology' and 'epistemology' that shifted the 'ground' upon which my research was designed. In the first phase of my fieldwork I was despondent when, in response to questions about their system of customary fishing rules, many respondents stated that they did not have specific rules for fisheries. Further, it was very apparent to me that they approached the entire concept of rights, rules and responsibilities from a standpoint very different to my own. This caused discomfort on two different levels for me. Firstly, the practices that I observed and the informants own descriptions of these practices pointed to a pattern of behavior and norms, even though we could not find a common language or word to describe what I observed and interpreted as 'rules' or 'rights'. Secondly, I later became aware that my own reactions to what I was hearing were shaped by my hopes that I would find an elaborate set of 'design principles' and rules that would provide recognition and acceptance for these communities from marine scientists, government

fisheries managers and state lawyers. A process of close self-reflection at this stage enabled me to become aware of my own bias. I realized that I was influenced by my own identity, located as a social scientist, within a western, state-centric notion of law as well as within a theoretical context in which the dominance of a particular perspective in the common property literature (Ostrom 1998), shaped approaches to the study of customary systems of resource use and governance. The fisheries management literature that I had explored for my research proposal had been strongly influenced by western, positivist conceptions of science and law. I became aware of the extent to which I was falling into the age-old trap of 'seeing like a state' (Scott 1998), searching for clearly identifiable 'rules', located in a discrete set of institutional relations called 'law'. This reflection forced me to acknowledge that despite professing to be working within a 'grounded theory' approach in which theory would later emerge from the data, I was inadvertently projecting my own a priori assumptions and theories onto the research data collection process, even in this supposedly 'pre-theory' phase.

Several scholars have critiqued grounded theorists such as Glaser and Strauss (1967) and Bryant and Charmaz (2007) amongst others for failing to adequately acknowledge that theory is inseparable from practice and that "We are utterly unable to look at the world "theory free" as we cannot escape approaching reality through words and categories" (Reiter 2013:7) or in the words of Plummer, theory is "everywhere…intimately connected to issues of problem, method and substance" (Plummer 1990 in May 1993:22). Rather, "instead of pretending to be neutral, we need to be aware, explicit, transparent, and honest about our starting position, standpoint, situatedness, or positionality" and that "only once we are aware of the theoretical models and assumptions that guide our approach to reality, we can then expand and ask different and new questions that allow us to explore the empirical terrain that surrounds the empirical segments we initially focused on" (Reiters 2013:7). This moment of realisation in my research was a shocking one for although I was aware of the way in which research is influenced by our preconceptions, this issue appeared to refer to a paradigmatic reference (western legal philosophy and thought) that was foundational. I felt the limitations of my own standpoint, aware that not only was I not unbiased, but that the theoretical, philosophical and epistemic position that I started from might not adequately equip me to imagine the complexity of an African

philosophy, ethic and cultural system of social organisation that was so different from my own. Given the limitations of my language and cultural standpoint, in the context of the distorted interpretations of a colonial and apartheid history, I doubted if I would be able to undertake this research into the 'nature of customary systems' and 'do justice' to these systems. I gradually found my way through my fieldwork and data collection practice through the simultaneous reading of a range of texts on the history of legal anthropology and legal theory (Chanock 1985, Comaroff and Roberts 1981, Moore 2005). These detailed explorations of how methodology and epistemology have shaped knowledge and understandings of systems of law over the past century provided me with critical reference points along the way.

A rich scholarship on the nature of customary systems of law in Africa and the methodological challenges that arise in conducting research on such systems exists (Comaroff and Roberts 1981, Bennett 1995 and 2008). Observers and analysts of these systems have long debated what constitutes 'law', how best to study such systems and how they have interfaced with other systems of law and social fields (Moore 2005). This legal anthropology literature, coupled with discussions with colleagues working on issues related to the recognition of customary law and African philosophy, inspired confidence in my ability to identify and deepen my own awareness of the biases in my thinking and in my research practice. Readings of literature on transformative research paradigms (Mertens 2009, 2010) helped me to develop reflexive strategies to further work with the contradictions inherent in position. As my own reading of the literature expanded across disciplines, from the 'design principles' of natural resource management literature (Ostrom 1998), to an understanding of customary law as woven into the social, cultural, ethical and economic fabric of everyday life in communities, I was able to be alert to this bias and create the space for the unique character of each context to emerge from the grounded context of the respondents' own life experience and expression of norms and 'rules'. Ironically, in effect, the theoretical frame that this literature offered me enabled me to adopt a more truly 'grounded' approach to the actual data collection process. I expanded the range of questions that I asked and encouraged participants to describe their lives and social organisation more freely. I observed a wider range of social relations and activities, beyond the narrow confines of fisheries and the use of marine resources and the linkages between socio-cultural

dimensions and the marine environment. Thus my approach and the research design shifted and expanded within the research process itself as my own disciplinary perspective deepened and developed. This made a dialectical process of theory-in-practice possible. In doing so, I discovered an "expanded repertoire" of norms and rules (Comaroff and Roberts 1981) and patterns of meaning and law- making that were previously unimagined from my initial perspective.

3.4. Methodology

This research comprised qualitative, ethnographic case study research conducted in two communities during the period February 2011 to December 2012. In total 80 fieldwork days were spent staying in these two fieldwork sites, divided up into shorter periods of a week to a month long. The qualitative methodology selected for this study was an eclectic one, aiming to accommodate the transdisciplinary nature of the study of customary law by drawing on the collective strengths of different disciplines' methods and tools for understanding a community's expressions of law. Jurisprudence emerging from the Constitutional Court in South Africa on the processes involved in understanding customary law indicates the importance of this aspect of using methods that enable the study of customary practices '*in their own setting'(Shilubana 2008) .*

3.4.1. Selection of the case study site

The history and political struggles of the Dwesa-Cwebe community living on the Eastern Cape coastline, adjacent to the Dwesa-Cwebe MPA have been well documented (The Village Planner 1996, Palmer *et al*. 2002, Fay 2003). As this community has historically lived within an area defined as a 'bantustan', under traditional authority[21], recognised by both the colonial and apartheid regimes under their limited purview of 'African customary law', I decided that this would provide an important legal context within which to explore customary marine resource use and governance systems and their relationship to living customary law. I had no prior contact with individual members of this community; however, I had visited the Dwesa Reserve in 1983. In addition, a discussion with the official responsible for MPAs in the Department of Environmental

[21] Traditional Authority is the official statutory term used in South Africa to refer to the system of customary governance of African communities. The Traditional Authority structure of Dwesa-Cwebe communities is outlined in Section 3.5.2.

Affairs (DEA) had suggested that the DEA was in the process of evaluating the management of the MPA and considering the communities' request for access to marine resources (*pers.comm* Boyd 2010). My selection of Dwesa-Cwebe MPA was thus influenced by the following aspects:

- Pre-existing reference by the community to customary practices cited in the literature;
- A diverse cultural, institutional and socio-ecological context;
- An MPA where customary and statutory systems were in conflict over the interpretation of the communities' rights to access and use marine resources;
- A governance system in the process of review and evaluation with the potential for change in how customary rights would be accommodated within a protected area. This would have important implications for how the new Policy on Small-scale Fisheries (SSF) would be interpreted and implemented in this context.

I selected two out of the seven communities, namely Ntubeni and Hobeni, in which to undertake my research. Initially I planned to use only one of the seven communities comprising the land claimant community of Dwesa-Cwebe as I was concerned about how I would accommodate more than one community. I selected Ntubeni, one of the communities that has access to marine resources on the edge of the MPA and hence is considered 'legal' in terms of statutory fishing regulations. However, once I had commenced with my research here, it became apparent to me that I needed to include one of the other seven as well that did not have any 'legal' access to the MPA as this would highlight the different ways in which customary practices have interfaced with statutory law and regulations and how communities have responded to and resisted the statutory prohibitions on their customary practices. I selected Hobeni as this was a community that had been vocal about their lack of access to resources and I was aware that fishers had been arrested for alleged violations of the MLRA within the MPA (See Figure 2 overleaf).

3.5. Introducing the case study site: Dwesa-Cwebe communities

3.5.1. Location and history of the communities

Dwesa-Cwebe MPA lies on the Eastern Cape coast of South Africa, stretching approximately 18 kilometres along the coast, at 32.312779S; 28.827291E at its western boundary and at 32.205459S; 28.946712E at its northern boundary (see Figure 2 below). The MPA lies adjacent to the Dwesa and Cwebe Nature Reserves, known together as the Dwesa-Cwebe Reserve.

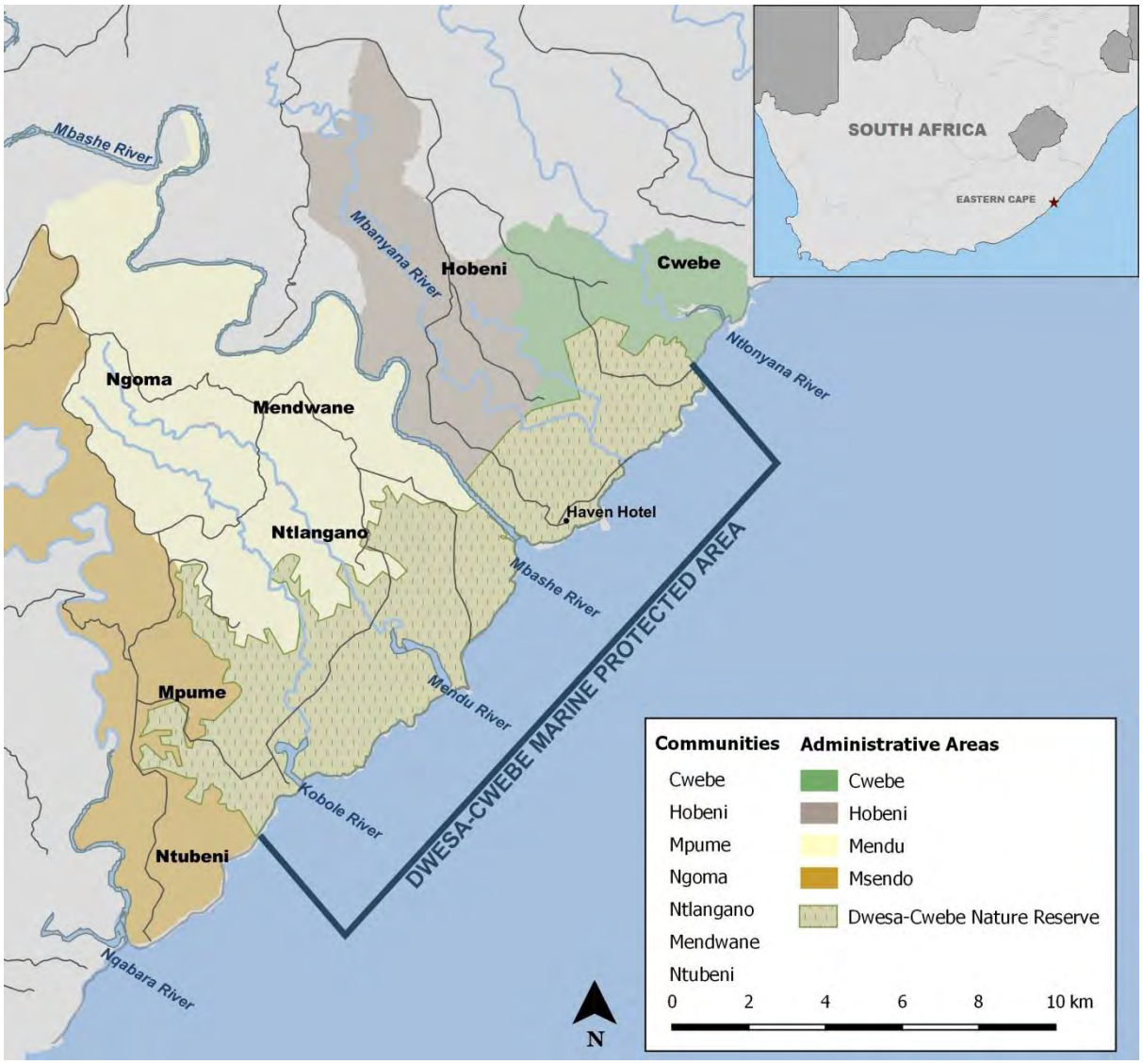

Figure 2: Map of Dwesa-Cwebe communities and Administrative Areas

The communities referred to as the 'Dwesa-Cwebe communities', referred to collectively only for the purpose of analytical distinction in this thesis as 'the Dwesa-Cwebe community', reside adjacent to the Reserve on either side of the Mbashe River. These include Cwebe, Hobeni, Mendwane, Ntlangano, Ngoma, Mpume and Ntubeni.

Two of the communities, namely Cwebe in the far north, living alongside the coast and next to the Suku River, and Hobeni, now cut off from the sea by the reserve, are located on the northern side of the Mbashe River. There is no bridge across the Mbashe within the reserve and those wishing to travel from one side to the other are required to travel inland on gravel roads and cross a low level bridge which is frequently flooded. Four communities are located on the Western side, (Ntubeni, Mpume, Ntlongana, Mendwane). On this side, Ntubeni is the only community that lies immediately adjacent to the coast.

The concept of the larger 'Dwesa-Cwebe community' is a politically and socially embedded concept, created largely through the interaction of the state with the eight communities that previously resided in this area. For this reason it has been described as "an imagined community" (Palmer *et al.* 2006 in Sustainable Development Consortium (SDC) 2006:57), an identity obtained through their interfacing with the statutory authorities as part of their claim to their coastal land and associated natural resources in 2001. This identity as a single community does not correspond directly with a single territorial or political entity and the politics of this identity as a single community are ever present. Originally there were eight communities however they grouped as seven communities for the purpose of establishing Common Property Associations (CPAs) as part of the statutory requirements for settlement of their land claim (SDC 2006:27). As will be explored in Chapters Five to Eight of this thesis, the ancestors of these communities formerly resided in the reserve and in the areas close to the current boundary.

There are significant differences between those communities settled on the eastern side of the Mbashe River (Hobeni and Cwebe) and those on the south western side (Ntubeni, Mpume, Ntlongana, Mendwane). These differences relate to the specific socio-cultural and political histories of the clans that settled in these areas. Broadly speaking, the

clans constituting the five communities on the western side of the Mbashe River were of amaGcaleka and Mfingo origin, the Mfingos having been settled in the region by the British. The clans on the eastern side were amaBomvana. (Fay 2003) records that amaBomvana gained a reputation for resisting the influence of missionaries and of their colonial occupiers and were referred to by other groupings in the region as the 'Reds'. "The 'Reds', named for the distinctive red ochre clay that they painted on their faces. In contrast, the residents on the other side of the river were known as 'the Schools' due to their willingness to obtain a colonial education. As Mayer put it, Reds maintain[ed] the historical awareness of being a conquered people ... [seeing] a continuity between their long military resistance and their resistance through preserving their cultural identity" (Mayer 1980 in Fay 2003:80). Fay suggests that this perception of the Reds by the statutory authorities "led to (a) neglect that effectively entailed a concession of a degree of local autonomy" (Fay 2003:79).

This observation is noted in the current context where it has been the Hobeni and Cwebe communities associated with the 'Reds' who have resisted the imposition of a range of statutes most vociferously, asserting their local culture and customary practices in their responses to the statutory prohibition on access to marine resources in the MPA and requesting assistance in defending these practices in court (*State versus Gongqose 2012*)[22].

3.5.2. Administrative authorities and institutional arrangements

A complex, overlapping set of governance institutions prevails in Dwesa-Cwebe. In this region of the country, traditional tribal authorities were established through various statutory acts of the colonial and later apartheid era. These authorities continue, overlaid by the local governance institutions introduced post 1994.

For the purposes of this research, the traditional authority is conceptualised as comprising four layers of traditional governance, each nested in the layer above it. These include the Regional Authority, the Traditional Authority, and Administrative

[22] This case is explored further in Chapter Eight.

Areas which comprises the Headman's authority and the neighbourhood authority, comprising the sub-headman's authority (see Table 2 overleaf).
However, as will be presented and analysed in the subsequent chapters, not all of these layers of authority are referenced in the customary system of governance and expressions of living customary law within which the marine resource use is embedded.

The Traditional Authority comprises the Regional Authorities, which include the Paramount Chiefs and chiefs and the tribal authorities which comprise the chiefs and his or her headmen, each headman administering an area referred to as an Administrative Area (AA). The seven communities of Dwesa-Cwebe straddle four tribal authorities, including two chiefs. In the Xhora area this is Chieftainess Nobangile and in the Gatyana area, King Sigcau, who is the paramount chief in the area (Palmer *et al.* 2006 in SCD 2006). There are four different Administrative Areas represented in Dwesa-Cwebe, each with its own headman. However, in Dwesa-Cwebe, the terms 'headman' and chief' are often used interchangeably to refer to the headman at the level of the AA. He may also be referred to as 'Nkosi' (plural is amakosi).

Ntubeni and its four neighbours on the Dwesa side are located within the Willowvale Area (Gatyana), whilst Hobeni and Cwebe fall within the Xhora (Elliotdale) area. All of these Administrative Areas fall within the Mbashe Local Municipality which in turn falls under the Amatole District Municipality. The seven villages straddle three municipal wards in terms of the local municipality ward demarcation (Palmer *et al.* 2006 in SDC 2006: 60).

Table 1: Traditional authorities of the Dwesa-Cwebe communities

Administrative level	Leadership position	Source of authority
Regional Authority	Paramount Chiefs and Chiefs King: Xolilizwe Sigcau	Hereditary
Tribal Authority	Chief (Nkosi): Gatyana: King Xolilizwe Sigcau Xhora: Chieftainess Nobangile	Hereditary
Administrative Area: Cwebe Hobeni Mendu AA, incorporating under this authority Mendwane, Ntlangano and Ngoma; Msentu AA incorporating Mpume and Ntubeni	Headman (Nkosi): Chief Jonginkosi Geya Chief Patrick Fudumele Chief Solontsi Chief Vulinqaba Ndlumbini	Hereditary
Villages/communities: Cwebe Hobeni Mendwane Ntlangano Ngoma Mpume Ntubeni	Authority of the headman (listed above). This is exercised in consultation with the elders and sub-headman at neighbourhood level who meet regularly together with amakosi (chief or headman of the AA)	Hereditary
Neighbourhoods	Sub-headmen	Appointment by members of the neighbourhood

(Adapted for Dwesa-Cwebe from Kepe (1999) in Cousins and Claassen 2006:34)

This research focused on Ntubeni and Hobeni. Hobeni comprises six neighbourhoods, however, the fishers and harvesters reside predominantly in three neighbourhoods closest to the sea, known as Mhlanganisweni, Velelo and Mavundleni, and hence most of the research was conducted in these neighbourhoods. Ntubeni comprises three neighbourhoods namely Ngomane, Gume and Mkuhlu. All of them were included in the research.

In 1999 the seven communities established Communal Property Associations (CPAs) for the purpose of their land claim settlement and in 2000 a Dwesa-Cwebe Land Trust was established, comprising representatives of the CPAs[23]. The Chiefs had ex officio status on the CPAs. In 2012 the Land Trust was disbanded and a new umbrella CPA comprising

[23] This process and these institutions are discussed in Chapter Six.

representatives from all seven communities was registered (*pers.comm* Mazwi Mkhulisi 2012).

3.5.3. Demographic and socio-economic profile

The total population of the collective Dwesa-Cwebe communities is estimated to be 14 720 persons living in 2382 households (SDC 2006:57).
This includes:

Cwebe 2644
Hobeni 3730
Mendwane 2817
Ntlangano 497
Ngoma 1116
Mpume 2080
Ntubeni 1836

In 2000 Census SA declared the Elliotdale and Willowvale districts to be the poorest districts in the country (SA Census in Shackleton 2007:137). Subsequently a study by the Agriculture and Rural Development Research Institute found that 93% of households in rural Elliotdale and 91% of households in rural Willowvale had incomes below a poverty line set at R533 per adult equivalent per month. Between 70% and 77% of the households were classified as 'ultra-poor' (ARDRI 2001 in Shackleton 2007:138). This trend along the Eastern Cape coastline was confirmed by Branch *et al.* (2002) in a study focusing specifically on fishing households undertaken for the Subsistence Fisheries Task Group. This study found that 34% of fishing households along the Eastern Cape coast were classified as 'ultra-poor' households and 57% were classified as 'poor' (Branch *et al.* 2002:444). In 2008 the Amatole District Municipality noted that the number of residents living below the poverty line "has increased significantly between 1996 and 2004, for the Eastern Cape as a whole, and particularly for the poorer areas of Amathole" (Amatole District Review 2008:15). The Mbashe municipality, within which Dwesa-Cwebe is located has the highest rates of poverty (90.38%) and dependency on social grants (5.10) in Amathole District, coupled with

high unemployment (78.51%) and higher than average proportion of people (7.12%) aged over 64 years. An indication of the depth of poverty in the area is revealed by the Municipality's share of the Provincial poverty gap (6.01%), which is substantially higher than its share of the Provincial population (4.31%) (Amatole Integrated Development Plan 2011:23).

Understanding of the assets available to the community, their livelihoods and the socio-economic conditions of the community as a whole as well as intra-community differentiation has to date been drawn largely from two household surveys conducted in two phases between 1995 and 2000 and undertaken under the auspices of the Institute of Social and Economic Research at Rhodes University by Palmer, Fay and Timmermans and documented variously in Palmer *et al.* (2002), Fay and Palmer (2002) Fay (2003) and Timmermans (2004). These surveys confirm the high levels of poverty cited in the Census statistics of 1990 as well as the centrality of natural resources from the forests and coastline in the local, largely subsistence economy. This was subsequently confirmed by Shackleton *et al.* (2007). These surveys indicated that two thirds of the households surveyed had incomes below the poverty line (Timmermans 2004:83) with a higher proportion of female-headed households living below the poverty line (Fay and Palmer 2002:162).

Use of marine resources is a key source of protein, particularly for the two communities of Ntubeni and Cwebe (Timmermans 2002: 194). Fay and Palmer (2002) cite significant levels of social differentiation between communities, highlighting the persistence of historical differences between the villages on either side of the Mbashe River. They correlate intra-community differentiation largely to differences in the household developmental cycle including issues such as migration, access to employment, dependence on pensions and the availability of labour and the gender of household heads (Fay and Palmer 2002:154-173).

3.5.4. Gaining entry into Dwesa-Cwebe communities

The Dwesa-Cwebe community members speak isiXhosa. As English is my mother-tongue, language was a significant obstacle. I sought to address this by undertaking a course in isiXhosa prior to my departure, however, I found this did not equip me

sufficiently to understand the particular use of phrases in Hobeni and Ntubeni and hence I relied on the services of two young Xhosa-speaking university students from the region as interpreters. In addition I used the services of two local community members who were regarded as community research assistants by the communities themselves. Both of these two men have assisted previous researchers and understood the importance of interpreting as closely as possible to the original words used by the respondents.

In order to gain entry I sought the assistance of an outside, isiXhosa speaking researcher who had worked in the area for the NGO that had supported the community with their land claim in the period 1994-2001. He accompanied me on a scoping study to the area and introduced me to the local headman, sub-headmen and key community members. In both Ntubeni and Hobeni I began my work with a visit to the local traditional authority leader or chief, known as Nkosi (plural amakosi), as I erroneously assumed that amakosi had authority over marine resource use. In both of these areas residents informed me that amakosi played no role in fisheries governance. Instead, authority is vested at the level of the local sub-headman. In both instances I was required to merely inform amakosi of my presence and my intended research, rather than ask permission. This was confirmed in my subsequent interactions with amakosi who requested me to liaise directly with the fishers and their local sub-headmen. In both instances amakosi were supportive of the research.

3.6. Research methods

The research methodology included a combination of several different qualitative research methods in addition to a quantitative household survey. Triangulation was used to strengthen the reliability of data through the use of these various methods including in-depth interviews, oral histories, focus group discussions, meetings and-depth individual interviews with key community informants, interviews with key government and civil society stakeholders, community meetings as well as participation in and observation of a court case and the analysis of legal proceedings. In addition I drew on a wide range of secondary and archival material comprising correspondence and reports on the history of Dwesa-Cwebe and the Land Claims process.

3.6.1. Methods used, rationale and process followed

3.6.1.1. In-depth interviews

A total of 46 in-depth interviews using a semi-structured guide were conducted in Ntubeni (22) and Hobeni (24), including 26 men and 20 women[24]. It was originally intended that these interviews would be oral histories. It soon became apparent however, that individuals were uncomfortable with this focus on themselves as individuals for any length of time and they found it much easier to 'tell the story' of their family or their community. They interspersed their own feelings, experiences and responses within this larger 'story'. This may have been the result of the interplay of different issues. On the one hand, telling their personal life history to a stranger may have inhibited them. Further, the language barrier and need for interpretation in isiXhosa was interruptive and kept breaking the focus of the interview and the dynamic of individual story teller and listener. Most importantly, it has been argued that life histories are not always appropriate in "cultures where people might not think of themselves in the kind of isolated, individualistic and linear way that the approach tends towards" (Powle 2004:3). For this reason a less structured form of oral history referred to as 'personal narrative' was used, with a set of guiding questions. As a result of this shift in method and structure in the interviews, the majority of the individual interviews (40) would be more appropriately called in-depth semi-structured interviews with only 6 of the interviews taking on the process and atmosphere of an oral life history interview in which the informant themselves really guided the direction of the interview after being given an opening question.

For the individual interviews and oral histories I used a snow balling method. I relied on my local community guides to identify persons who utilised marine resources, requesting a spread of men and women, young and old. I then on occasion found them with other neighbours and friends who, on hearing about the research, told me that they also harvested or fished. I purposively selected two of the three respondents in the criminal matter of *State versus Gongqose and two others (2012)* as I was eager to understand how the law operated in such instances and their responses to it. I

[24] See Annexure One for a list of interviews, gender of the informant and the date of interview. Hobeni is indicated with an 'H' next to the number of the interview and Ntubeni with an 'N.

interviewed them prior to their meeting the attorneys who subsequently defended them in their trial; however, it was after they had approached a local NGO for legal assistance. This purposive sample was selected to specifically include key elders in the community who were considered repositories of culture and history. It also included interviews with four sub-headmen and young men and women. It also included one former member of the Dwesa-Cwebe Land Trust.

Informants were asked if they were comfortable with me taping the interviews. Confidentiality and anonymity was confirmed. All the interviewees gave their permission to be recorded.

In addition to these interviews with community members, six semi-structured interviews with key informants were held with conservation authorities, staff and with two members of the CPAs, one in Hobeni and one in Ntubeni. These interviews ranged in length from half an hour to one hour. These interviews were not recorded. I made handwritten notes in the interviews and added notes and observations on recall subsequent to the interviews.

3.6.1.2. Household survey

A household survey was undertaken with 62 fisher and harvester households in Ntubeni. This survey was conducted in all five of the case study sites in the Human Dimensions of MPAs research. It drew on a variety of existing surveys that have been used with small-scale fishing communities in other parts of the coast (Raemaekers *et al.* in prep). A common strategy was developed for the household survey. The survey includes questions on a range of household data and then focuses on the use of marine resources and related fisheries livelihood and management issues. The schedule that I used for Dwesa-Cwebe was then adapted to include a few key questions suggested by Fay (2003), who has written extensively on issues related to land use, cultivation, crops and cattle in Hobeni. Drawing on the experience of Palmer *et al.* (2002), the unit of analysis for the survey was the homestead. All three neighbourhoods of Ntubeni

namely Ngomane, Gume and Mkuhlu were included in the research. Regrettably Hobeni was not surveyed.[25]

I approached the sub-headmen from each of the three villages in Ntubeni and Hobeni for advice on how I should identify who could be trained and paid to administer the questionnaire. The sub-headmen from each area selected one young person with a minimum of Grade 10 to be trained. One of the assistants had previously participated in a research project (Palmer *et al.* 2002). The questionnaire was translated into isiXhosa by a researcher in Cape Town. In August 2011, assisted by a Zulu and Xhosa speaking researcher, I piloted the questionnaire with four research assistants and then the assistants together piloted the questionnaire with a resident from Ntubeni. The survey was then revised slightly on the advice of a local research assistant. All the interviews were conducted in isiXhosa.

A purposive sampling strategy was utilised as the survey wanted to target those households that harvested marine resources. The research assistants in each area drew up a list of marine resource harvesting households in their area based on their own knowledge and with the advice from the headmen and elders in the area. They then went door to door to conduct the survey. In total 62 households in Ntubeni were included out of a total of 210 households during the period 8-30 August 2011.

3.6.1.3. Focus Groups

Focus groups have been variously described in the literatue as in-depth group interviews (Hughes and DuMont 1993 in Smithson 2000:357) and as informal discussions amongst a group of individuals about a selected topic (Wilkinson 2004 in Smithson 2000). I elected to use focus groups for a number of reasons: to increase the range of data available to me on the residents' histories, customary practices and perceptions and to simultaneously corroborate information amongst the group; to create a safe environment in which individuals would feel part of a collective and to observe their interaction with each other and how they ascribed meaning to particular

[25] Use of marine resources is prohibited here. Whilst it does continue, the conservation authorities were concerned that the researcher might raise expectations through conducting a survey. For Hobeni data was collected through all the other methods and drew on the survey conducted by Palmer *et al*. 2002,

aspects of their culture and customs. A total of 6 focus groups were held in Dwesa-Cwebe, three in Ntubeni and three in Hobeni. The focus groups were conducted in isiXhosa and were interpreted by the isiXhosa students assisting me. In Ntubeni one of the focus groups was facilitated by an isiXhosa speaking research assistant. The participants for the focus groups were chosen to reflect the range of users of marine resources. In Ntubeni one group was held with a group of elderly women crayfish harvesters, all over the age of 75 years; one group was held with 4 young women harvesters all under 35 years; and one group was held with male fishers. In total 28 persons participated in the focus groups in Ntubeni. In Hobeni, two focus groups were held with the Hobeni Fishermen's Association and one was held with the women's association.

Focus groups provide an opportunity to obtain a considerable amount of data from a larger number of participants at the same time, and to observe the interactions amongst members. They provide an opportunity to observe the processes whereby participants, in an interactive manner, make sense of their own experiences. However, they have a number of limitations and weaknesses as a method that have been highlighted in the literature (Smithson 2000). I witnessed the fact that their apparent strengths can simultaneously be a weakness from the perspective of research method. Whilst the group provided a measure of safety for individuals to speak and describe their historical practices, inevitably the collective nature of the discussion and the tendency for the group to work towards a shared articulation of the practice in their community then silenced more distinct experiences of individuals. The group interaction provided insight into the processes of the collective interpreting the meaning of their own system of customary law and governance; however it also influenced this very process of making meaning in that inevitably participants were influenced by each other and by the direction of questioning about customary norms and rules. Smithson (2000) has observed that whilst this can be a limitation of this method, it can also be used as a source of data in that it provides an opportunity for the researcher, using informed analysis, to become aware of the way in which narratives are socially constructed. This was evident in the meetings in Hobeni following the communities' awareness of the Gongqose court case which is described further in Chapter Eight. As is discussed in Chapter Eight, in these focus groups it was evident that the group was influenced by the

legal process and the line of questioning pertaining to their customary practices. The triangulation of data through the combined use of individual interviews and participant observation, as well as the awareness of the timing of the use of different methods, enabled the researcher to track these shifts and influences.

3.6.1.4. Community feedback and discussion meetings

In addition to the focus groups, I facilitated four community meetings with fishers and women harvesters in Hobeni and two in Ntubeni. These meetings comprised combined meetings with men and women with the aim of checking my information, gathering additional detail and providing feedback to the communities on the progress of the research. The meetings in Hobeni focused on the court proceedings and the rezonation plans, as well as providing feedback and a 'checking mechanism'. In total 56 persons attended the meetings in Hobeni and 24 persons attended the meetings in Ntubeni. This 'checking data' method can contribute to strengthening the quality and dependability of qualitative research (Mertens 2005: 359).

3.6.1.5. Mapping of sacred sites and fishing and harvesting locations

In addition to participating with the Hobeni fishers in a community mapping activity with the fishermen and women harvesters, where GPS mapping was undertake along the coast identifying their fishing spots, I undertook 3 mapping exercises with community members, one in Hobeni and two in Ntubeni to identify and explore the fishers' customary fishing and harvesting areas as well as the communities' sacred areas (See Map 4, Chapter 7 and Tables 4 and 5).

3.6.1.6. Participant observation

i) In the community

Over the period of four months spread over two years, I engaged with the community members in a range of activities and also observed four community meetings. These activities included observing both individual fishermen and groups of women crayfish and inter-tidal mussel harvesters harvest, clean and prepare their harvest. I observed several cultural activities in both Hobeni and Ntubeni, including ritual beer drinking,

preparations for initiation rituals including the building of the house for the initiates, visiting homesteads following the death of a member of the homestead and cultural dancing and stick fighting practices amongst the youth. This participant observation enabled me to observe the range of expressions of custom and culture in the everyday activities of the residents of these villages.

ii) Participant and observer in court proceedings

In 2010 three fishers from Hobeni were arrested and charged with fishing illegally within the Dwesa-Cwebe Marine Protected Area (*State versus Gongqose 2012*). They argued they had customary rights to the marine resources within the MPA. I had met these fishers during my fieldwork in 2011, prior to their court case. I was subsequently requested by them and their legal team to give expert evidence from my fieldwork in their court case in March 2012. It had become apparent to me by the time the possibility of the court action emerged that the narratives of the communities on their customary system and rights were embedded in a system of law other than that of the dominant statutory law codified in the Marine Living Resources Act. Further, it was clear that the rules operating within this dominant system of marine governance ran counter to the local rules by which the research participants operated. Preliminary analysis of these narratives suggested that these different systems of rules were located in different world views. Further, it suggested that these systems continuously interface. The opportunity to observe the court case provided an opportunity to observe the interaction between these two systems in a very immediate way and to draw on this interaction in developing a theoretical understanding of customary systems and how they might be accommodated in a new governance regime. This referred directly to objective four of this research. The research draws on the court case to illustrate the interaction of customary law with other systems of law.

The decision to both give evidence in this matter, and to use these proceedings as part of the methodology of this research derived from the particular paradigm within which this research is located and from the conceptual and theoretical framework that was emerging as the research evolved. Most critically, the request to give evidence provided an opportunity for me to ensure that the research responded to the communities' needs, and was in keeping with the 'activist scholarship' intent of the methodology. It also provided me with the opportunity to observe the community in interaction with their

legal team as well as enabling me to engage with the legal team and understand the implications of the legal process for the customary system of governance. I attended all of the court proceedings. The findings from this participant observation are presented and discussed in Chapter Eight.

3.6.1.7. Review and analysis of legislation, other primary records and documentation

In addition to the literature review conducted for this thesis, I undertook a review of a wide range of unpublished letters, memorandums and notes from various key informants and stakeholders. I also reviewed a set of archival records containing legislation for the area from the last century. In addition, I reviewed the heads of argument, affidavits and a range of materials that subsequently formed part of the court record in the *Gongqose* trial.

3.6.1.8. Methods of triangulation

I adopted a range of strategies to strengthen the rigor and dependability of the data that was collected. The literature emphasizes the importance of triangulation (Lincoln and Guba 1985, Bennett 2004:11, Spicer 2004) and the selection of a number of different methods as described above. Triangulation strengthens the research through enabling checks on internal consistency across a variety of sources of information. Persistent observation, corroborated by the individual interviews as well as the observation of the court case specifically was used as a tool to ensuring that observed practices were representative of practice over time.

Forewarned by the extensive literature on research methodology coupled with literature on the particular challenges of doing research on a fluid subject like customary normative systems (Bennett 2004:11), I was conscious of the need to maximize triangulation and to engage in strategies to enhance my own reflexivity throughout the research process. I kept a personal diary when I was in the field, noting instances in interviews when I was aware of my own biases and those of my interpreters. In listening to the transcripts of some of the interviews I have subsequently identified instances of potential bias coming through the way in which I or

the interpreters phrased questions. I have subjected these interviews to further rigorous analysis. The considerable quantity of data gathered across the various methods used in both sites contributes to mitigating the impact of bias in the data set overall. As will be discussed in Chapters Six to Nine where the findings are presented, strong themes, coherence and categories of experience are clearly discernible across the range of methods and sources of data in each case study site, suggesting that the data is dependable as an account of the respondents' expression of their customary practices.

This triangulation of methods described above contributed towards promoting internal consistency and also helped to address a specific challenge presented by the nature of culture and custom, which was much of the focus of this research. Much of the symbolic content and constitution of many of the customs and cultural practices under examination lies at the level of taken for granted everyday practice that remains unarticulated in people's everyday lives. Put in the direct context of my research, the individuals that I interviewed found it hard to explain **why** they did certain things that way, it was just "*injalo pakhade*" interpreted as 'that is how it has been and always will be' (H42a). Jean Comaroff, in her seminal work on the Tshidi people of the South Africa-Botswana borderland, highlights this challenge which is both a conceptual one and a methodological one. It concerns "the very constitution of social practice itself and, with it, the connection of context, consciousness and intentionality" (Comaroff 1985:4). This is tricky when so much of what people do or practice is taken for granted everyday reality "as it has always been done" and is only "partially subject to explicit reflection" (Comaroff 1985:5). This makes interpretation of the meaning of a particular practice by the research participant him or herself unlikely in the course of their responses.

3.6.1.9. Interpreting, transcribing and translating interview materials

The interviews were conducted in isiXhosa and during the process of the interviews the informants responses were interpreted into English throughout the interviews, as my questions and prompts were similarly interpreted into isiXhosa. The interviews and focus groups with the community members were all recorded with their permission. These oral recordings were then simultaneously translated and transcribed in English.

3.7. Coding and analyzing the data

Following the transcription of all of the interviews by an independent isiXhosa speaker, I embarked on a process of manually coding the information. I listened to the recordings of each interview again, against the typed transcript, recalling the person interviewed and the atmosphere. I then identified key themes across the range of interviews. I proceeded to code these into sub-categories, refining each category with several rounds of listening and analysis. As I identified key sub-categories and themes I developed a list of corresponding numbered interviews in which I identified some of these key words or themes occurring. I proceeded with my own refinement and analysis of these themes, relating them back to key themes in the literature.

I then gave a selected sample of the oral interviews within which I had identified key themes to an independent isiXhosa professional interpreter who listened to the original recording and commented on the quality of the original interpretation. She also undertook to translate specific scripts where key themes or phrases appeared that required careful checking for the nuances involved, interpreting and cross checking to see that I had understood the intent of the informants correctly. This was particularly critical for a concept such as 'custom'. In isiXhosa the term custom is used in a nuanced way and there are two very different meanings of custom – *isithethe*, meaning custom that is voluntary and custom that is obligatory, *isiko*, within the specific context of when and where it is performed. This interpreter was satisfied with the quality of the interpretation that she assessed and confirmed my understanding of key themes from the perspective of isiXhosa and the cultural meaning conveyed by the informant (*pers.comm* Mponono 2014).

3.8. Ethical issues

Like all research, this research project presented a range of ethical issues that needed to be addressed throughout the research process. The University of Cape Town provides ethical guidelines for students and an ethics proposal was submitted to and accepted by the Ethics Committee (Sunde 2010b). Issues such as free and informed prior consent, transparency with regard to the purpose and use of the research and issues regarding confidentiality and anonymity were addressed at the outset in the ethics proposal and

with participants. However, the ethical guidelines and regulations did not prepare me for the ethical dilemmas that the level of conflict between the fishing communities and the conservation and fisheries management authorities in both sites presented. These included:

1. Communities' lack of awareness of their human rights and repeated reports during interviews of human rights violations by the conservation and government authorities;
2. The killing of one of my focus group participants by conservation rangers and the communities' subsequent request to me to assist in finding legal assistance;
3. A request to give expert evidence in a legal matter in which the accused fishers from Hobeni were regarded as facing criminal charges;
4. One of the funders of the research project questioning my acting as an expert witness in the court case and threatening the integrity of the funding agreement with the university if I mentioned the name of the funder in the court proceedings.

Doing research in a context in which the majority of the local community do not know their rights on the subject matter under discussion and have been subjected to human rights violations has presented the most significant ethical dilemmas for me in designing and executing the research in a methodologically and ethically sound way.

During the interviews with participants the stories of dispossession and loss evoked strong emotional responses in both the research participants and myself. I found it a challenge to respond empathically to the content of the material shared whilst simultaneously maintaining the objectives of this specific research process which did not address the short term needs of the community. The methodological, moral, and ethical dilemmas of conducting research in such situations have been well documented in the literature (Hale (ed.) 2008, Mertens 2010). Mertens *et al*. (2009) note that the transformative paradigmatic assumption related to ethics shifts the focus of ethics from regulations to a human rights agenda (Mertens *et al*. 2009 in Mertens 2010:11). "Such research strives to extend the meaning of traditional ethical concepts to reflect more directly ethical considerations in culturally complex communities" (Mertens *et al.* 2005 in Mertens 2010: 11).

3.9. Limitations of the research and related impacts

Cross-cultural and linguistic differences limit and impact research, translating meanings (Krog *et al*. 2009, Zerner 2003a). "The word translate has three meanings: to bear or carry from one place or condition to another", to turn into one's own or another's language'; to change the substance, form or appearance" (Zerner 2003a:2). As noted above, my own language limitations have shaped the research.

In addition to this limitation, I am aware that the local interpreters did at times interpose their own feelings and opinions on the interview. This is evident from the transcripts where at times they elaborated on a question in such a way that it became a leading question or they provided an example to the respondent to illustrate the type of answer required and this might have biased the response. Fortunately these instances are very apparent from the transcripts and I am able to assess from the respondent's response the extent to which they influenced the response. In general, they do not appear to have influenced the approach to the response. In addition the focus groups helped to mitigate bias which appeared in individual interviews. As noted above however, whilst the focus groups were an important component of the research and contributed towards the overall triangulation of the data, the focus groups as a method of data collection had their weaknesses in that they created opportunities for peer influence and may have led to the articulation of a shared perspective that was not necessarily reflective of the actual practices in the everyday lives of participants.

In retrospect I feel that the time spent in the field was too limited and additional time living in the community would have been preferable and enabled me to gain more understanding of the cultural context. However, due to the very remoteness of the area and challenges for a woman travelling alone in this area, it was not always possible for me to spend more time in the field.

3.10. Conclusion

This chapter introduces the case study sites, Ntubeni and Hobeni villages, within the Dwesa-Cwebe community in the Eastern Cape, providing an orientation to this community and the rationale for the selection of this site in the context of the objectives of the research outlined in Chapter One. The research methodology comprised a qualitative, grounded research and engaged-scholarship approach using a range of methods to strengthen triangulation. Aware of the constraints on the research as a result of my language limitations, I was required to adopt a number of strategies to overcome these constraints and to ensure that the voices of the informants were not lost in translation (Zerner 2003a). The current socio-cultural and political context of Dwesa-Cwebe MPA and the surrounding communities, in particular the request to give evidence in the Gongqose trial, demanded a reflexive praxis and forced me to engage with the distinctive ecology of the Dwesa-Cwebe communities' "epistemology, ontology, axiology, rhetoric and methodology" (Creswell 2007:17) in a very immediate way. In this regard the process of the research mirrored its content and conclusions, in that it highlighted the need for a relational mode of engagement and an 'activist ethic' (Cornell 2012).

CHAPTER FOUR: THE LEGISLATIVE AND POLICY ENVIRONMENT

4.1. Introduction

The history of the governance of marine resources in South Africa, for both fisheries management and conservation purposes, is closely entwined with the history of land occupation, use and control in South Africa (Sowman *et al.* 2011). This chapter outlines the legislative and policy environment of marine resource governance and the way that this governance has historically interfaced with the broader political economy of the country.

4.2. The pre-colonial period

4.2.1. Early marine resource use along the coastline

Archaeological records bear evidence of the patterning of human interactions along the coastline of Southern Africa over centuries (Deacon and Deacon 1999, Parkington 1977, Gribble 2005, Whitelaw 2009). Yet despite a rich archaeological record, little is known about the social relations and customs of these early marine resource users. The available records indicate that as early as 700 AD some Khoisan were present along the Eastern Cape coast and although they did not settle permanently, they were likely to have been the first users of marine resources in the Dwesa-Cwebe region (Palmer *et al.* 2002, Dennison 2010). This coastline was subsequently settled by the Bantu-speaking Nguni peoples in the late Stone Age (Parsons 1982:34). AmaThembu and amaMpondo moved from Natal into this area approximately between 1100 and 1300 AD whilst another group of the Mpondo, moved southwards. Those Nguni clans who settled in the coastal belt were predominantly pastoralists who, by the 17th century, had well established gardens and cattle (Hammond-Tooke 1974, Hunter 1979). It is evident, however, that prior to the arrival of the first travellers and missionaries in the 17th century, amaXhosa and amaMpondo living in the Eastern Cape coastal region were already harvesting inter-tidal resources and using spears to spear fish in both estuaries and in tidal pools (Shaw in Hammond Tooke 1937:98). Trade between amaMpondo and amaXhosa in "rare shells and sharkskin for field medicine" is noted (Peires 1989: 108).

Travellers along this Eastern Cape coast in the early 16th and 17th century make reference to the presence of fish garths and traps (Shaw and van Warmelo 1981:360). Along the Cape northern and western shores there is evidence that the coastal dwelling branch of the Khoisan, known historically as the 'strandlopers' (walkers along the coast), depended on a range of marine resources (Parkington 1977). It was these indigenous peoples that were present along the shores of the Cape when the Dutch settlers arrived at the Cape in 1652.

4.3. The interface between colonial law and customary practices

4.3.1. The first statute of the Cape

In 1652 the Dutch colonialists took occupation of the Cape. Van Riebeeck's diaries provide the perspective of the Dutch occupiers on seeing the local inhabitants fishing practices for the first time. The Commander's Journal indicates the presence of 'Strandlopers' or 'Watermen' "fishing after a fashion" and the 'Vischmans', "professedly fishermen, and expert in the use of the hand line and spear" (Thompson Wardlaw 2013:33). As early as 9 April 1652 (three days after Van Riebeeck's arrival), the Commander's first Placaat or Edict contained a provision stating: "…no fishing, therefore, and no thawing of nets shall be allowed except by consent of the Commander after having consulted with the Council" (Wardlaw Thompson 1913:4-5). Subsequently a series of restrictions were introduced to control fishing. As early as 1657 these restrictions were used to ensure that fishing activities met the needs of the newly established colonial settlement, initially restricting fishing to ensure that the local freemen would contribute towards the establishment of agriculture and then subsequently to assist with supplying fish to the Dutch station (Wardlaw Thompson 1913:7-8). By 1708 the demand for fish had escalated so much that slaves were allowed to fish on Sundays and to sell their catches. Kolbe who arrived in 1705 and remained at the Cape for some time described the indigenous inhabitants fishing practices. "The Hottentots in every kind of fishing outdo the Europeans about the Cape. They fish both in the sea and in the Rivers…..Many of em are Fishermen by profession and maintain their Families by the trade. … They take fish by the Angle, the Net, the Spear or Pointed Rod, and by Groping or Tickling" (Kolbe (1705) in Wardlaw Thompson 1913:34).

4.3.2. The establishment of fishing 'communities' along the Cape coast and the emergence of customary systems of use and governance

Responding to the demand for fish from the early Dutch controlled colonial station at the Cape, fishers gradually established small hamlets along the coast and an artisanal, boat-based small-scale fishery emerged along the Western seaboard in the 17th century (van Sittert 1992, Dennis 2010). These communities were a heterogeneous mix of local 'coloured' fishers of mixed racial origin, in part descendants of indigenous Khoisan, in part Malay slaves, castaways as well as European immigrants who survived the many shipwrecks along the notoriously treacherous Cape coast. Records suggest that fishing became one of the few options available to freed slaves following the emancipation of slavery; as a result in the mid 1800's a rural class of poor landless families apparently settled along the Western Cape coast, eking out an existence where they could get access to vacant land (van Sittert 1994, Sunde 2003, Dennis 2010). Archival research and oral histories indicate that these small-scale fishing communities in the Western Cape evolved distinctive customary fishing practices and associated cultural identities (van Sittert 2003, Dennis 2010, Williams 2013, Sunde *et al*. 2013).

4.4. The Dwesa-Cwebe coastline: the 'Wild' Eastern Cape coast

In contrast to the Cape, where the local fishers became subject to the reach of the various colonial authorities as early as 1652, the majority of the coastal dwellers along the eastern seaboard of the country continued to access and use marine resources in accordance with African customary systems. Early travellers recorded the existence of groups of people fishing along the coast using a wide range of technologies, from the fish traps of the Tembe-Tsonga in the north to the more isolated fishing activities along the Eastern Cape coast (Bigalke 1973, Shaw and van Warmelo 1981, Whitelaw 2009). Although primarily herders and pastoralists, there is evidence that the tribes that settled in the coastal region, amaMpondo, amaBomvana and amaGcaleka, have used marine resources for a range of uses as far back as living memory extends (Hammond-Tooke 1974, Hunter 1933 in Hunter 1979).

Whilst there has been considerable anthropological work done on the characteristics of pre-colonial society it is increasingly recognised that interpretations about the nature of

customary systems of resource use and governance in this period are highly problematic as the record has been so distorted by colonial and post-colonial interpretation, that any attempt to understand customary systems distinct from this history of interaction is impossible (Chanock 1985). Historian Jeff Peires notes that "historical events of the pre-colonial period cannot be adjudicated in terms of the customary law of the postcolonial period because the circumstances of the pre-colonial period were so fundamentally different to those of the present and the recent past that the fundamental assumptions of the present simply do not apply" (Peires 2013 unpaginated). Peires (2013) confirms that during this period there were few constraints to either mobility or the use of land and other natural resources. In contrast, the 18th century and 19th centuries were a period of enormous upheaval, change and conflict for the peoples of the Eastern Cape (Peires 1989, Delius 2008). The movement of the colonial forces eastwards led to conflicts between amaXhosa and the colonialists and in the 19th century the Eastern Cape was brought under colonial control (Delius 2008:221).

4.5. Establishing a fisheries management system and the introduction of statutory controls

The colonial authorities adopted varying approaches to the issue of how to rule the territories that they had occupied. Initially the British adopted a policy of direct rule in the Eastern Cape Colony, aimed at breaking down the power of chiefs and traditional authority through the imposition of magistrates. There was no recognition of customary law and colonial interpretations of the law were applied to African subjects (Delius 2008:221). This approach differed from that adopted to the north east in Natal, where the Natal colonial authorities adopted a system of indirect rule. As the Cape Colony expanded its territories in the area east of the Kei River, known as the Transkei during the mid-1800s, it gradually altered its policy, developing what is regarded as a hybrid policy combining elements of both direct and indirect rule (Delius 2008:222). "Recognition was afforded to customary law but only where it was not deemed to be 'repugnant' to civilized standards" (Delius 2008: 222). In 1885 the Cape Government Proclamation 140 of 1885 extended laws of the Cape to United Transkeian Territories.

As a consequence, a number of regulations applicable predominantly to the fisheries and marine resource use in the Cape came to apply to the Dwesa-Cwebe coast. Due in part to the very rural landscape and lack of enforcement mechanisms, local residents of this coast appear to have had little if any knowledge of these regulations and continued to practice their customary systems of harvesting (Bigalke 1973, Vermaak and Peckham 1996).

In the late 1890's the colonial administration began extending its control over natural resources in general and introduced a range of restrictions on hunting, forestry and fisheries, signalling the colonial administration's interest in controlling these resources (van Sittert 2003, Tropp 2006, Sowman *et al.* 2011). During the following decade interest in fisheries grew. Following an Enquiry into Fisheries, recommendations were placed before Parliament concerning the examination and charting of fishing grounds and the appointment of a Marine Biologist as a Fisheries Expert, such efforts all aimed at developing the colonial fisheries "along modern lines". A Marine Biologist was subsequently appointed and in 1896 a Fisheries Committee or Advisory Board was formed to assist him in his work (Wardlaw Thompson 2013:29-30).

Commenting on the role of the State in these early years in the establishment of the industry, van Sittert (2003) observes that the colonial state was a weak one, with a limited reach. "Local users had effective day-to-day control over the resource free from official surveillance and exploited it in accordance with the logic of a folk biology uncontested by marine science" (van Sittert 2003:210).

4.6. Statutory recognition of customary systems of marine resource use

Historical records suggest that by the early 1900s a complex array of marine tenure arrangements had emerged in the coastal and estuarine waters of the Cape (van Sittert 1992, Sunde *et al.* 2013). These arrangements were a hybrid mix of local customs and rules overlaid with colonial provincial administrative regulations that aimed to regulate the type of gear permitted and create a system of zonation that would protect the local fishery from outside

competition (van Sittert 1992). The presence of various systems of customary fishing rules is confirmed through the judgement in *van Breda and others versus Jacobs* in the Appeal Court in 1921 (*van Breda and others versus Jacobs 1921*). This matter involved the crew of two traditional beach-seine fishing operations in False Bay. In their evidence before the court the applicants argued that they had an ancient customary system of rules that determined rights to fish in their traditional fishing grounds.

Although the fisheries and marine resource laws of the Cape had been extended to cover the Transkei by the Transkeian Proclamation of 1895, these appear to not have been enforced (Vermaak and Peckham 1996). However, the late 1890s saw the emergence of a distinctive state narrative about "African's ecological 'destruction' in the Transkei which necessitated the colonial 'protection' of forests and trees from 'extinction'" (Tropp 2006:4). Legislation covering other natural resources, particularly forests, was implemented and, as shall be described in the next chapter, had a related impact on communities' access to marine resources.

4.7. Entering a new phase: the establishment of a national fisheries governance system

In the period up until Union in 1910 and including the immediate period after Union, provincial regulation persisted, albeit it of varying strength depending on the proximity to the centre in the Cape. From the 1930s however the State embarked on a determined path towards shifting the locus of governance firmly in its favour. In terms of the Sea Shore Act of 1935 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 growing racially based, segregationist thinking of the State is evidenced in the administration of marine resources during this period. The State embarked on the progressive and simultaneous introduction of legislative and policy mechanisms that favoured established white, industrial interests (Van Sittert 1992). A series of regulations placed increasing restrictions on subsistence and artisanal fishers and brought them under the control of the industrial sector, steadily eroding the customary access and use rights of local fishers (van Sittert 2003).

There is archival evidence that these regulations were largely ignored by small-scale fishing communities on the ground in the Eastern Cape who, in all likelihood, were unaware of them (Bigalke 1973). The influence of the narrative of the 'destructive natives' in the Eastern Cape on the administration of fisheries is evident, however. In a letter sent to the Secretary for Native Affairs in Pretoria in 1934, the Provincial Secretary argues for regulations prohibiting the catching or collection of a range of organisms, except under permit issued by the district magistrate, for the Transkei stretch of coastline. This letter is supported both by the Director of Fisheries Survey of the time and by a local Magistrate who states

> *"This aims at eliminating the danger of the depleting your coast of such shellfish by native invasions from adjoining native territories where shellfish have become almost extinct. I have received numerous complaints of natives crossing over to our coast and carrying away sacks of every edible matter they can find on the rocks at low tide. I have observed this disastrous consequence of the wholesale and promiscuous stripping of the rocks in native territories, and I feel sure Dr van Bonde will agree that no fishing may be expected on the coast where their food has been exterminated, and even an unreasonable negrophilist would not advocate the killing off of the fish food at the expense of the very numerous native fishermen. If measures are taken to guard against this menace, if only to protect shellfish from Kentani to East London, it will materially assist to resuscitate the good fishing on our shores, but prohibition further afield might improve our coastal fishing to the extent of some places on the South Coast of Natal where stripping of rocks is not tolerated"* (1/NQL, Vol 62 3/6/3 in Emdon 2013).

This view was however not shared by all Magistrates along this coast and in 1935 the Magistrate from Ngqeleni observed in a letter to the Magistrate of Mthata that:

> *"From information gleaned from ardent fishermen and observers, the depradations of the natives is negligible compared to the quantities of shell fish etc., which are out of reach of the natives at lowest tides. People who fished this coast for years, state that the stripping of the rocks does not appreciably affect the fishing because most of the fish caught are seasonal.*

> *Furthermore I do not see how the natives can be checked, for the nearest Police Post is 30 miles from the coast, and owing to the rock-bound and rugged nature of this coast, natives will continue to gather shell fish etc., with impunity. The shellfish etc., gathered on this coast, greatly augment the natives' food supplies in times of famine"* (1/NQL, Vol 62 3/6/3 in Emdon 2013).

The racial basis of the approach to statutory regulation is evident in that the first letter was addressed to the Secretary of Native Affairs who, following the Native Administration Act of 1927, became responsible for this sector of the population.

4.8. The apartheid years: reserving the marine commons through increasing state intervention

The racially discriminatory policies of the early Union government were extended in the years following Union. The rural areas of the country were impacted by a series of laws and policies aimed at shaping the labour needs of the capitalist apartheid state and simultaneously managing 'the native question' which in turn shaped access to and use of natural resources in these areas (Beinart and Bundy 1987, Fay 2003).

An understanding of these legal mechanisms used by the State is necessary to frame subsequent discussions on the ways in which statutory and customary legal systems interfaced along the shores of the country. Within the fisheries sector along the Western seaboard, the lucrative capital intensive, White dominated industrial fisheries grew in strength, supported by the apartheid state (van Sittert 1992, 2003). Similarly, the inland mining and agricultural interests and needs of white capital were supported during the first half of the century with a range of policy and legislative interventions that served to ensure a steady supply of labour (Beinart and Bundy 1987). The Native Trust areas, later known as Bantustan reserves, along the Eastern seaboard in Eastern Cape and KwaZulu-Natal, provided the labour for the industrial expansion of the country, but these areas themselves remained undeveloped rural reserves, their coastlines later providing ideal natural laboratories for the growing marine science industry. This opportunistic use of these reserved areas has emerged subsequently in

the writings of many marine scientists and conservationists who refer to the role of these areas as ”providing a reference point for measuring exploitation of natural resources” (Siegfried 1977in Fay *et al*. 2002:95). As commercial exploitation of the marine and coastal areas grew around the urban centres, so did the attachment to these reserves as ‘pristine natural environments’ and “the last line of defence” (Attwood 2000:3) that should be retained as reserves to protect inter-tidal biodiversity and act as breeding and nursery grounds to supply the fisheries needs of the fishing industry elsewhere.

4.8.1. State authoring of native affairs, administration and law

The Native Land Act of 1913 and the Native Administration Act of 1927 paved the way for an approach to customary law which continues to this day and which has patterned marine and coastal resource use and governance in very specific, racially based ways. This policy of separate development whereby areas of the country set aside under the Native Land Act would eventually come to be self-governed as black ‘homelands’ also referred to as ‘Bantustans’ impacted the Eastern Cape considerably. Many of these areas in the Eastern Cape lay adjacent to the coast (see Figure 1 overleaf).

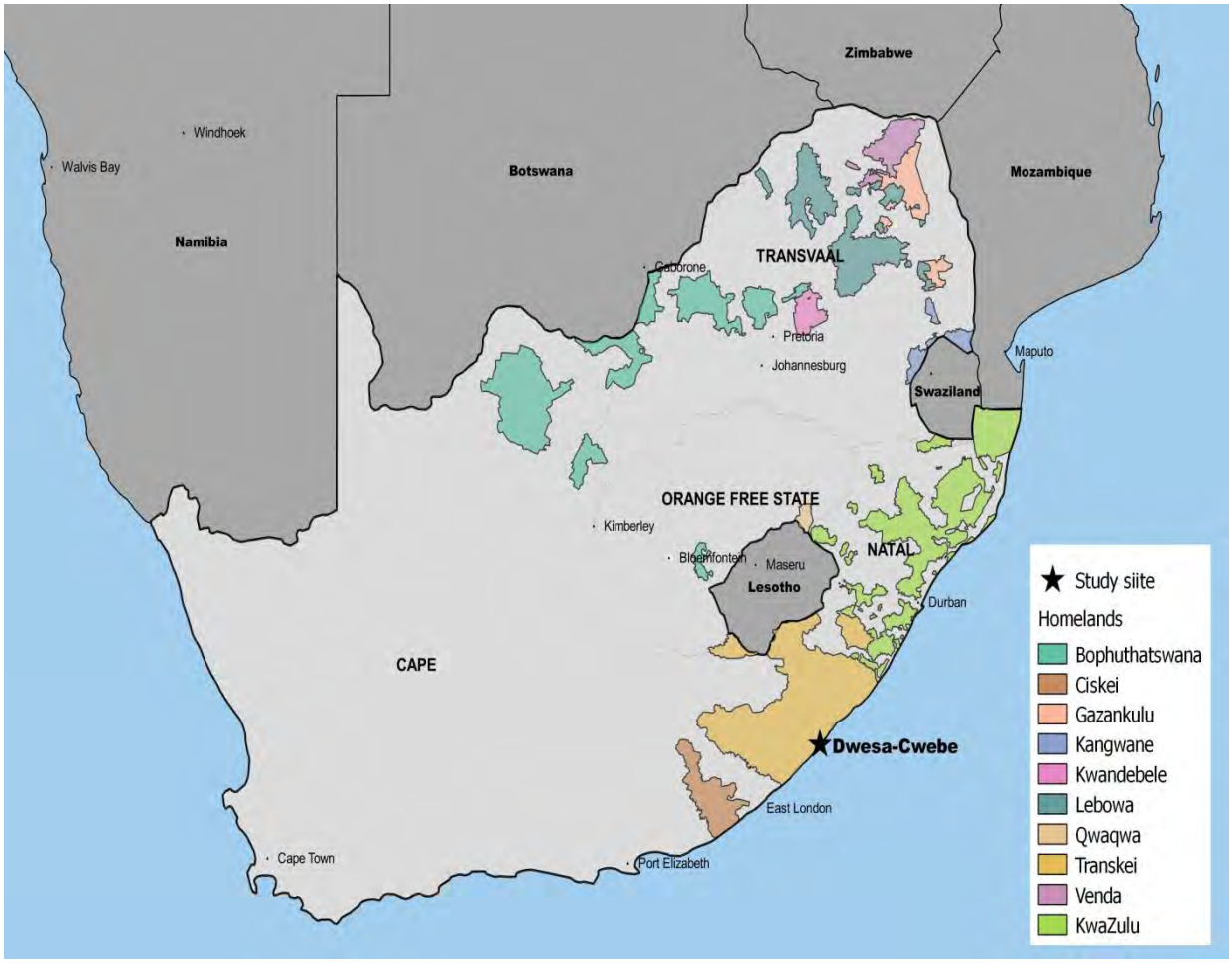

Figure 1. Map showing the former homelands or 'Bantustans'[26] (repeated from page 12).

The Native Administration Act 38 of 1927 "set out to define a distinct administrative and legal domain for Africans drawing on highly authoritarian understanding of chiefly rule as a model" (Delius 2008:223). This act gave chiefs the authority to impose controls over the rural population and was a significant mechanism of power used in the process of re-shaping traditional authority. It recognised 'Native law and custom' as the legal means for dealing with disputes in which native interests predominated (Delius 2008: 223). It went hand in hand with "an evolving system of customary law that entrenched the powers of the supreme chief and supported a highly authoritarian interpretation of chiefly powers" (Chanock 2001 in Delius 2008:223-224).

The Native Trust and Land Act of 1936 consolidated the establishment of Native reserves. By 1936 however the environmental conditions in the reserves had begun to

[26] This Figure 1 is a copy of figure 1 in Chapter one, inserted here for ease of reference

cause alarm and hence in the following decade a number of proclamations were introduced, referred to as "betterment, reclamation and rehabilitation" (Delius 2008:227, Fay 2003). These proclamations provided for the introduction of a form of 'villagization' through what was considered 'improvement and protective measures' on communally held land in the Native reserves (Fay 2003). Under the auspices of these betterment proclamations many rural coastal communities were forced to vacate their land immediately adjacent to the coast and move into areas designated for residence. Chiefs were used as the instruments of the state in implementing these policies which their people rejected. The impact of these removals on the Dwesa-Cwebe community are discussed in the following chapter.

The betterment policies of the 1940s were subsequently abandoned in many areas in the face of the resistance that they received (Fay 2003, Delius 2008, Tropp 2006). This was in part also due to the shifts that the rise to power of the National Party in 1948 enabled. The National Party introduced a new approach to the system of racial separation that had gained ground since the turn of the century. It aimed to create "a distinct domain for African society" and asserted that the institution of chieftainship was the cornerstone of such a society (Delius 2008:229). Towards this end it introduced the Bantu Authorities Act in 1951 which defined tribal authority in such a way that it further distorted the power and authority of chiefs, lessening their dependence on their subjects and granting them new powers (Delius 2008:229). Headmen were now subject to the chiefs and the chiefs themselves became largely instruments of control for the apartheid system (Delius 2008). The Act involved the demarcation of new Tribal Authority boundaries, in many instances drawing arbitrary boundaries around communities (Claassens 2008).

Following the election of the National Party to power in 1948 the racially based approach to governance gathered weight and in this process, the expression of power through the use of law by the dominant regime is evident (Cousins 2007). In addition to the Bantu Authorities Act of 1951 which shaped governance in the coastal Bantustan areas, a key legal mechanism of governance that came to have wide reaching influence on marine resource management and conservation particularly for Coloured, African and Indian coastal communities was the Group Areas Act of 1950. This Act,

implemented over several years, led to the forced removal of thousands of coloured, Indian and African South Africans from land that they had historically occupied along the coast. In so doing they lost not only their tenure security to land but also their tenure of marine resources within the waters that they had traditionally occupied and fished in for their livelihoods (Sunde 2003). In terms of the Group Areas Act many beaches and coastal areas were declared 'whites only' and restrictions were placed on access to the beach for 'non-white' persons. All along the coastline, in areas other than those already defined as Native Trust reserves, black communities experienced this loss of access to their livelihoods with associated impacts on their culture and customary practices (Walker 2008, Sunde 2011, Williams 2013).

The 1959 Promotion of Bantu Self Government Act 46 aimed to consolidate the policy of separate development by enabling the self-governance of the Transkei as an independent African 'homeland' (See Figure 1). In 1963 the Transkei became self-governing and achieved its independence in 1967. The Constitution Act 48 of 1963 transferred the responsibility for marine conservation in Transkei to the Transkei Government. The Transkei Nature Conservation Act was promulgated in 1971. This act made provision for wild life and marine reserves and granted headmen ex officio status as conservation officers (Vermaak and Peckham 1996 in Palmer *et al*. 2003). Additional restrictions on fishing, harvesting and bait collection were introduced and selling without a permit was prohibited.

4.9. Back to boundaries: The intersections of marine resource management and conservation and apartheid spatial planning

In the 1960s the conservation of marine resources in South Africa was influenced by the call by the International Union for the Conservation of Nature (IUCN), for the establishment of MPAs (Faasen 2006). In the next decade there were further calls for the establishment of MPAs all along the coastline (Attwood *et al.* 1997:343). The promulgation of the Sea Fisheries Act of 1973 signalled a response to these calls and a new approach to statutory management and regulation of both fisheries and marine conservation. This Act provided for the establishment and management of marine reserves in terms of Article 10. In 1976 a Marine Reserve Committee was established to

"Investigate and recommend guidelines on Marine reserves" in terms of this Act (Attwood *et al.* 1997:343). This committee recognised the dual objectives of MPAs: protecting and enhancing marine species resources (Attwood *et al.* 1997:343). Statutory provision for the protection of marine areas was also covered in a range of other legislation introduced in the 1970s including the National Parks Act (1976) and several provincial nature conservation ordinances.

This new wave of conservation thinking influenced marine resource management and dovetailed closely with apartheid spatial planning. A considerable proportion of the coastal land vacated in terms of either forestry conservation or racial segregation laws was subsequently opportunistically declared part of the national conservation estate, either as part of marine reserves or contiguous marine and terrestrial reserves. The histories of all of the major MPAs in South Africa are thus shaped by the racially based removals in the apartheid land and seascape (Sunde and Isaacs 2008, Sowman *et al.* 2011) See Figure 3.

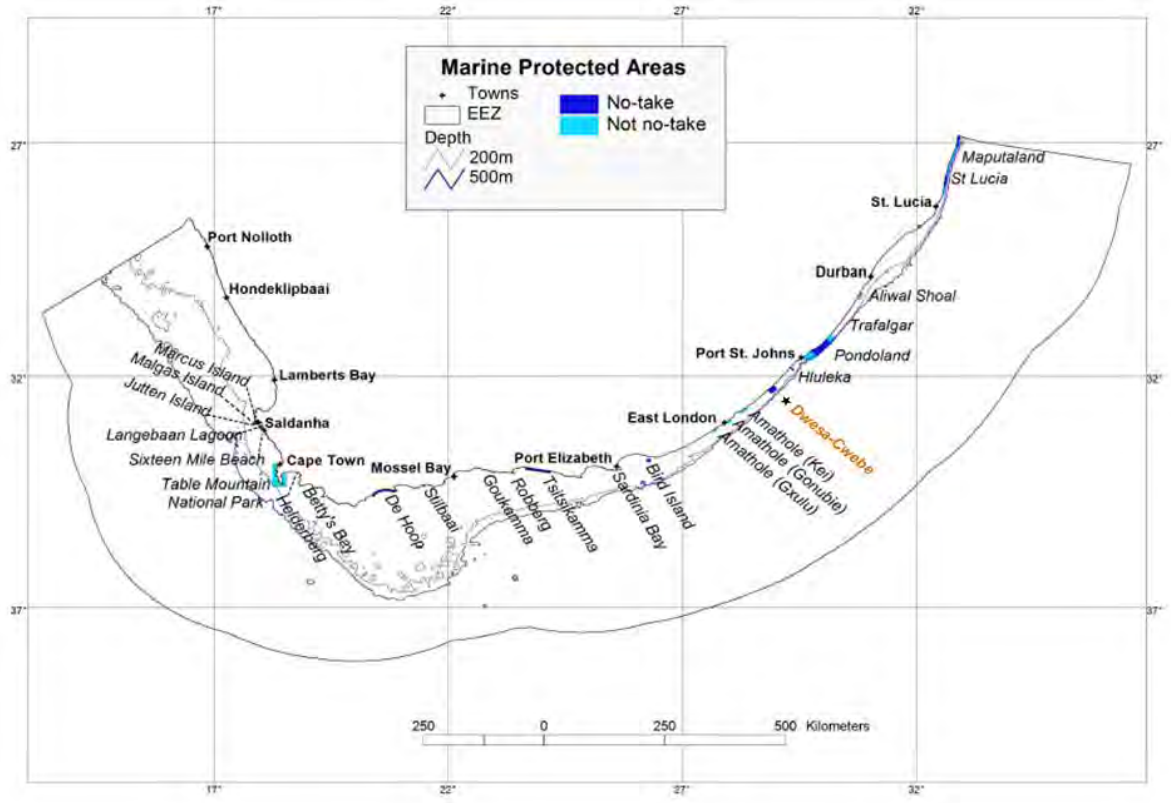

Figure 3: Map locating Dwesa-Cwebe MPA and the 23 MPAs along the South African coastline

In the Transkei conservation and fisheries governance was managed in terms of the Transkei Nature Conservation Act of 1971 and subsequently the Environmental Decrees of 1991. The Dwesa Marine Reserve was initially declared in 1975 in terms of the Transkei Nature Conservation Act.

4.10. Race, class and power: apartheid partners in marine science, conservation and governance

The Sea Fisheries Acts of 1973 steadily consolidated the modern statutory management regime introduced in the 1940s, whereby the State geared the management framework towards the needs of the racially-based industrial sector (van Sittert 2002). The Department of Sea Fisheries made statutory provision for commercial and recreational fishing, introduced permits and set about modernizing the fisheries. African and Coloured South Africans were initially restricted from owning quotas in their own right and numerous restrictions on fishing effectively limited their commercial engagement, fostering their dependence on the white industry. There was resistance to the imposition of these restrictions and in the Western Cape in particular, Coloured artisanal fishers who claimed to have customary rights to these resources continued to fish, despite statutory prohibitions (Hauck 2009). Elsewhere along the coast subsistence activities continued despite restrictions that deemed them illegal (Harris *et al.* 2002:406).

In the Eastern Cape the local fisheries beyond the borders of the marine reserves remained relatively un-commercialised and did not attract the attention of policy makers and law enforcement. The Transkei or 'Wild Coast' became known as a favourite holiday destination for many white South Africans who sought interaction with nature and good fishing in areas relatively unspoilt by development (Dennison 2010). The literature on resource use along the Eastern Cape coast during this period comprises largely scientific studies which focus almost entirely on the ecology, either ignoring the local owners and residents of this coastline or depicting them as " inter-tidal predators" (Hockey and Bosman 1988). Viewed through the prism of the 'marine reserve', scientists continued the discourse of 'invasion' evidenced in the Magistrates letters of

the 1930s, expressing concern at the harvesting levels of the local indigenous people who regularly visited the coastline to harvest marine resources (Hockey *et al*. 1988, Lasiak 1987).

In 1975, the government of the self-governing Transkei, eager to assert its own authority and identity on the region and attract foreign tourists and investment, declared the Dwesa-Cwebe Reserve (Palmer *et al*. 2002). Angling continued to be permitted in certain parts of the reserve, effectively enabling recreational fishers and local fishermen to continue their customary fishing practices undisturbed. In 1992 the reserve was again declared in terms of the Transkei Environmental Decree. By this time however the edifice of apartheid was crumbling and it was merely two years before the people of the Transkei once again became citizens of South Africa, this time as free citizens.

4.11. Changing Gear: Conservation and fisheries management in the post-apartheid period

The first democratic elections in South Africa in 1994 ushered in a suite of legislative reforms aimed at redressing discrimination experienced under apartheid in relation to access to and ownership of land and related natural resources (Witbooi 2006, Sowman 2006, Isaacs 2006). The new Constitution of 1996 recognised the principles of equality and non-discrimination and provided the legal basis for the restitution of land and other property. The National Environmental Management Act of 1998 provided a framework for a suite of environmental legislation that aimed to give effect to Article 24 in the Constitution which recognised the right to the environment. This also provided the legislative framework within which legislation and policy for both fisheries management and marine conservation and biodiversity protection was subsequently located. From a fisheries perspective, new legislation was required to dismantle the racially-based fishing industry (Witbooi 2006). In 1998, after extensive debates about the mechanism for promoting access to marine resources, the Marine Living Resources Act No 18 of 1998 was gazetted. This act aimed to secure redress, equitable access to marine resources and to transform the fishing industry (DEAT 1998). At the time the state recognised that little was known about the nature of subsistence fisheries along

the coast and hence in 1999 a Subsistence Fisheries Task Group (SFTG) was established with the specific intent of undertaking research into this sector and making policy recommendations with regard to how best to address its needs (Branch *et al*. 2002, Harris *et al*. 2007). Whilst the SFTG used the language of "restoring their rights" and "recognizing their distinctive needs" (Branch *et al.* 2002:19), this reference to rights was not located in any broader discussion about pre-existing customary rights nor was this concept of 'restoration' elaborated. The promotion of subsistence fishers' rights in the reports and suite of papers published as an outcome of the SFTG did not include recognition of entitlement to customary rights. On the contrary, the position was that

> "being a subsistence fisher, i.e. the "poorest of the poor', is arguably undesirable and the goal is to develop and promote alternative options that will reduce reliance on direct use of natural resources and ultimately result in a shrinking of this sector over time" (Harris *et al.* 2007: 126).

This objective of restoring rights therefore followed a policy of seeking recognition for traditional rights within the existing statutory framework, using the mechanism of 'subsistence rights', but with a view to shrinking the numbers of fishers (Sunde 2013). Ironically the statute ultimately made provision for a permitting system which was implemented from 2002 onward, not a system of rights, and to date no rights have been recognised for subsistence fishers. Instead permit exemptions have been allocated (Sowman *et al*. 2014a).

With regard to marine conservation, the recognition of environmental rights in the Constitution provided impetus for a host of new interventions. The Task Force on Marine Protected Areas established in 1997 to investigate the state of MPAs and to make recommendations in this regard noted that "Most MPAs were proclaimed without sufficient information and with no research or monitoring programmes to assess whether these areas are performing useful functions" (Attwood *et al.* 1997).

Following the gazetting of the MLRA in 1998, which makes provision for the Minister to declare MPAs, the state issued a Gazette in 2000 whereby all existing MPAs were re-proclaimed (DEAT 2000). Section 43 of the MLRA effectively prohibits all fishing in MPAs; however it does make provision for the Minister to declare an exemption to this

prohibition. This more stringent no-take approach to marine conservation was influenced by the growing awareness of the Convention on Biodiversity and the need to expand the suite of no-take MPAs (Attwood *et al.* 1997, Lemm and Attwood 2003). It was also influenced by the increasing concerns in the country that line fish stocks were over-exploited and hence in crisis (*pers.comm* Alan Boyd 2013). The State subsequently entered into a number of contracts with provincial conservation agencies whereby authority to manage MPAs was devolved.

Despite the fact that there was one national authority with the mandate to manage fisheries and marine conservation, there appears to have been little policy coherence during this period (Raemaekers 2009). Permits were gradually introduced for subsistence fishers in both the Eastern Cape and KwaZulu-Natal, in line with the MLRA and the SFTG regulations; however, very different approaches were followed in the two provinces and a *de facto* system of legal pluralism came about. In KZN the Ezemvelo Authorities 'ring-fenced' subsistence fishing communities and embarked on a process that was referred to as 'co-management' (Hauck and Sowman 2003, Harris *et al*. 2007). MPAs were zoned for use and fishers living adjacent to MPAs were permitted to fish but for subsistence use only with strict bag and size limits. In the Eastern Cape, permits were allocated on an ad hoc basis (Raemaekers 2009). Subsistence fishing was legally permitted in only one of the three MPAs along the former Transkei coast; however, even here the DEAT withheld allocation of permits to one community when the Traditional Authority refused to cooperate with them (Sunde and Isaacs 2008).

4.12. Challenging the continued exclusion and marginalisation of small-scale fishing communities

As noted above, the MLRA of 1998 failed to recognise the rights of small-scale fishers, restricting them to a definition of 'subsistence' fishing that did not accommodate the histories and culture of many small-scale fishing communities (Masifundise 2005, Sowman 2006). The rights allocation system introduced by the State excluded many fishers who had a lengthy history of fishing (Masifundise 2005, Isaacs 2006). These fishers argued that the new policies had impacted their 'traditions' and 'customs' and did not recognise their 'historical' rights (Masifundise 2005). The NGO Masifundise and

the fishers with whom it was working had close links with international organisations working in support of small-scale fishing communities and drew extensively on inspiration from these epistemic communities in developing an understanding of fishers' rights during this period. In 2005 Masifundise, with support from the LRC, launched legal action against the Minister on the grounds that the MLRA had not accommodated them and hence the new fishing policies violated their human rights (Masifundise 2005). The court papers referred to the customary rights recognised in the van Breda court judgment (*van Breda versus Jacobs* 1921). A lengthy period of resistance and advocacy activities on the part of the fishers in the Western and Northern Cape followed the launching of this court action (Sowman *et al*. 2014a). In 2007 the Equality Court ordered the then Minister of DEAT to develop a new policy that would accommodate the rights and socio-economic needs of small-scale fishers (*Kenneth George versus the Minister EC1/2005, 2007*).

In November 2007 a National Policy Task Team (NTT) was established comprising representatives of fishing communities from all four coastal provinces, together with representatives from key community based organisations, NGOs and research institutions. Over the subsequent five years the NTT engaged with the state on the content of a new Small-scale Fisheries Policy. During this period Masifundise assisted the fishers in establishing an umbrella organisation in the Western and Northern Cape, known as Coastal Links. Masifundise staff and Coastal Links leadership networked extensively with international organisations and attended several key international fisheries meetings where the customary rights of traditional fishing communities were given considerable attention (ICSF 2008a and 2008b). In 2009 the issue of customary rights was raised in the National Policy Task Team discussions (personal observation 2009). The government officials involved in the Task Team at the time expressed their misgivings regarding the recognition of customary rights, arguing that this might lead to conflict between those fishers considered 'indigenous' such as those fishers with Khoisan ancestry, and African fishers and communities seeking equitable access to the fisheries.

In 2009 and in 2010 Masifundise, with assistance from their legal advisors, Legal Resources Centre (LRC), once again approached the Equality Court for an order of court

in order to compel the DEAT to implement the Equality Court Order of 2007 in full (*Kenneth George* EC1/2005, 2009, 2010). In the court papers for this order the applicants presented an argument based on their customary rights (*Kenneth George* EC1/2005, 2009, 2010). The papers drew on international law and policy instruments that recognise customary rights as well as regional jurisprudence emerging from the African Human Rights Commission.

Despite the Constitutional recognition of customary law, customary rights in relation to marine resources have not yet received *de facto* recognition. As recently as 2011 the DAFF resisted attempts by members of the National Small-scale Fisheries Policy Task Team to secure recognition of customary rights in the new small-scale fisheries policy (DAFF 2011). The authorities subsequently reluctantly agreed to include customary law as a principle in the small-scale fisheries policy using the language of the Constitution but prefaced this agreement with a legal opinion in which they argued that to date "No evidence has been presented, nor has any been suggested, to indicate the existence of a system of customary law adopted and observed by certain fishing communities" (DAFF 2011:1). As a compromise, the final policy gazetted in 2012 included the principle that the state must " recognise 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" (DAFF 2012:14). However it removed all other proposed text on customary rights and it did not include any mechanisms whereby this principle might be operationalized or communities made aware of the recognition of these rights.

4.13. Local and global linkages: locating living customary law

At the time of the gazetting of the new Policy on Small-scale Fisheries in South Africa a highly complex, plural legal scenario prevailed along the South African coast with regard to the recognition of customary marine resource use and governance rights. The *de jure* Constitutional recognition of traditional authorities and the right to customary law had been confirmed in a number of Constitutional Court judgements.[27] The Court also recognised living customary law as the expression of living law by the

[27] See *Alexkor vs Richtersveld* 2004*, Shilubana* 2009.

people, not necessarily that of traditional authorities or the official customary law as recognised by the State (*Shilubana* 2009). However, notwithstanding these Constitutional Court judgements, a parallel policy- making process with the view to giving effect to the Constitutional recognition of traditional authorities produced a confusing piece of legislation entitled the Traditional Leadership and Governance Framework Act 41 of 2003. This Act sets out definitions whereby customary authorities and institutions will be recognised, the boundaries of such authorities and the powers of these governing authorities. For example, Section 20 states that "National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of (a) arts and culture; (b) land administration; (c) agriculture; (d) health; (e) welfare; (f) the administration of justice; (g) safety and security; (h) the registration of births, deaths and customary marriages; (i) economic development; (j) environment; (k) tourism; (I) disaster management; (m) the management of natural resources" (South African Government Printers 2003:Section 20). This framework legislation, coupled with the Communal Land Rights Act of 2004, reinforced apartheid tribal boundaries and chiefly powers (Claassens 2008). Cousins (2008), Ntsebeza (2008) and Claassens (2008) observe the way in which this legislation is politically embedded in the current relations of power between the ruling African National Congress (ANC) and the traditional authorities. Ntsebeza (2008) has argued that the recognition of the traditional authorities and the powers and authority accorded the chiefs in this legislation is a reflection of the "highly political arena of choosing and consolidating alliances between the elites to the exclusion of ordinary people" (Ntzebeza 2008:257).

Surprisingly, in the light of these powers, the new Policy on Small-scale Fisheries did not make reference to this Framework Act or traditional authorities at all. However, it recognised rights arising in terms of customary law in so far as they are consistent with the Bill of Rights (DAFF 2012). Further, it recognised the right of small-scale communities who had been dispossessed of their rights, to redress. Simultaneously, in the same month that the Policy on Small-scale Fisheries was adopted in South Africa, the FAO adopted the Tenure Guidelines (FAO 2012). These Guidelines urge States to recognise customary laws and systems of tenure in so far as they are consistent with fundamental human rights. The South African Constitution requires the State to

consider international law when interpreting the Bill of Rights (Section 39 (1) (b). Further, it notes that foreign law may also be considered (LRC 2013:13-21). A considerable body of international and foreign law jurisprudence on customary rights now exists (Sunde 2013).

At the time that the Policy on Small-scale Fisheries was gazetted in June 2012, communities along the coast in the Northern and Western Cape provinces had begun asserting their customary rights to what they stated were their traditional fishing grounds and the marine resources these contained, notwithstanding the fact that their customary systems of marine resource use and governance had been greatly undermined by the imposition of apartheid management policies over the past 60 years (Sunde *et al.* 2013). Through their collaborative alliances with human rights lawyers, these fishers began to draw on national, regional and international customary law to assert their customary rights (*Kenneth George* EC 1/2005, 2010). Ironically, along the former Bantustan coast where communities continued to practice their customary systems (Sunde *et al.* 2013), these communities were unaware of the implications of the Constitutional recognition of living customary law for their own access to and governance of marine resources.

The Dwesa-Cwebe community continued to practice their customary system, stating

> "*Our grandfathers just knew that they should go to the sea; it was not a right like we call it today, it was life. It wasn't given by the government. These words we use today are not even appropriate* (HFG 2).

CHAPTER FIVE: HISTORIES, CUSTOMARY PRACTICES AND COSMOLOGY ALONG THE DWESA-CWEBE COASTLINE

5.1. Introduction

Prior to the annexation of the region by the British colonial forces in 1885, some of the ancestors of the coastal residents who now comprise the group of communities known as the Dwesa-Cwebe communities, had been settled on the land adjacent to the coast in and surrounding the Mbashe River, for at least a century (Fay 2003: 69). This chapter outlines the history of these coastal residents who have come to be regarded as the 'Dwesa-Cwebe communities'. It describes aspects of their cosmology, culture and associated customary practices that relate to their historical use and governance of marine resources. It explores processes of interaction at the interface of customary and statutory governance, from the pre-colonial period through to the complete closure of the marine commons on the eve of the settlement of their land claim in 2001.

As a result of the grounding of several sailing vessels along the Eastern Cape coast, early 18th century references to the coastal peoples of this region are relatively numerous and attest to the close relationship that the coastal dwelling amaMpondo, amaBomvana and amaXhosa clans had with the sea (Crampton 2004). Although known primarily as cattle herders and pastoralists, there is evidence that those living within close range of the coast used marine resources for subsistence, for trade and exchange with other tribes, for medicinal purposes and for spiritual and ritual purposes (Peires 1989, Hammond-Tooke 1974, Hunter 1979). The sea featured in their belief systems, their spiritual practices and their imaginations, nurtured by their daily interactions with it and their partial dependence on it for sustenance. Many of the early references to these uses have a strong mythical nature and are finely woven into the cosmology and practices of the residents. It is recorded that a young white woman survivor of one of these vessels married a local chief of the Tshomane clan resident near Lambasi (the bay of mussels), who can be traced as an ancestor of amaXhosa Paramount Chief Sarhili, the Great Gcaleka chief who was chief of many of the people now resident in the Cwebe area (Peires 1989, Crampton 2004). Oral histories recording the marriage of Sango, the principle son of Chief Tshomane and this woman, known as Gquma, report that

"By advice of the soothsayers the great dance took place at the seashore, and instead of following the custom in terms of which the bride should have been led to her husband's dwelling, Gquma and her maidens stationed themselves midway in the cleft of the black reef, where she had been tenderly delivered by the destroying waves, and, thither the bridegroom went to ask his bride of the Ocean. Gifts of meat, milk and beer were cast into the foam, and the soothsayers read the signs of the murmuring water as propitious of the union (Soga in Crampton 2004 and Deligoua in Crampton 2004: 41).

Praise poet to Paramount Chief Sarhili, King of the Xhosa for over 20 years sang "*the milk of his cattle is like the ocean*" (Smith 1864 in Peires 1989: 102). Reverend Stephen Kay, an early missionary on the east coast in the vicinity of the Mthata River recorded that in 1830, on questioning the Tshomane leader Mdepa why he had always resided so near the sea, he said "*because…it is my Mother. From thence I sprang and from thence I am fed when hungry'* (Kay in Crampton 2004:165).

Historical records suggest that amaGcaleka and amaBomvana came to rely increasingly on inter-tidal marine resources following the frontier wars and the Cattle-Killings of the 1850s (Peires 1989:166). The Cattle-Killings occupy a particular place in the history of amaXhosa who occupied the area that became known as the Transkei (see Figure 1). In 1857 a young Xhosa girl named Nongqawuse had a prophetic vision in which she interpreted the ancestors of amaXhosa to be calling them to slaughter their cattle and stop cultivating their land. If they did this the ancestors would rise, bringing herds of cattle, grain and prosperity and enable amaXhosa to once again rise as a powerful nation. Paramount Chief Sarhili, supported this call and gave authorization for the people to slaughter their cattle. It is estimated that approximately 50 000 people died and thousands were displaced in the cattle killings that subsequently took place over the 15 month period (Peires 1989). Peires has argued that one cannot interpret the actions of amaXhosa in the context of the Cattle Killings without an understanding of their cosmology and the social and political context of the time (Peires 1987). References to the link between amaXhosa belief in the moment of creation, the ancestors and the rivers and sea abound in the oral histories of Nongqawuse and the Cattle Killings of the 1850s. An exploration of the meaning, cosmological linkages and the implications of Nongqawuswe's vision is beyond the scope of this research however

the significance of the link between the world of the ancestors living under water and the people is noted (Peires 1987). The people believed that they would be re-born and their ancestors would liberate them from the suffering that they were experiencing at the hands of their oppressors and in the words of Makana "*vast herds would arise from the sea, accompanied by the Xhosa ancestors*" (Crampton 2004:318).

5.2. The settlement of the Dwesa-Cwebe coastal territory

The annexation of the Transkei region by the British followed in the four decades after the Cattle-Killings and Sarhili, Paramount Chief of the Gclaleka, was forced to flee eastwards. Peires notes that following the Cattle-Killings the people of the region suffered extreme hunger and "down by the coast they were reduced to eating shellfish and many old people and children died of dysentery" (Peires 1989: 166). "From the Kei to the Mbashe and from Hohita to the sea, Sarhili's country was now virtually deserted…the few remaining cattle of the Gcaleka Xhosa had now been captured by their merciless enemies and their dwellings and carefully tended gardens wantonly destroyed. Sarhili himself, with a strong bodyguard, took refuge in the dense coastal forests of Cwebe, just east of the Mbashe mouth" (Peires 1989: 307).

This land was already settled by amaBomvana on the Cwebe side of the Mbashe River. It is believed that amaBomvana had migrated along the Eastern Cape coast in the later 17th century, seeking refuge from the wars in southern Natal (Parsons 1982:34). Following the Frontier war of 1878 with the British, and the annexation of the area between the Kei and the Mbashe Rivers, the colonial administration settled groups of Mfingoes who were known to be loyal to them, on the Dwesa side of the Mbashe River (Fay *et al*. 2002:50). Mfingoes comprised groups that had fled Shaka's wars and moved westwards, settling amongst amaGcaleka. They settled on the Dwesa side and were subsequently joined by amaGcaleka who had crossed over to the Cwebe side when fleeing from the British (Fay *et al.* 2002:50). The current generation of Dwesa-Cwebe residents thus comprises largely of descendants of amaBomvana, amaGcaleka and Mfingoes (Fay *et al*. 2002:50).

The historical occupation of the land by their ancestors is recalled in oral histories by several residents whose ancestors were already living in the area when amaGcaleka sought shelter with them.

*"The early inhabitants of this land between the sea and Hobeni, were AmaDingatha clan, between Mbashe, Mbanyane and Bula River. In fact Amatshawe, Amaxhirha, Amakhwemthe came after AmaDingatha (who) were already here…. amaTshawe came across the river to find my forefathers here. They were pushed over towards this land by the English people. The people were descendants of Hintsa and his son Sarhili…..And they came and they came, the Amatshawe and Amaxhira, for shelter, for protection purposes and then they came to the great father. The great father was Dudu. The great fathers took them underneath the forest….to stay on the land that was behind the forest... At that time there was no Haven Hotel, it was just reserved grazing land (*H39*).*

*"I am a descendant of amaDingata clan. My father's ancestor, my great grandfather, uBashe, was the Chief of this area , when he passed away his son, my grandfather, Chief Unqgubu, took over and he gave permission for other clans to settle in this area" (*H42a*).*

5.3. Historical use of marine resources

The coastline adjacent to the Dwesa-Cwebe communities has historically been a place of symbolic and material significance; a source of food and of healing, where the spirits of the ancestors and community meet and are given expression. It is a space that continues to hold a range of values and meanings for the local communities. *"The ocean is a source of life" (*N6*)* and *"there is a lot of things that the sea is useful for in people's lives" (*N7*).*

Harvesting, catching, consumption of and trade in marine resources is reported by the Hobeni and Ntubeni residents to extend back to their ancestors occupation of this land. Informants confirm that for as long as living memory permits, their customary practice has been to utilise the sea and its resources in order to feed their families, to cleanse and heal themselves and to perform certain ancestral rituals (N5, N3, N14, H39, H42a).

Elderly male residents of both Hobeni and Ntubeni, in their late 70's and early 80's, report that their fathers, uncles and grandfathers used to fish and taught them the skill

of fishing (N1, N3, N18, H39). Women recall their grand-mothers and their mothers teaching them how to harvest mussels and other inter-tidal species (N2, N7, N9, N14, N22, N26, N28, N36). Typically women and young girls collect inter-tidal resources, whilst men and young boys fish with a rod and reel for a range of line fish species, also collecting resources such as octopus and prawns primarily for bait purposes. The residents report learning how to harvest and catch a range of species from their parents and grand-parents (FG H1, FG N3, FG H3 and FG H2). In the focus group meetings the residents of both Hobeni and Ntubeni identified the range of species that they harvest, the isiXhosa and English names of these species. They identified where along the coast they traditionally caught these species and at what time of the year.

Table 3: Hobeni marine resource species list

Species name isiXhosa	English and scientific name	Place	Season	Bait species used
Intlanzi	Line fish and other fish			
Impolo	Cob (*Argyrosomus japonicas)*	Mbashe estuary and up to 10km up stream All around the coast from Mbashe to Mbanyane	March – June	Ingwane (octopus) Inqonci (prawns) Worms
Isigomolo	Mussel cracker (*Cymatoceps nasutus*)	Esibhedbhezulwini, Shark Island Holmes Gulley Krakrayo	January – February	Amasinene (red bait) Inyarala (siffie/venus ear)
Nkonkolo	Pignose grunter*(Lithognathus Lithognathus*)	Mbashe estuary Emtonyeni or 'Surf' Qhamka Along sandy beaches from surf	July – August	Inqonci (sand prawns) Inqonci udaka (mud prawns) Sand crab
Khwenyana	Shad (*Pmatomus saltatrix*)	Mbanyane rocks	May-July	Sardines (bought) Intimla (Blacktail) Itula (Mullet)
Intimla	Blacktail *(Diplodus sargus capensis)*	Esibhedbhezulwini, Shark Island Holmes Gulley Krakrayo All the rocks along the coast	All year	All bait species – whatever is available
Damba	Galjoen *(Dichistius capensis)*	Esibhedbhezulwini, Shark Island Mbanyane Rocks Krakrayo All the rocks along the coast	April – May	Amasinene (red bait) Kolofish (crayfish) Inqonci (sand prawn)
Nyizala	Bronze Bream/Blue Fish	Holmes Gulley Esibhedbhezulwini, Shark	November	Amasinene (red bait)

	(*Pachymetopon grande*)	Island Mbanyane Rocks Krakrayo All the rocks along the coast		Kolofish (crayfish) Inqonci (sand prawn)
Nomgcam	Silver or Stone bream (*Neoscorpis lithophilus*)	Surf and the rocks all along the coast	All year	Amasinene (red bait)
Inkonkoni	Spotted grunter *(Pomadasys commersonnii)*	Mbashe River estuary and 10 km upstream,	July – August	Inqonci (sand prawn) Inqonci udaka (mud prawns)
Isiwa	Rock cod (*Epinephelus andersoni*) and (*Epinephelus marginatus*)	Esibhedbhezulwini, Shark Island Holmes Gulley Krakrayo All the rocks along the coast	All year	All bait species
Itula	Mullet (*Mugilidae*)	Mbashe River estuary Mbanyane estuary Mpenzu lagoon	All year	No bait used
uKrebe	Shark Ragged Tooth (*Carcharius Taurus*) and Spotted Gully (*Triakis megalopterus*)	Everywhere along the coast Esibhedbhezulwini, Shark Island Holmes Gulley Krakrayo Qhamka (Surf rocks) All the rocks along the coast	All year	Live bait – other fish
Isteme-steme	Sand shark (*Rhinobatos annulatus*)	Everywhere along the coast Esibhedbhezulwini, Shark Island, Holmes Gulley Krakrayo, Qhamka (Surf rocks near Haven)	All year	All bait
Skages	Skate or Blue Ray (*Dasyatis chrysonota*)	Sandy beaches – Surf	All year	All bait
Sub-tidal and inter-tidal species				
Imbaza	Mussels (*Perna-perna)*	Esibhedbhezulwini, Shark Island, Krakrayo Mbanyane rocks, Qhamka	All year but best in summer	No bait
Imbatyisa/ostile	Oysters *(Striostrea margaritacea)*	Qhamka, Esibhedbhezulwini, Shark Island, Mbanyane rocks	All year	No bait
Inyarala	Siffie or venus ear (*Haliotis spadicea* and *Haliotis parva*)	Esibhedbhezulwini, Shark Island, Krakrayo, Mbanyane rocks	All year. Found with amasinene	No bait
Amasinene	Red bait (*Pyura stolonifera)*	Mbanyane rocks Esibhedbhezulwini, Shark Island, Krakrayo	All year	No bait
Isigwegwe	Limpets (*Patella species)*	Esibhedbhezulwini, Shark Island, Krakrayo Mbanyane rocks	All year	No bait
Qonqwe	Alikreukal	Esibhedbhezulwini, Shark	All year	No bait

	(*Turbo sarmaticus*)	Island, Krakrayo Mbanyane rocks		
Ingwane	Octopus/also called catfish (*Octopus vulgaris)*	Esibhedbhezulwini, Shark Island, Krakrayo Mbanyane rocks	All year	No bait
Kolofish	Crayfish (*Panulirus homarus*)	Esibhedbhezulwini, Shark Island, Mbanyane rocks	Mainly winter but some all year	No bait used
Umqwbulu	Chiton (*Dinoplax gigas)*	Esibhedbhezulwini, Shark Island, Mbanyane rocks	All year	No bait

Table 4: Ntubeni marine resource species list

Species name isiXhosa	**English and scientific name**	**Place**	**Season**	**Bait species used**
Intlanzi	Line fish and other fish			
Impolo	Cob (*Argyrosomus japonicas)*	Nqabara estuary	March-June	Ingwane (octopus) Inqonci (prawns) (*Callianassa kraussii*) Worms (*Arenicola loveni)*
Isigomolo	Mussel cracker (*Cymatoceps nasutus*)	Esgingqini Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	January - February	Amasinene (red bait) Inyarala (siffie/venus ear)
Mkomkolo	Pignose grunter/ white steenbras (*Lithognathus lithognathus*)	Nqabara estuary	July – August	Inqonci (sand prawns) Inqonci udaka (mud prawns) Sand crab
Khwenyana	Shad (*Pmatomus saltatrix*)	Esgingqini Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	Winter	Sardines (bought) Intimla (Blacktail) Itula (Mullet)
Intimla	Blacktail (*Diplodus capensis*)	Esgingqini Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	All year	All bait species – whatever is available
Damba	Galjoen (*Dichistius capensis*)	Esgingqini Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky	April – May	Amasinene (red bait) Kolofish (crayfish)

		shore to Khiwane/Magonya		Inqonci (sand prawn)
Nyizala	Bronze Bream/Blue Fish (*Pachymetopon grande*)	Esgingqini Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	November	Amasinene (red bait) Kolofish (crayfish) Inqonci (sand prawn)
Nomgcam	Silver bream (*Neoscorpis lithophilus*)	Esgingqini, Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	All year	Amasinene (red bait)
Inkonkoni	Spotted grunter *(Pomadasys commersonnii)*	Esgingqini, Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	July - August	Inqonci (sand prawn) Inqonci udaka (mud prawns)
Isiwa	Rock cod (*Epinephelus andersoni)*	Esgingqini Phantsikwe Ofisi hantsikweNkampu Human Rock and from rocky shore to Khiwane/Magonya	All year	All bait species
Itula/amatule	Mullet *(Mugil cephalus)*	Nqabara estuary	All year	No bait used
uKrebe	Shark Ragged Tooth (*Carcharius Taurus*) and Spotted Gully (*Triakis megalopterus*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	Live bait – other fish
Isteme-steme	Sand shark (*Rhinobatos annulatus)*	Near the estuaries	All year	All bait
Skages	Skate/Blue Ray (*Dasyatis chrysonota*)	Off sandy shores	All year	All bait
	Stumpnose (*Rhabdosargus globicebs*)	Rocky shores from Nqabara, Human Rock to Magonya	All Year	As above
	Zebra (*Diplodus cervinus Hottentotus*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	As above
	River bream (*Acanthropagus berda*)	Estuary	All year	As above
Sub-tidal and inter-tidal species				
Imbaza	Mussels (*Perna-perna)*	Rocky shore at Nqabara Mouth and Human Rock eastwards along the rocky shores To Khiwane/Magonya	All year but best in summer time after heavy rains	No bait

Imbatyisa/ostile	Oysters (*Striostrea margaritacea*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	No bait
Inyarala	Siffie or venus ear (*Haliotis spadicea and Haliotis parva*)	Rocky shore at Nqabara Mouth and Human Rock eastwards along the rocky shores To Khiwane/Magonya	All year. Found with amasinene	No bait
Amasinene	Red bait (*Pyura stolonifera*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	No bait
Isigwegwe	Limpets (*Patella species*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	No bait
Qonqwe	Alikreukal (*Turbo sarmaticus*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	No bait
Ingwane	Octopus/also called catfish *(Octopus vulgaris)*	Rocky shores from Nqabara, Human Rock to Magonya	All year	No bait
Korofish	Crayfish (*Panulirus homarus*)	Rocky shores from Nqabara, Human Rock to Magonya	Mainly winter but some all year	No bait used
Umqwbulu	Chiton *(Dinoplax gigas*)	Rocky shores from Nqabara, Human Rock to Magonya	All year	No bait

Whilst they acknowledge that techniques and equipment have changed, there is continuity in practice. In the words of an elderly Hobeni man

> **"***People started fishing long before the white man came. The white man just had new ways of fishing that were easier. We used to take a certain tree, the ntozani tree, the mtombe or the mnimkulu tree, and we made ropes from it and added hooks. Then came the white man with their rods. They would throw away lines that got knotted and our parents picked these up, untied them and started using them. That is how we got introduced to those techniques*" (FG H2).

In her anthropological work on the amaMpondo in 1932-1933, living along the coast from amaBomvana of present day Cwebe, Hunter notes that the people living along the coast speared fish in tidal pools and lagoons. AmaMpondo calculated the tides by the moon and used to harvest shell-fish at low tide. "The old men assure me that they knew this before the coming of the Europeans" (Hunter 1933 in 1979: 96). The women from most homesteads within 5 miles of the coast collected shell-fish, some of whom went for

three days at spring-tide, others going only once per month. "Coastal people are extremely fond of fish, some even preferring it to meat" (Hunter1979: 96). As early as 1932 Godfrey observed that there were 26 fish names distinguished in isiXhosa (Godfrey 1932 in Shaw and van Warmelo 1981:362).

Whilst the lengthy history of inter-tidal harvesting is confirmed by all informants, they express different views on the history of fishing and how this has changed over time. "*The white man got here and found our father fishing just with twine from the forest climbers…. Even before whites came here, we knew how to fish"(*H 39). Others indicated that fishing became more popular with the arrival of white residents and holiday makers at the turn of the century. An 83 year old informant stated *"We grew up with these things being already done, because it was both white and black people who used to do these things, so we don't know who came up with them" (*N3*).*

5.4. The resident's relationship with nature and how rights in nature arise

The sea has continued to have a central place in the cosmology, culture and everyday lives of the Dwesa-Cwebe residents. As a source of water, the sea is considered a source of life. The rivers flow into the sea, connecting the sea with the cycles of life on land. In the dominant myth of Creation, the sea is "*our big home*". "*We can all trace our big home which is the sea. We must go there for rituals as it is our big home*" (FG H3). Many clans believe that the ancestors reside in the sea and in certain rivers and streams (N6, H32, H39, H41). These ancestors are called "*Mamlambo*", or 'the water people' (Peires 1987, Fatman 2003a in Davies 2009:171, Fikizolo, 1997). This isiXhosa belief is confirmed in research conducted elsewhere along the Eastern Cape coast (Fikizolo 1997, Davies 2009). Some families are required to perform a particular ritual, referred to as '*isiko*,' (customary ritual), to honour their ancestors in the sea and rivers. *"The sea is a big river that people use. When someone gets sick they have to be taken to a big river"* (N6). *"Mlambo clan believe that their ancestors reside in the waters" (*H41*).*

Whilst different amaXhosa groups have differing conceptualizations of the Creator (Peires 1987, 1989, Hammond-Tooke 1974), invariably they subscribe to a concept

linked to that of the Creator God who is simultaneously the Creator of Nature. This is "*Indalo kaThixo*" (Nature of God) (H 42b). It is also referred to as *uHlanga* which refers to the creator god and the source of creation (Peires 1987:54). Many Ntubeni and Hobeni residents have embraced Christianity but they also retain a strong belief in the power of the ancestors and integrate this with their Christian beliefs (H 42b, H 40). For these residents, God is "*God the Creator*" (H42b). Water from the sea is vested with powers, linked to both the Creator and the ancestors (N6, N17, H32, H40, H41, H42b). Like many indigenous churches throughout South Africa, these clans believe that this water possesses divine power to cleanse and heal.They use sea water for baptism, healing and cleansing services and rites (Kunnie 1992 in Lebeloane and Madise 2006:1). In exploring the origins of this relationship with the sea and its resources, residents trace the source of this relationship to their cosmology, to their concept of the Creator, and to their understanding of their own 'human nature' (*indalo yethu).* They say the origins of their rights to use resources lies in the fact that it is '*indalo yethu'* (H40)*,* literally meaning 'our nature', by which they signify 'our human nature'. The term '*indalo yethu'* signifies the indivisibility of human beings from nature. Their relationship to their land, the forest and the sea arises from, and through, their relationship to this "Creator" of Nature (H28, H40, H41, H42b). Residents describe this relationship and its link to their entitlement to fish and harvest marine resources in different ways, dependant on the extent to which they affirm a Christian God, '*Thixo,'* as central (H42c). Many residents, especially those who have embraced Christianity, believe that "t*he nature was created by God for us"* (H40*).* Several residents articulated this belief that '*God provides these resources for the use of those persons dwelling in this place*' (H42b). "*Those things belong to God – Creator"*(H37).

When asked where rights to marine resources comes from one resident explained

> *"It is coming from the Nature. We claim that, as we have been born here. God settled us here. This is our place with its nature, as we got it from the Bible".*

Researcher: "Do you have a word or a saying in isiXhosa that captures that belief in nature?"

> *"Of course. 'Indalo yetho'. As I have already said, its quoted from the Bible. When God settled Adam and Eve he gave them the right to eat the nature. That is our background knowledge …it causes us to claim that it is given to us" (H40).*

Irrespective of whether or not they attribute the source of their entitlement to use these resources to God, to the Creator, or the Creator-Nature, all residents invest the sea with tremendous powers. In the cosmology of the coastal residents of Dwesa-Cwebe, the sea is personified. "*We are ruled by the sea*" (H39). It is all powerful and it has its own controls (N6, N12, N13, N14 H23, H28, H37, H39). "*It was the sea that was making the rules*" (H24), "*the sea regulates harvesting*" (H37) and "*the sea has certain times to give out food and certain times to not.* (N6). "*The sea closes itself, opens itself. When it's open, that is our right to go and harvest mussels. When it is closed, we are unable to harvest mussels"* (H28). The sea provides *and "was like a father to us because we knew that in everything we wanted to do the sea was there and we would get money from selling the sea food to buy food and also eat them without asking anyone for anything"* (N7). One informant stated "*the sea is life-giving to the people in our custom*" (H38). The emphasis is on the sea providing for people's well-being through their use of it, rather than on people using the sea.

The identity of the self and the identity of the collective is integrally connected to the material world which sustains and nurtures that collective as expressed in "*all that we are lies there"* (respondent points to the sea) (H31), "*the sea is our big home*" (FG H 6). This distinctive ontological relationship, and its origins in their world view linking their lives on land to those of their ancestors, the power attributed to the sea, and their interpretation of the laws of nature shaping their interactions with the sea is common to the cultures of many indigenous peoples around the world (Westra 2008).

5.5. Social and metaphysical boundaries defining the community

Entitlement to use natural resources is derived from the inhabitants' relationship to those who first occupied the land. They state that they have a relationship to that land and the adjacent coastline through this relationship with their ancestors which is referred to in the present tense *"It is the land of our ancestors, it is land of the old ones"* (H39).

This entitlement derives from one's living in this particular space, having been born in this space and hence belonging there. This 'belonging' to the land is unlike a western notion of 'ownership':

> *"it was a norm that the land does not belong to the chief, it belongs to the people who are the first inhabitants. We grew up with this nature, we love this nature. The nature was created by God for us, you cannot deny us what is rightfully ours."*
>
> Researcher: Is there a word for this entitlement, this sense of what is "rightfully" yours…?
>
> *I don't really remember the isiXhosa word but what I know, people say this is our land….umhlaba wethu (our land), imithi, (our forest), nezihlanzi (our fish), nezimbaza, (our mussels)'…When a person grows up we grow together with these things… How can you divorce us now? We were born together with these things… we grow up, we are born as if you are one with the same mother. The mussel or fish is a brother to a human being that was born and grew up next to the sea. (When I was born) the first thing to see was my mother, the second thing to see was my father, then the sea with the mussels to eat as well as what ever was our tradition ..imveli yethu, (our tradition), we were born with these things 'together' - There was no human being before there was a marine species, they were born together. How can you separate them by a fence? We will die for these things" (H 41).*

This interpretation highlights a central principle common to many systems of indigenous knowledge and law, in which "a Cartesian split between nature and human reason becomes impossible" (Westra 2008:55). This perspective of the "connaturality" (Westra 2008:56) of the relationship between humans and nature and its indivisibility is an underlying principle echoed by many informants when describing their relationship with nature and is well documented in indigenous and customary systems of governance (Westra 2008).

There are several terms used in the local idiom to describe this social-ecological interaction. However, when translated into English these terms lose their meaning. The English word 'belonging' was used by several respondents when describing their relationship to the land and resources. In addition to *indalo yethu* (our nature), residents frequently use the phrase '*umhlaba wethu*' (H42a, H39). While '*umhlaba*

wethu' literally means 'our land', according to local isiXhosa speakers, it refers to their collective relationship of belonging to their land (H39, H41, H42a). *Umhlaba wethu* signifies the on-going relationship of the ancestors to that land and to the community. It gives expression to the belief in the continuing presence of the ancestors and their on-going interactions with members of the community (N4, N6, N7, N10, N28, N32 N36, N39). It has a metaphysical, temporal and spatial component that transcends the meaning usually ascribed to it in English. This is common to many other indigenous coastal peoples' worldviews (Williams 2006, Davies 1984, Ruddle 1994).

*"When we say this is our land, umhlaba wethu' (our land), we mean the land from the banks of the Mbashe River, from this direction, from Neko forest, across Mbanyana River to the borders of (Cwebe)…If you take from Cwebe to Hobeni, from Mbashe to Sondwane in a place called Nyumbazana Mbashe and Cwebe… from Mbashe River- you go from here to the river, from the river you go across, down to the river, to the mouth. So the mouth, the rocks that are there – the rocks between the river and the sea – and everything that is beyond the rocks, its ours – which is on the land – before you can get to the sea water – it is our land. You go across like that up until Mbanyana Mouth…around the four corners – the rocks by the sea belong to us" (*H39).

The right to occupy this land, build a house for residential purposes, to establish fields for cultivation, to use the natural products from the forest and the sea and to use communal areas for grazing arise from residence of this territory. Residence is derived from occupation of this territory by the ancestors of the clans now occupying the area (H42c). Residence was clan based but this norm is also flexibly applied and outsiders may be granted permission to settle in the area (Fay 2003, FG H2).

5.6. Eviction and dispossession from the coastal zone

Forced removals from coastal areas started at Dwesa-Cwebe in 1893 and continued for nearly a century under the guise of various conservation, spatial planning and apartheid regulations (Vermaak and Peckham 1996, Fay *et al.* 2002:53). Although motivated on the grounds of the need to protect the forests from the destructive activities of the local people, the Conservator of Forests for the Colonial Transkeian Conservancy noted that

with these forced removals "the Government has thus acquired most valuable areas, suitable for the cultivation of sugar-cane, coffee, tea [and] mangoes' (Henkel 1893 in Fay *et al*. 2002:53). Some households were forced to move out of the coastal area with this initial group of removals in the 1890s (Vermaak and Peckham 1996 in Fay *et al.* 2002), whilst others were moved as part of the betterment planning schemes of the 1930s and subsequently again as part of an extended version of these schemes and the Transkei conservation regulations of the 1970s and 1980s. The latter included the establishment and fencing of the Dwesa Reserve in 1975.

It is difficult to ascertain precisely how many households were impacted by these removals. Out of the total number of land claimants from all seven communities, 600 out of 2,300 families trace their ancestral links to persons who lived within the boundaries of the Nature Reserve (Village Planner 2000:19). It is estimated that 46 households were forced to move as a result of the establishment of the protected area in the 1970s (SDC 2006:27). In Hobeni alone 65 homesteads were removed through the second wave of betterment (Fay 2003: 110). Timmermans (2004:41) recorded that at least 7 households in Ntubeni were forced to move. Many residents in both Hobeni and Ntubeni were impacted and some families have had to move twice in their lifetimes (N22, H24, H42a). Responses to removals differed across neighbourhoods and individual homesteads and varied according to a range of factors (Fay 2003). Residents report on these removals with considerable emotion. "*We were very hurt, but there was no choice*" (N13). *"We were chased twice. Grandparents were chased from the Haven, inside (the reserve), and we were chased here (Mhlanganisweni) from Velelo. And the parents were buried here. Our grandparents are that side, the other side (Velelo). Since we moved, we did not get a chance to go (back) there. We weep for those graves of the ancestors we left behind there" (H24).*

The establishment of the Haven Hotel in the 1920s, inside the coastal forest on the Cwebe side, is closely associated in the memories of the current generation with the first wave of removals. The Haven Hotel was established to enable white Transkeian traders and civil servants to have holidays on the coast (Dennison 2010:169). The hotel was built inside the coastal forest not far from the mouth of the Mbashe River (see Figure 2). The land on which the Haven Hotel was built was land that had been given to

amaTshawe and other clans by amaDingata when they fled the English during the Frontier wars (H39, H41, H42a). It was from here that they were 'chased' and where the first owner of the hotel, Reid, allegedly built over the graves of their ancestors.

*"The land which is currently where the Haven Hotel is, underneath or inside the dining room, in fact the kitchen, underneath the kitchen there is the grave for my old grandfather, Mpampa" (*H39*).*

*"My grandfather used to narrate some stories about fishing and other things that they used to do when they were boys like me. He told me, as I grew up outside the Nature Reserve, he told me that some of his own homestead, my grandfather's grandfather, was inside the Nature Reserve at a place near to the Haven Hotel. I grew up knowing that my grandfather's homestead was inside (the reserve)" (*H30*).*

In the following decades the coast on either side of the Mbashe River, adjacent to the Cwebe and Dwesa forests, attracted white holiday makers (Dennison 2010). It is apparent from oral histories that the grandparents and parents of the current residents took advantage of this growing, albeit seasonal market for fish and marine resources provided by these holiday makers (N4, N5, N7, N9, N22, H36). Oral histories suggest that residents were free to harvest marine resources and to sell them whenever an opportunity presented itself. However the market was limited largely to holiday makers and white residents. Several of the Hobeni residents gained work as 'gillies' at the hotel during the holiday seasons (H23)[28].

5.7. Statutory and customary governance of marine resources in the Transkei after Union

In contrast to the small-scale fishing communities living in the Cape, under the close watch of the colonial authorities, the residents of this Eastern Cape coastline continued to live under the system of customary governance that they were accustomed to prior to the beginning of the twentieth century. Whilst the annexation of their territories did impact this traditional system of authority over time as the powers of the Chiefs and

[28] Gilly is the term used to refer to a person who assists on a fishing expedition.

headmen of their territories were greatly changed by the state (Beinart 1982, Delius 2008), the customary system within which their everyday fishing activities and decision-making were located appears to have retained its integrity at neighbourhood level and marine resource access and use continued to be managed at this level, without the involvement of the Chiefs (N1, N13, H39).

Prior to the mid-1930s, statutory regulation of marine resources remained largely in the hands of the Provincial authorities. As such the administration based in the Cape appears to have had little impact on marine resource use in the Transkei in the first two decades following Union. References in the Magistrates letters referred to in Chapter Four suggest that there was minimal enforcement of any fishing regulations by the fisheries authorities. In 1940, Act 19 of the Sea Fisheries Act further extended certain restrictions on fishing but it appears that these were not enforced in the rural margins of the country and there was little awareness of or enforcement of regulations until well into the 1970s (Bigalke 1973:155).

Following the 1959 Promotion of Bantu Self Government Act 46 the Transkei Constitution of 1963 allocated responsibility for preservation of game and fish in this part of the Eastern Cape to the Transkei Government. Subsequently a "Flora and fauna' division of the Department of Agriculture and Forestry was established (Palmer *et al*. 2002:90). This institution was responsible for all matters previously connected to nature conservation under Cape Provincial Administration. In 1971 the Transkei Nature Conservation Act came into effect, paving the way for increased protection of natural resources and the establishment of nature reserves. The Sea Fisheries Act 19 of 1940, succeeded by Act No 58 of 1973 continued to govern fisheries however until in 1991 new fisheries regulations were promulgated under the Transkei Government Notice 107.

The Wildlife Protection and Conservation Society lobbied the new government to increase conservation along the Transkei coast (Wildlife Society 1976 in Fay *et al*. 2003:92) and the society commissioned a scientific report on Dwesa Forest in 1974 (Fay *et al.* 2002:92). The report presented by Moll (1974) established the scientific narrative that motivated increased restrictions and enforcement, highlighting "the

increasing threat posed by the surrounding communities" (Fay *et al*. 2002:92). Amongst restrictions on other natural resources, Moll called for shell-fish harvesting to be stopped to allow for recovery. He then recommended that restrictions should be placed on harvesting (Moll 1974 in Fay *et al.* 2002:92). The Dwesa Nature Reserve was declared shortly afterwards in 1975, extending the earlier forest reserve to include the shoreline, rivers and estuaries. (Fay *et al*. 2002:92). Subsequently an ecologist, Tinley, was contracted to develop a management plan in which he placed considerable emphasis on the promotion of a 'sustainable use' policy (Fay *et al.* 2002:93). With regard to marine resources, he recommended that there should be "rotational harvesting of shell-fish" but "no line or spear fishing should be allowed although the netting of fish in the estuaries by local fishermen under supervision should be considered" (Fay *et al*. 2002:93).

5.8. The establishment of Dwesa-Cwebe Marine Reserve

Subsequent to its proclamation in 1975, a fence was erected around the Dwesa side of the Reserve and several households were forced to relocate from inside to outside the reserve, thereby further restricting their access to the sea (N4, N22). Despite the fact that inter-tidal harvesting was not completely prohibited in terms of the fisheries legislation at the time, it would appear that the establishment of the Reserve administration office on the Dwesa (Ntubeni) side, the forced removals of several households from the area, and the *de facto* restrictions on access due to the fence, enabled the authorities to restrict access to inter-tidal resources along the western coastline of the reserve (Siegfried 1977 in *Fay et al*. 2002, Lasiak 1998). Recreational anglers were permitted angling and spearfishing from the right bank of the Mbanyana river and the left bank of the Mbashe River and on the Dwesa side from Humans Rock at the entrance of the reserve to the Kobole estuary (Fay *et al*. 2002:97) (See Figure 2). Interviews with residents on the Ntubeni (Dwesa) side indicate that for them access was first denied with the fencing of the reserve which was completed in 1977 (N3, N4). Residents on the Hobeni (Cwebe) side indicate that the fence was completed in 1982 (FG H6).

Following the creation of the reserve and the introduction of various wild animals, the stretch of coastline adjacent to the reserve became the location of intense research on inter-tidal marine resources (Lasiak 1987, 1990, Fielding *et al*. 1994). A team of researchers from the University of Cape Town that visited the reserve in 1977 to assess the biodiversity of the area noted that certain areas of the coastline were already closed to harvesting of marine organisms (Siegfried 1977 in Fay *et al*. 2002).

The Hobeni and Ntubeni communities are unanimous in their assertion that they were not consulted when the reserve was established in 1975 and fenced during the period 1977-1982 (N2, N12, N11, N13, N14, N15, H26, H28, H31, H32, H33, H36, H41, FG H1, FG H2, FG H3 and FG N1, FG N2, FG N3).

They report that the area was fenced and wild animals were introduced.
*"They never asked for our permission. They said that the animals must get used to the place and that there are dangerous animals that would harm us so they said we should not go in" (*N2*). "No one came to talk to us as the fishermen… They just said we were not allowed to go in" (*H23*).*
A sub-headman stated that "When they closed Dwesa they first fenced the place and they said the place has been sold. If, how, from who? I don't know how that happened" (N12).
One community leader recalls his father informing him that consultation around the proclamation of the reserve was limited to certain Chiefs recognised by the Transkei government and the local community was not consulted. "*In 1974 they consulted the Chiefs at the Great Place but at that stage they did not say they would stop the community from getting access to resources, it was only to bring in animals to make it a tourist attraction" (H 42).*

The impact of the restrictions was felt unevenly in terms of location in relation to the Mbashe River which cuts a natural boundary between the Dwesa side and the Cwebe side of the forests. The Ntubeni residents experienced *de facto* dispossession slightly earlier (in 1977) than Hobeni (1982). Harvesting inter-tidal resources was prohibited but for a few years limited fishing was permitted. The Environmental Conservation Decree No. 9 of 1992 was promulgated. Dwesa Marine Reserve was declared in terms of this Act and also gazetted a Marine Reserve in terms of the Sea Fisheries Act of 1988.

Whilst no harvesting of inter-tidal resources was permitted, fishing was still allowed in certain stipulated areas of the reserve, namely on the eastern banks of the Mbashe River and from the entrance to the Marine Reserve up to the western side of the Kobole estuary.

Because of the gender based division of labour, it was mostly women harvesters that were hardest hit by the fence and the prohibition on harvesting of inter-tidal resources. Local women residents report initially they were permitted to harvest for a few months of the year however this was soon stopped (FG H3). As early as 1986 Hobeni women were apprehended by rangers in the reserve and allegedly locked in a garage for several hours and their catch confiscated by the rangers (FG H3).

It is clear that levels of enforcement differed on either side of the Mbashe River but in general there was little compliance. Lasiak, an expert on inter-tidal resources undertaking considerable research in Dwesa-Cwebe Marine Reserve at the time noted in 1998 that regulations "are rarely enforced, poorly advertised, and regularly flaunted, particularly by subsistence-gatherers who either are unaware of or do not recognise the validity of these rules" (Lasiak 1998:16). In effect, the local community continued to practice their customary systems of marine resource use (H42a, H44, FG H1, FG H2, FG H3). "*We continued to go there though especially at night, but now they are very strict. Now they shoot if they find you*" (FG H3).

5.9. The impact of closure on the communities of Hobeni and Ntubeni

In the in-depth interviews and survey conducted as part of this research, informants were asked if the MPA had an impact on their lives, and if yes, to describe how it had impacted them. The informants seldom differentiated between the terrestrial and marine reserve, despite the statutory boundary dividing the two, due to the fact that the land and coastal territory is contiguous and because they have to enter the coastal forest reserve in order to access the marine reserve. Because various regulations were introduced at different times, such as the declaration of the forest reserves as early as 1903, fencing of the reserve in the late 1970s, and tighter harvesting and fishing

controls in 1991 with the introduction of the Environmental Decree in 1992, the community often confuse different regulations when referring to the impact of the marine regulations. Their perspective of the dates when these various legal instruments were promulgated also blurs the distinction between the forest and nature reserve, the marine reserve and the MPA.

Informants interviewed expressed a very wide range of emotions and experiences about the establishment of the reserve in the 1970s and then subsequently the marine reserve in 1992. These feelings appear to still shape their attitudes towards the government conservation and management authorities today. The closure of the forest, the loss of grazing area and their loss of access to the sea impacted their livelihoods and basic food security.

*"They put in some animals and then they told us to stop fishing because they wanted the animals to get used to their new surrounding and they were still dangerous when they got here. Ever since that time they have never opened (the sea) again. So now living here is not as easy as it used to be because we don't have enough food outside (the reserve) and the food is inside. Our cattle used to graze in there and we would get milk because there was a lot of grass inside there" (*N1*).*

*"This affected the fishermen after they fenced off the forest because nothing used to impact on our fishing before that but as soon as they fenced we were given restrictions on where to do the fishing and where not to and also about what we should fish." (*N3).

"We are deeply hurt by that, it's very painful that we cannot go there anymore" (N2).

Most critically, both Ntubeni and Hobeni residents report the fence closed off an important source of food, leading to increased levels of hunger *(*N14, H25, H26, H31, H32, H38, H41*).* "*Now everything has changed because starvation took place and after starvation everything falls apart" (*H31*).* It closed off grazing for their cattle and it closed off access to the forest for important wood products upon which they depended for the construction of their houses, their fences around their cattle kraals, their cultivated fields and for firewood (N1, N2, N3, N4, N6, N7, N10 N11, N12 N13, H29, H33, H37, H40). *"We can't even go to collect wood for our kraals, now one has to go and buy (wood) whereas we have it right at our door steps." (N4).*

*"We have small grazing areas ever since we were asked to move out of Dwesa" (*N1*).*

It also closed off access to forest and marine resources used for medicines (N17). For one household living near a natural spring in the forest, the fence closed off their nearest access to fresh water (N11). Some referred to the fact that they were promised work but this did not materialise (H24) and the reserve in fact reduced the benefits that they had previously experienced from tourism as the cash earned from selling crayfish and mussels to the white holiday makers in the camp at Dwesa or at the hotel had provided a critical source of cash income which enabled residents to send their children to school (N1, N7, H23, H30 H31 H40).

"There were white people who used to stay inside there in the camps, we would sell the fish to them and life was very good because we would sell the fish and we would get some money. Now things have changed and we also relocated. Now we are living a very difficult life "(N7).

'There was a huge difference in our lives and poverty struck us because we used to survive using those mussels and fish. For example I was working with someone in Nqabara, and every month I would bring him maybe 5 fishes and he would send groceries or money back, and that's how we lived.' (N10).

"We suffered a lot and we were forced to drop out of school and go find work in the big cities but before life used to be easy. We would use wood for fencing and the cows to plough. If there was any damage to the fence you would just go to the forest and repair it" (N 11).

According to several informants, the loss of access to sea food impacted their health (N14, N28). *"When we used to eat mussels the children here never had kwashiorkor, most sicknesses were rare because they ate sea food and we knew that we would not get sick very easily when we eat sea food. Now there is more sicknesses (N14).*

In the in-depth interviews in both villages, overwhelmingly most informants said that they did not know the reasons for the establishment of the reserve and the prohibition on fishing and harvesting (N2, H32, H33, H35, H26, H41). Out of a sample of 62 persons interviewed for the household survey in Ntubeni, only 11 said that they understood the reasons for the closure. Out of these 11, only 1 person said it was to conserve nature. The majority indicated that it was to 'protect them from wild animals'.

*"We don't know why. They are the only ones who know because when they closed they said they brought animals" (*N2*).*

Only one resident cited the protection of biodiversity as the reason stating *"They want to preserve the fish so that they don't go extinct" (N14).*

5.10. Conclusion

The Hobeni and Ntubeni communities trace their current customary practice of marine resource use to that of their ancestors who first settled the coastal land on either side of the Mbashe River as early as the 17th century. Like that of many indigenous peoples and customary communities across the world, their cosmology and culture reflects their close association with the sea. The customary practices that they have evolved are embedded in a world view and ontology in which their entitlement to use these resources flows from their human-nature, and their relationship with the natural environment in which they are located (Westra 2008). Their interaction with the marine environment is regulated by the natural laws of the sea. Over the century from 1893 until 1994, a range of colonial and apartheid statutory interventions have disrupted this relationship, enclosing their marine commons and alienating them from the natural resources upon which they had depended for their livelihoods and which constitute the material basis of their culture.

CHAPTER SIX: A NEW DEMOCRACY: CLAIMING CUSTOMARY RIGHTS TO MARINE RESOURCES IN DWESA-CWEBE

6.1. Introduction

The emergence of democracy in South Africa brought hope to the residents of the Dwesa-Cwebe that they would regain their land and access to natural resources. However, in the immediate years following the first democratic elections in 1994 and the dismantling of the Bantustan system, the inhabitants of the Dwesa-Cwebe region struggled to secure the freedoms guaranteed by the new Constitution. As the marine science community summoned scientific evidence to strengthen the exclusionary conservation narratives that had previously enjoyed an easy marriage with the separate development policies of the apartheid regime, the communities of Dwesa-Cwebe developed their own strategies to reclaim their land and related marine resources. In this Chapter, these strategies of struggle of the communities to regain access to their land and marine resources are explored against the backdrop of the statutory fisheries and conservation management interventions that evolved after 1994.

For over a century, from 1893 onwards, until the present, the communities of the Dwesa-Cwebe area had been subjected to an array of different statutory regulations. Similarly during this period after 1994 there was a confusing array of statutory authorities involved, made more confusing due to their name changes during this period and to the transfer of responsibilities from one institution to another[29].

[29] Initially in 1994 the communities negotiated with the provincial conservation authorities, known as Eastern Cape Nature Conservation (ECNC). This authority was taken over by the newly created Department of Economic Affairs, Environment and Tourism (DEAET). This provincial DEAET is not to be confused with the national DEAT, also involved in these negotiations as the department responsible for the national mandate of environmental affairs and tourism which, up until 2009, included the governance of marine resources. In addition, the Eastern Cape Parks Board (ECPB) was set up as a statutory body to manage the protected areas. In 2005 the authority for management of the reserves was officially transferred from DEAET to ECPB. This later changed to Eastern Cape Parks and Tourism (ECPTA) in 2008.

Table 4: Time line of the Dwesa-Cwebe Communities

1800s	Settled by amaBomvana, who moved in from the east and amaGcaleka from the West
1878	Area east of the Mbashe River was annexed by the British, Mfingo settled in Dwesa
1885	Cape Gov Proclamation 140 of 1885 extended laws of the Cape to United Transkeian Territories
1890	Early fisheries legislation aimed to control exploitation of coastal resources especially in Cape but applicable in Transkei
1893	Dwesa and Cwebe Forests established and first forced removals from actual forest areas and coastal strip between forests and sea
1913	Native Land Act of 1913
1930	The Haven Hotel established – fishers start selling to guests and hotel
1936	SA Native Trust Act of 1936
1940	Act 19 Sea Fisheries Act extended restrictions on marine resources
1951	Bantu Authorities Act 68 of 1951, implemented in Transkei from 1956 onwards
1959	Promotion of Bantu Self Government Act 46 of 1959
1963	Transkei Constitution Act 48 of 1963 allocates responsibility for preservation of game and fish in Transkei to Transkei Government
1971	Transkei Nature Conservation Act – Nature Conservation Division established
1973	Transkei Independence
1975	Dwesa Nature Reserve established
1977-	Forced removals in several areas surrounding Dwesa-Cwebe Reserves and fence erected around reserve – key moment of exclusion for local residents as wild animals introduced
1982	Fencing of Dwesa-Cwebe forest completed
1991	Marine Reserve declared - “no collection of marine organisms but recreational anglers were allowed to continue”- restrictions apparently not very tightly enforced all along the coast of the reserve
1992	Environmental Conservation Decree No 9 restricts fishing and harvesting

1994	Protest action and community goes into reserve and harvests resources
1994	East Cape Nature Conservation (ECNC) falls under National Dept of Agriculture
1994	Tralso and The Village Planner work in the area and support community advocacy
1995	First meeting between the communities, Eastern Cape Nature Conservation and other departments to discuss the process of a land claim
1996-1999	Series of meetings between ECNC and communities to discuss future co-management arrangements and negotiate Land Settlement Agreement
1998	Marine Living Resources Act of 1998
2000	MPA Declared in terms of MLRA and no take regulations imposed – community no longer able to harvest at all and complete fishing ban but fishing ban not implemented
2000	CPAs established in 7 localities and elect Land Trust
2001	Dwesa-Cwebe Land Trust registered and Land Settlement Agreement signed
2004	ECPB start enforcement of no take MPA regulations
2005-2009	DEAT promises to review the no take regulations
2010	David Gongqose and two others arrested for fishing in MPA

Source: Information pre 2001 drawn largely from The Village Planner (2000) and Palmer, Timmermans and Fay (2002).

6.2. Strategies of struggle and competing narratives: 'invading' or reclaiming the reserve?

By the early 1990s, the impact of the closure of the forest on access to forest products and grazing for their cattle, coupled with the closure of the marine reserve for inter-tidal harvesting and increased restrictions on fishing, was being felt by the communities bordering Dwesa-Cwebe Reserve as they had few alternative sources of livelihood (Palmer *et al.* 2002, Timmermans 2004). The residents of the villages surrounding the reserve now depended largely on migrant remittances for their livelihoods and retrenchments in the mining industry had hit hard (Fay *et al.* 2002:99). The situation

was exacerbated by a very severe drought that had started in 1990 and the communities urgently needed access to emergency grazing in addition to their needs for wood for housing, edible plants in the forest and marine resources (Fay *et al.* 2002:108). In 1992, assisted by a non-governmental organisation, The Transkei Land Service Organisation (TRALSO), the Cwebe and Mendwane communities began to mobilize around the demand for access to their land, the forest and marine resources upon which they had depended (The Village Planner 1996). During this period the communities made various representations to the conservation authorities, to political parties and to their traditional authorities but their requests were ignored (Fay *et al.* 2002:108).

At the beginning of 1994 three of the communities living adjacent to the Dwesa-Cwebe Reserve, Mendwane, Cwebe and Hobeni communities, made specific appeals to the nature conservation officials to allow them to visit ancestral graves, to collect sea water and harvest shell fish (Fabricius and Timmermans 1995 in Fay *et al.* 2002:108) Their requests as well as subsequent demands made at community meetings were ignored (Fay *et al.* 2002: 109).

Five months after the 1994 democratic elections, the communities of Cwebe and Hobeni took a decision to enter the reserve and harvest the resources that they believed to be rightly theirs. The Mendwane community joined the action and smaller groups of residents also protested on the Dwesa side of the reserve (Fay *et al.* 2002:109, *pers.comm* Terblanche 2013). This action needs to be seen in the context of the broader political climate in the former Transkei. During the last years of apartheid a number of protests had erupted in the former Bantustan (Gibbs 2010). Most notable was a protest in Mpondoland, to the east of Dwesa-Cwebe, led by the daughter of a chief. Residents living along the coast in and adjacent to the Nature Reserve at Mkambati marched and demanded the return of their land within the Nature Reserve that had been expropriated from them in the early 20th century (Gibbs 2010). The mobilising slogan for this protest action was that '*The land… belonged to the people and their chiefs, who deserved a say in how it was utilised*' (Gibbs 2010:5). Many of the residents on the Cwebe side had been influenced by exposure to political activism whilst working in the mines in Johannesburg. A branch of Umkhonto Wesizwe, the ANC underground movement, had also been in operation in Cwebe (Fay *et al.* 2002). In 1994, frustrated by

the failure of the authorities to respond to their growing needs, and the pressing impact of the drought, Cwebe and Hobeni residents decided to embark on collective action to "raise awareness of our plight" (Tropical Forest Resource Group 2000)[30].

In September 1994 several hundreds of residents entered the reserve and began harvesting marine resources as well as forest products.

"*The people were angry because of the empty promises because when the fence was put up the people were promised that they would get a chance to go in and harvest 25 litres (of inter-tidal resources) but that did not happen so the people were angry and wanted to go in by force*" (H23).

"*There were some organisers who organised the whole community and told us to go out to the beach and then we met everyone from Cwebe, we met at the beach. We got in there and some were just doing nothing, some were harvesting mussels, some were fishing" (H36).*

The army was called in to force the harvesting to an end (Palmer *et al.* 2002:109). *"A lot of the people were arrested. The police were waiting for us at the gate, with others 'pushing' us from behind saying 'get out, get out'. They targeted the leaders of the strike. Some of them ran away. Many were arrested but not all went to jail"* (H32).

The protest action received considerable coverage from national television and print media and was portrayed as "an invasion" that "plundered" the natural resources of the reserve. (Tropical Forest Resource Group 2000, Fay *et al.* 2003:109). In contrast, residents stated that they entered the reserve because "*we are sick because we cannot cure ourselves with water from the sea, we are hungry because we cannot eat mussels*" (Tropical Forest Resource Group, 2000). Following the protest a group of marine scientists undertook an emergency assessment of the reserve and reported that the reserve was stripped of its resources, residents had "destroyed a significant proportion of the intertidal resources in the MPA" (Dye and Lasiak 1994, Fielding 2010) and that it would take the reserve ten years to recover (Tropical Forest Resource Group, 2000). The descriptions of this incident as a destructive invasion echoed the exclusionary discursive practices of the colonial and apartheid regimes evidenced in the depiction of the local 'natives' as 'predators' that threaten not only the integrity of the reserve but

[30] This reference refers to a video made in 2004 by the Tropical Forest Group that includes original footage from the protest action in 1994 and interviews with residents, hence it is not paginated.

the also the integrity of the national conservation estate (Tropp 2006). Scientists began to suggest that this was "unconstitutional, since it affects the quality of the environment for a much wider constituency than simply the Dwesa-Cwebe communities" (Fielding 2010). The assertion of a political and scientific perspective of the importance of the MPA for the greater public good stood in contrast to the growing demand for restitution of their land and resources which was gaining recognition as the post-apartheid land restitution policy and administrative mechanisms moved into gear. Following the protest a strong conservation narrative was inserted into discussions about how to approach policy on the restitution of protected areas that were under land claim with many environmental groups reluctant to see the communities get full ownership rights over the land (Timmermans *et al.* 2002). This restrictive approach however informed the thinking during the negotiations on the Dwesa-Cwebe land claim. The Wildlife and Environmental Society of South Africa campaigned strongly against returning the land to the community (Timmermans *et al.* 2002:119). Fairhead *et al.* (2012) note that "the discursive gaze and institutionalized practices of colonial science and administration often went hand-in-hand to construct peasants as environmental destroyers, justifying their removal, restriction or re-education" (Fairhead *et al.* 2012:249).

Negotiations between the communities bordering Dwesa-Cwebe reserves and the various government departments on the terms for the recognition and settlement of their land claim over a period of several years led to the establishment of a complex set of new governance of tenure relations: it effectively determined that Dwesa-Cwebe Reserve would retain its statutory conservation status but would create a range of institutions that would theoretically enable the state and communities to jointly manage the reserve (The Village Planner 2000, Timmermans *et al.* 2002:119). This approach to balancing conservation and land restitution in protected areas, whilst implemented here in Dwesa-Cwebe as early as 2000, was only formalised in 2007 (Paterson 2011).[31]

[31] Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007).

6.3. Community negotiations for 'Our land, our forest and our sea'

Following the protest action representatives of the community met with the authorities to discuss the return of their land and access to their resources. The then Minister of Agriculture in the Eastern Cape, Delport, encouraged the communities to establish Conservation Committees (CC's) in anticipation of their further talks with Eastern Cape Nature Conservation (ECNC) about their land and the reserve (Terblanche and Kraai 1997). TRALSO requested an independent consultant group, the Village Planner, to assist the communities in undertaking participatory research in support of their land claims (Terblance and Kraai 1996, 1997). The reports developed as part of this process documented oral history evidence of the residents' customary occupation of the land and their use of a range of natural resources from the forests and the coast, highlighting the fact that this material basis of their culture has existed as long as living memory (Terblance and Kraai 1996, 1997). The communities' traditional local knowledge of forest products, such as wild fruit and vegetables and a range of herbs and medicinal plants became evident, as did their world view and approach to the sustainable use of both the sea and the forest (Tropical Forest Resources Group 2000). It would appear that in response to the strongly expressed concerns regarding the future conservation and sustainable use of the area, the community referred increasingly to their traditional system of caring for resources in a way that ensured sustainable use, known as *ukulondoloza* (H42).

A land mark meeting was held in Mendwane on the 3 December 1995 where the negotiations over the return of their land and resources began (Eastern Cape Nature Conservation (ECNC) 1995). The meeting was facilitated by an independent mediator. Over and above the community representatives from all eight communities from the four communal areas adjacent to the reserve, the meeting was attended by a range of stakeholders including the following: the (ECNC), the Department of Environmental Affairs and Tourism (DEAT), the Department of Forestry, the Wildlife Society, the National Parks Board, the Department of Land Affairs and Agriculture, a representative from the Premiere's office, TRALSO and The Village Planner. This meeting reached agreement on the stakeholders that would be centrally involved in the land claim negotiations. This meeting confirmed that the role of chiefs was not regarded as

significant (ECNC 1995). As noted in the previous chapter, as a result of the apartheid authorities' use of the chiefs as instruments of their control for implementation of betterment and other administrative functions that were not perceived by the communities' as the legitimate authority of the Chiefs, the communities rejected this permutation of traditional authorities. They did however acknowledge the role of the local customary institutions, such as the authority of sub-headmen (Fay 2002). The decision taken at this meeting reveals the community representatives' assertion of their living customary law underlying their customary governance system, and their interpretation of its institutional forms, rather than that of 'official' customary law. The communities established a Community Committee (CC) in this meeting for the purpose of the negotiations with the ECNC. In their statement of intent they demanded that ownership of the land be returned to its "rightful owners" and that they wanted involvement in the reserve "for the sake of their children" (ECNC 1995:7). The statement of intent read by the ECNC indicated that the ECNC recognised the importance of fishing and harvesting of shellfish and committed the ECNC to meeting with the community and working out a management plan that would include responsible use of resources (ECNC 1995:8).

The basis for a Joint Management Committee (JMC) was subsequently agreed upon, comprising four community representatives from each village level Community Conservation Committee (CC) and officials from the newly re-organised Eastern Cape provincial department, the Department of Economic Affairs, Environment and Tourism (DEAET) (Palmer *et al.* 2002:118).

6.4. Building 'the Trust', preparing for co-management

In the negotiations with the various government authorities in the years between 1995 and the signing of the Land Claims Settlement Agreement in 2001, it was assumed by both government authorities and the communities that negotiations towards a settlement agreement and co-management of the reserve included the sustainable utilisation of marine resources. The department with the national mandate for fisheries and MPA management, the DEAT, was party to these negotiations. All the documentation during the period 1995-1999 indicates that all parties agreed that the

reserve should remain under conservation status but that the communities would co-manage the reserve through the 'joint-management committees' and get access to resources, including marine resources, on a sustainable use basis (Palmer *et al.* 2002). Initially the process appeared to gain some ground. The community representatives were successful in securing a number of agreements on resource utilisation. Most significantly, they requested the reserve management to refer transgressions of the regulations to the local community level, where they would deal with them, rather than prosecuting them via the Magistrates court (Palmer *et al.* 2002:118). It is reported that this did not work however as the CC's found it difficult to take actions against the transgressors. In 1996 a Deed of Settlement outlining the Department of Land Affairs' recognition of the land claim was signed between the claimants and the Department of Land Affairs (DLA). However, despite the signing of this agreement, a delay then ensued due to the complex, plurality of state institutions involved in the negotiations and uncertainty over which government department actually owned the land (Forestry, Land Affairs or Nature Conservation). In addition, the absence of a legal entity that could encompass the complex tenure arrangements that had been proposed to address the need to restitute the land but retain conservation status added challenges (Palmer *et al.* 2002:127, SDC 2006). Frustrated by the lack of progress the communities' representatives suspended their participation in the JMC in March 1997. The reassurance of the then Minister of Land Affairs, Derek Hanekom, that he supported their claims to restitution and that the state intended to transfer property rights to the communities, subject to various conditions including guarantees of future conservation, enabled the process to re-gain focus (Palmer *et al.* 2003:127).

6.5. Creating the 'community': communal property associations and customary communities within a statutory framework

The statutory framework for land reform and restitution required that the communities establish a new legal entity for the purpose of holding their land and managing their resources (DLA 1997). In 1997 the community representatives from the eight communities began establishing the new institutional arrangements required for the transfer of their land. As noted earlier, up until now the traditional authorities at the level of the chiefs had been largely side-lined and were not considered to be key

authorities in this process. Instead much of the mobilising work had occurred at neighbourhood and sub-ward level, involving some of the sub-headman in some areas[32]. This was largely due to the fact that the institution of the chief had lost authority and respect during apartheid and the Bantustan years when they had worked closely with the apartheid state. Palmer and others observed that in 1999 the registration of the CPAs aroused little opposition from local traditional leaders and they cautiously supported the process (Palmer *et al*. 2002:129). The chiefs were given an ex officio advisory role on the Communal Property Associations (CPA) Committees (Palmer *et al.* 2002:129).

The communities established CPAs in the seven primary villages (merging two villages into one) and developed the founding articles for the establishment of the Dwesa-Cwebe Land Trust which would be the body that would hold the rights on behalf of the communities and would give leadership to the process of establishing co-management (SDC 2006).

The emergence of the Trust led to an increasingly frequent reference to 'the Dwesa-Cwebe community'. The differences between the communities appear to have been underplayed during the Land Settlement Claim process (Fay 2003). The concept of 'a Dwesa-Cwebe community' does not have a lengthy or easy history in Dwesa-Cwebe (SDC 2006:37). As noted in Chapter Three, it is evident that it is largely in response to the manipulations of betterment planning, conservation planning and more recently the statutory requirements of the land claim that what was originally eight dispersed villages have come to be considered 'a community'. In this regard the notion of community is a political response to the dictates of statute and policy and does not necessarily link neatly with the boundaries of local allegiances and social networks. As will be explored in Chapter Nine, the further coalescing of identities as a 'small-scale fishing community' in response to the needs of current small-scale fisheries policy processes and the possible rezonation of the MPA more recently has additional implications for the boundaries of their system of customary governance and highlights the way in which customary systems are not unchanging systems but adapt to the needs and interests of their context as they interface with other systems of governance and law.

[32] See Table 1 illustrating the traditional authority structures

In November 1997, DEAT declared Dwesa-Cwebe Reserve as a Marine Reserve in terms of the Sea Fishery Act of 1988 but fishing was still permitted east of the Mbashe to Mbanyana estuary and from Human's Rock to Kobole under strict regulations (see Figure 2). The community continued to work with the authorities to prepare for the Settlement Agreement and the joint management of the reserve.

In November 1998 the draft Master Plan and Conservation Management Plan was released by the provincial Department of Economic Affairs, Environment and Tourism (DEAET) for comment. This document states that the Directorate of Sea Fisheries within the national department (DEAT) was

"open for negotiations around which area should be closed and which areas open for utilization" and "the possibility of rotating open and closed areas should be considered" (DEAET 1998: unpaginated).

In June 2000, the Administrative Management Plan with the proposed institutional structures for the co-management of the Reserve was released for comment. This document was workshopped with the Dwesa Cwebe Land Trust (The Village Planner 2007). During this year the community continued to negotiate with the various Departments involved (Land Affairs, DEAT and DEAET) in good faith, on the understanding that they would get access to marine resources but on a limited, sustainable use basis.

The processes of integration that took place amongst the new, statutory-based institutions and authorities of governance, such as the CPA's, and the established neighbourhood level customary institutions such as that of the sub-headman and his councillors, as well as the approach to the deepening of democracy through the development of these structures, is evidenced in a report from the Strategic Planning workshop held with the interim Trust and CPAs in 2000. The workshop focused on finalisation and registration of the Trust and its relationship to the CPAs. The meeting resolved that in canvassing opinions from the communities about the Trust, "The CPA chairperson should meet with the whole CPA committee. The whole committee will be responsible for ensuring that every member family is informed about the meeting. This will be done in conjunction with the local traditional leadership. Every opportunity where people are gathered will be used to inform people about the meetings" (The

Village Planner 2000:15). This integration of the local level customary institutions of governance with the statutory institutions reflects the consistent attempts by the community leadership to infuse these new institutions with the spirit of living customary governance.

Notwithstanding these earlier efforts to build unity across the seven communities as well as within communities and with traditional leadership, considerable contestation has emerged more recently within the community reflecting the tensions inherent in the local statutory institutions that have been established. In the past four years the legitimacy of the Trust has been challenged, two successor Trusts have been established and considerable conflict has emerged within the communities about this statutory body. Whilst residents cite a range of reasons for this conflict, a key component relates to the representation of the clans who claim to be the legitimate claimants of the land within the reserve and who resent being forced to share the benefits of restitution with a larger community, some of whom were not forcibly removed (H 24, H 43). The CPAs in several communities have become defunct and by 2011 residents of Ntubeni claimed that their CPA no longer functioned (N18). In 2013 the ECPTA announced the dismantling of the Trust and the establishment of an umbrella CPA, comprising members from all seven communities. This new structure was registered in 2013. The Chiefs have ex officio status on this structure (*pers.comm*. Mkhulisi). [33]

6.6. Extending the conservation estate: Gazetting of the Dwesa-Cwebe MPA as a no-take MPA

As noted in Chapter Four, in 1997 a Task Team on MPAs had noted the need to strengthen South Africa's commitment to no-take protected areas (Attwood *et al.* 1997). In 1998 the MLRA was gazetted, introducing new marine legislation for fisheries and marine conservation. The MLRA Section 43 makes provision for the declaration of an MPA. All fishing is prohibited within such an MPA unless exempted by the Minister (DEAT 1998). Following the gazetting of the MLRA in 1998 a further Task Team was established within DEAT to oversee the re-promulgation of all MPAs in terms of this

[33] A detailed discussion of these conflicts is beyond the scope of this research however see Paterson (2011) and Fay (2013) for further discussion on these processes of contestation.

new statute (*pers.comm* Oosthuizen 2013). Unbeknown to the communities, members of the national DEAT team corresponded with the Eastern Cape authorities responsible for Dwesa-Cwebe Marine Reserve in order to ascertain what zonation was required for the reserve and what exemptions should be gazetted in terms of the regulations to be promulgated. However they received no response (*pers.comm* Oosthuizen, DEA August 2013). No communication with the Dwesa-Cwebe communities or their representatives, who were at that stage involved in negotiations with DEAT representatives around the Settlement Agreement, is recorded (*pers.comm* Gerry Pienaar 2012). The Dwesa-Cwebe Marine Reserve was thus gazetted a complete 'no-take' MPA on the 19 December 2000 in terms of the Marine Living Resources Act (Gazette No. 219487), effectively prohibiting any utilization of marine resources by the land claimants.

There is no record of any discussions with the community or with other state authorities that indicate that the DEAT had changed its intentions with regard to the principle of sustainable use of marine resources and zonation between 1998, the date of the Draft Management Plan (DEAET 1998) in which they confirm their intentions to support sustainable use, and the gazetting of the MPA as a no take MPA in December 2000. The Memorandum written by the Commission on Restitution of Land Rights setting out the request for settlement of the land claim to the Chief Land Commissioner in June 2001 confirms, in a section entitled "The Description and Extent of the Claim that "*besides residential rights members of the community enjoyed agricultural, grazing and use of resources (including resources from the forests and the sea) rights*" (Commission on Restitution of Land Rights 2001a:3). This Memorandum was accepted and signed by the Chief Land Commissioner in June 2001, six months after the no take MPA was gazetted. It is clear from the Land Claim Memorandum and the subsequent agreements signed with the community that both the Land Claims Commission and the community anticipated that their pre-existing rights to resources would still be negotiated with DEAT, despite the promulgation of the MLRA in December 2000 (Land Claims Commission 2001a:6). In all the multi-stakeholder negotiations about the Settlement Agreement in the years prior to the promulgation of the MLRA, the DEAT and DEAET representatives were party to discussions about the continued conservation of the area, post settlement, but with the understanding that the community would get

access to resources on a sustainable use basis. The community throughout this period accepted that the reserve and MPA status would be maintained and their use would need to be sustainable, captured in the local term, *ukulondoloza*, which refers to the use of resources in a careful way that will ensure their well-being and sustainability (*pers.comm* Kuzile Juza 2011).

Gerry Pienaar, the Eastern Cape official from the DEAET who was the official responsible for negotiations with the community at the time has confirmed that there was 'limited or no consultation' with the provincial authorities by DEAT about the sudden declaration of the reserve as a 'no-take' reserve and that in fact the DEAET did not support the no-take status of the reserve and did not enforce it in the initial years post 2000 (*pers.comm* G. Pienaar 2012 and Lemm and Attwood 2003:36). In an interview in 2003, Pienaar indicated that the DEAET believed they were not adequately consulted prior to the promulgation (of the MPA) under Section 43. At the time the no fishing' requirement was not being enforced and DEAET were still operating under the fishing requirements of the now defunct Decree (Lemm and Attwood 2003:36). "The DEAET believe that it is not desirable to exclude all fishing within Dwesa-Cwebe MPA as fishing is the main reason people visit this MPA" (Lemm and Attwood 2003:36).

This no-take status was thus not implemented by the conservation authorities until the end of 2004 and hence although the Dwesa side continued to bear the brunt of the new regulations due to the presence of the conservation office, the fishers on the Hobeni side continued to fish openly in the areas demarcated by the 1997 stipulations (H42b, FG H 2). Women on the Hobeni side were more cautious but did continue to harvest inter-tidal resources. Women and men on the Ntubeni side, however, under the close watch of the rangers at the office, were not permitted to fish or harvest resources after 2000 although a few continued to enter the reserve against these statutory prohibitions but only at night, usually restricted to full moon periods and with great caution.

At this time the MPA was *de facto* managed by the Eastern Cape Parks Board (ECPB), under contract to DEAET. Layers of legal pluralism are apparent at this level as this provincially-based authority resisted the imposition of the MLRA and continued to implement its own laws, including the old Transkei legislation (Lemm and Attwood

2003:36). Not only did it not implement the new statute but it also continued to implement this now defunct Transkei legislation, albeit on a selective basis. A system of legal pluralism thus existed at this local level with half the reserve on the western, Dwesa side controlled as a no-take zone and the local community excluded whilst on the eastern side of the Mbashe Estuary there was a 'recreational' fishing zone to accommodate the visitors to the Haven Hotel. Regulation of fishing by the local community, albeit technically outlawed by the regulation stating that one must be resident in the Park for at least one night, was not actively enforced[34].

It was only in 2004 when the ECPB began enforcing the no-take regulations throughout the MPA that the communities on the Cwebe side of the MPA began to feel the impact of this closure. That the department was aware of this earlier discrimination favouring recreational visitors sleeping at the hotel inside the reserve is evident in the letter sent to the hotel manager by the Deputy Director General of the DEAT in 2005 where he uses this discrimination as a reason for being forced to finally implement the MLRA prohibition equally for both recreational fishers and the local community on the eastern side of the MPA (DEAT letter from DDG Monde Mayekiso to Hawkins dated 12 September 2005).

6.7. The Land Claim Settlement Agreement of 2001

"*The day of the ceremony in Dwesa when the settlement was signed, everything was made clear that community still had benefits (from) marine resources as well as forest resources…* They freed the forest, the sea too was freed" (N39).

On the 17th June 2001, in the presence of a large number of community members, as well as representatives from all the government departments that had been involved in the negotiations, the mandated representatives of the communities, as the Dwesa-Cwebe Land Trust, signed the Dwesa-Cwebe Settlement Agreement with Commission on the Restitution of Land Rights (Commission on Restitution of Land Rights 2001b). This Settlement included several different components:

[34] In terms of the Transkei Environmental Decree of 1992 which had not been withdrawn from the statute books.

- An agreement by the state to restore ownership of the land to the Dwesa and Cwebe community to be held in Trust on behalf of the community subject to the terms of the Agreement. It further agreed to enter into a "Community Agreement" in terms of which the manner of management, control and utilization of the Reserve would be governed. This included immediate transfer of the land and the Haven Hotel to the community, with a 21 year lease for management of the Reserve by an appointed conservation agency;
- A Management planning framework and a management transformation plan;
- Guaranteed co-management of the Reserve and the Hotel
- Enabled access to a share of the financial benefits flowing from the Hotel and the Reserve. The agreement included a financial settlement amounting to 14 million. This comprised payment up front of the full lease amount for the lease of the Reserve to DEAET for 21 years, compensation in terms of the Restitution of Rights Act, and Restitution and Settlement planning grants for all households (SDC 2006:40-41). It was agreed that the financial compensation and payment would be held by the Amatole District Municipality on behalf of the Dwesa-Cwebe Land Trust.

Paragraph 12.1 of the Agreement states:

> *"The community shall enjoy favoured status in terms of the benefits from eco-tourism employment opportunities, resource rights, input to management policies etc in accordance with the management plan."*

Although the Settlement Agreement excluded the MPA from its ambit because of the MLRA, in Section Three it stated that in 1995 at a meeting with the communities
"*the Eastern Cape Nature Conservation agreed that*

- *the communities should have access to sea and forest resources, based upon the principle of sustainable utilisation as permitted by law*,
- *the communities should participate in the management of the nature and forest reserves* (Commission on Restitution of Land Rights 2001b: paragraph 3.6:6).

The communities interpreted this as an indication of their continued rights to access to marine resources and that a resource use and management agreement would be

finalised in due course. In the words of one fisherman "*When we signed in 2001 we were told we were free. We have access" (N24).*

The Settlement Agreement included the principle that *"Local customs, traditions and knowledge relevant to the conservation and sustainable use of biodiversity must be recorded, recognised, respected and used in the management of the reserves*" (Commission on Restitution of Land Rights 2001:4).

Despite the gazetting of the MPA as a no-take MPA in terms of the MLRA just six months prior to the signing of the agreement, the communities continued to believe that the state would still continue negotiations with them regarding the utilisation of marine resources. According to a Trust member at the time, the expectations following the negotiations and the Settlement Agreement was that the ECPB would facilitate the establishment of a Co-Management committee, as per the Settlement Agreement, that would co-manage the reserve, including the marine component, which was not regarded by the community or the local authority as a separate component of the natural ecosystem (*pers.comm* Kuzile Juza 2011).

6.8. Enforcing the 'new' law

In 2000 when the no-take MPA regulations were gazetted in terms of the MLRA, the ECPB had no authority or capacity to enforce the MLRA as there was no management agreement with the national DEAT to manage the MPA on its behalf (Lemm and Attwood 2003, DEAT 2008). There was thus no implementation of the statute at this local level. The residents of Hobeni community thus continued to fish in the Mbashe River estuary, adjacent to their homes and to the Haven Hotel, in accordance with the Stipulations of the 1997 gazetting of the Marine Reserve in terms of the Sea Fisheries Act of 1988. Likewise, whilst fishing and harvesting was prohibited in much of the rest of the Reserve, the Haven Hotel, located at the mouth of the Mbashe River, was a favoured spot for sports fishermen. An angling association had started a tradition in 1980 of coming to the hotel for an annual Pignose Grunter competition. The mouth of the Mbashe is one of the few spawning sites for this fish (also known as white steenbras) and hence during July-August this was a popular spot. Several local

fishermen worked regularly as gillies for the recreational anglers who visited the hotel (N23, N24 and *pers.comm* Millar 2011).

In 2004 the DEAT provided additional capacity and hence towards the end of 2004 a new enforcement unit, referred to by the local fishers as 'the water police' suddenly started monitoring and enforcing the MLRA 'no-take' regulations as gazetted four years prior to this.

One of the first groups to be caught by this new enforcement unit was a group of 13 women and one man from Hobeni. On the 13 December a group of women from Velelo neighbourhood went harvesting mussels. One of the women was Ms N (H 38), who is a 43 year old woman. She explained *"I was hungry. I had no food here in the house. My child was four months old*". She said that they cooked some of the mussels next to the sea and kept some of them. The rangers came and 13 of them were caught. "*We were caught by the rangers down by the sea, taken to the gate and we were then taken by the police to Elliotdale and then we stayed there for two months. We spent two months in Elliotdale at the police cells then we were moved to Wellington Prison in Mthatha. We told the magistrate that we were hungry and the magistrate told us that the sea is under government, we are not allowed to go and take something from the sea. The local community collected money to pay our two lawyers. We stayed there three months until we paid the R1 500 fine*". *My husband was in jail at the same time for one month for harvesting wood in the forest. He had to pay a fine of R1000.* Her husband's mother looked after her child. "*You have no right to see your child when you are in jail. It's only a relative who is allowed to come during the weekends. Not during the week*". "*In jail sometimes we got food, sometimes we didn't. I was not fine at all. I had headaches. I went to the clinic at the Wellington Prison. They said I think too much"* (H38).

When the authorities began enforcing the MLRA Gazette No 219487 regulations that stipulates that the entire area is a no take MPA at the end of 2004, it was not only the local community that was taken by surprise. The recreational angling community was unaware of this legislation (*pers.comm* email sent by Dennis Schultz to Colin Attwood 19 April 2005). The Haven Hotel management was also not informed about the

enforcement of the statutory regulations neither was the national Angling Association that held annual competitions in the area. In a letter to Monde Mayekiso, the Deputy Director General of DEAT in July 2005, the hotel manager queries the regulations and indicates that neither his management nor the local Hobeni community nor the angling association were aware of the MLRA Gazette that effectively prohibited fishing in the MPA four years prior to this (pers*.comm* letter sent by Hawkins to DEAT DDG 25 July 2005). The correspondence that ensued between these recreational users of the Reserve and the authorities highlights the fact that despite their access to communication technologies, the 2000 Gazette was 'news' to them and they repeatedly refer to this as "new fisheries legislation", querying its legitimacy (*pers.comm* Hawkins to DEAT DDG 25 July 2005).

In his response two months later, the DEAT DDG states "we are planning to review the regulations as there have been several reports that the present situation is unworkable" (pers.comm letter sent by DEAT DDG Monde Mayekiso to Hawkins 9 September 2005), clearly indicating their intention to review the no-take status of the Reserve. The recreational angling association were granted an exemption for their fishing competition during this and the subsequent three years but the local fishers and owners of the land remained excluded.

During the four years following the beginning of enforcement of the MPA regulations the DEAT Marine and Coastal Branch (MCM), the provincial department responsible for environmental affairs, the DEAET and the conservation management agency, the ECPB, made repeated commitments to review the no-take zonation and engaged in a number of interactions with the community regarding the re-zonation of the Reserve (pers.comm email sent by du Toit DEAT:MCM to DEAET 8 February 2006, DEAT 2006b, ECPB 2007). In 2007 the DEAT official responsible for MPAs, Alan Boyd, indicated in a speech made to the National MPA Forum that the Department was reviewing the zonation at Dwesa (DEAT 2007). In 2008 Boyd developed a detailed proposal for the re-zonation that would allow limited subsistence fishing by the communities and also recreational fishing as a means of promoting socio-economic beneficiation for the communities (DEAT 2008). This proposal received considerable opposition and criticism from the marine science community which argued the need to maintain the

no-take regulations in order to protect critically endangered line fish species for which the MPA is an important nursery ground (*pers.comm* Alan Boyd 2008). In 2009, the DEAT committed to reviewing the zonation at a meeting with the Hobeni community (*pers.comm* Gongqose 2012). In the same year the DEAT commissioned a consultant to undertake an evaluation of the Dwesa-Cwebe MPA for this purpose (Fielding 2010). This evaluation, published in 2010 following the division of the DEAT into DAFF and DEA[35], recommended that the no-take status of the Reserve be retained. The report drew heavily on references to international and national level legal instruments such as the CBD and the Constitution in its motivation for retaining the prohibition on the use of marine resources in the interests of the protection of marine biodiversity for the nation as a whole (Fielding 2010). The research for the report did not seek the knowledge or views of the community. Subsequently Fielding acknowledged in his expert testimony in the Gongqose trial that this evaluation did not include any interviews with the community themselves *(State v Gongqose and others* 2012).

In 2009 the Hobeni fishers established the Hobeni Fishermen's Association in order to advocate for their rights to fish in the MPA (FG H2).[36] The establishment of this local structure by the fisher community of Hobeni appears to have been influenced by several factors. Several of the members had lived in urban areas where they had been exposed to local political organisations; one of their members, David Gongqose, had been involved in the subsistence fisheries sector in Cape Town during the period when subsistence fishers mobilised against the DEAT on a regular basis (*State v Gongqose and others* 2012). Most significantly, many of the members had worked as gillies for the recreational anglers who frequented the hotel and had been exposed to the power of the recreational anglers associations which had successfully organised annual events at the hotel for over 25 years and had managed to get an exemption from DEAT to continue their competition, despite the MLRA ban on fishing.

[35] In 2009 the DEAT split into two departments. The mandate for MPA management was retained by the Department of Environmental Affairs (DEA) whilst the mandate for management of all marine living resources was transferred to the newly constituted Department of Agriculture, Fisheries and Forestry (DAFF).

[36] This committee comprises approximately 25 male members, including the local sub headman from Velelo who is recognised by the Hobeni community and the Hobeni Chief as the traditional authority representative for fishing.

The arrest of three fishermen who were caught and charged for fishing illegally in the MPA in September 2010, coupled with the killing of a community member by a ranger from ECPTA in April 2011, mobilised the Hobeni community into action[37].[38] On the 25 April 2011 the Hobeni Fishermen's Committee (also at times referred to as the Hobeni Fishermen's Association or the Mbashe Fishermen's Association or 'the committee'), with support from the hotel management, wrote to the national department, now known as the Department of Environmental Affairs (DEA) requesting intervention and informing the authorities that if there was no response that they would embark on mass action (*pers.comm* letter sent by Hobeni Fishermen's Association to DEA 25 April 2011). Although this letter used the language of rights to livelihoods and benefit-sharing, this letter was the first letter sent by the group that referred to the Constitution and national legislation confirming the right to equality and non-discrimination. The content of the letter signalled a new engagement by the committee and the broader community with the legislative framework within which their rights were denied. It was written on behalf of "*the Hobeni community and especially the fishers*" and signed by the Chairperson and the Deputy Chair of the Hobeni CPA, a number of current and former Land Trust members, the Chair of the Fisherman's Association and the local sub-headman of the Velelo neighbourhood as well as the ward representative and a youth representative.

It is significant to note that in August 2011 when I commenced my fieldwork in Hobeni and visited the Chief of Hobeni, the Chief indicated to me that he was not a fisherman and he requested me to meet with this sub-headman from Velelo. He subsequently informed me that any correspondence about fishing from the Department was referred to the sub-headman and to the fishing committee (*pers.comm* Chief Patrick Fudumele 2011).

The ECPTA responded to the letter and facilitated a meeting with fisher representatives of all seven communities and the DEA at which the DEA acknowledged that there had been no consultation in 2000 and that they would review the zonation (ECPTA 2011). Subsequently the Hobeni Fishermen's Committee, frustrated and desperate, wrote a

[37] The case of the three fishermen, known as *State versus Gongqose and two othe* referred to as *Gongqose* 2012 is discussed in detail in Chapter Nine.

[38] In 2008 The ECPB was restructured and the Eastern Cape Parks and Tourism Agency (ECPTA) was established. It was subsequently contracted by DEAT to manage the Dwesa-Cwebe Reserve and MPA.

letter to the ECPTA and DEA in October 2011 in which they stated: "*we have had enough of you breaking our rights of fishing. Now its time for us to take another step. You have forgotten that we as the community and the fisherman (sic) also have the right to fish. We will take our own step to resolve this matter… You have been doing this for years now and its better you kill us or you continue with your apartheid rules but this time we will solve this matter in our own way"* (pers.comm Mbashe Fishermen's Association letter to DEA and ECPTA October 2011). Again this letter was signed by a broader constituency that just the fishers, including the sub-headman and the CPA members, indicating the integration of the customary and the new local governance authorities and institutions. The reference to apartheid rules and then to them solving this matter "in our own way" signalled the assertion of the fishing association's own customary system of law.

The fisher's committee received no response to this correspondence until September 2012, when, four months after the judgement in the case related to the three fishermen was released, the DEA and ECPTA again committed in a series of meetings that they would review the zonation (*pers.comm* Mkhulisi 2012). In November 2012 the ECPTA released a document informing communities that they intended to consider rezonation (ECPTA 2012), and requested each of the seven communities to elect two representatives to engage with the organisation in discussions about re-zonation and to elect 'Marine Resource Committees". Officials from ECPTA conducted meetings with two representatives of each of the communities along the coast. The representatives pointed out their communities' preferred fishing and harvesting areas and the ECPTA officials mapped the GPS reference points for each area (ECPTA 2013). The Hobeni fishers and harvesting community insisted to the ECPTA that they wished their entire fishing community, including men and the women harvesters and key elders in the village who held particular historical and traditional knowledge, to participate in the planning of the rezonation. They insisted on using the opportunity on the beach to inform the officials of the ancestral and historical significance of each area and their customary use of all species, including the use of marine resources for cultural and spiritual purposes[39] Subsequently ECPTA met with the representatives to provide feedback on the progress with rezonation in a series of meetings and the GPS references points were recorded

[39] The Hobeni fishers and harvesters requested that I be present to witness this mapping process and demanded that it be delayed until the 17 November 2012 when I could be present as an observer.

(ECPTA 2013). This rezonation process is on-going and has yet to be confirmed at Ministerial level.

6.9. Continued use of marine resources

Following the implementation of the MLRA regulations and the complete prohibition on access to marine resources in the MPA, the Ntubeni residents were able to continue to access both line fish and inter-tidal resources along the stretch of coast outside the Reserve on the Dwesa side, between Nqabara estuary and the border of the MPA (see Figure 2). Their homesteads are adjacent to this stretch of coastline so the closure has not imposed lengthy distances to their fishing and harvesting sites, however it has restricted them to a very short stretch between the MPA and the Nqabara River which acts as a physical boundary. They continue to harvest a wide range of resources (See Annexure 2). Use of resources is difficult to quantify as residents report irregular catches but on average most fishermen fish two to three times per week and catch on average 5 fish per week (N1, N12, N10, N15). Women harvest inter-tidal resources weekly, but with harvesting predominantly clustered around the spring low tides, they harvest on average 20 litres of mixed inter-tidal organisms per person per trip (N3, N4, N7, N9, N16, N22). The survey conducted in Ntubeni shows that out of a total of 62 persons interviewed, only 5 people sell everything they catch. The majority of persons consume all the resources that they harvest in their households (37 out of 62), whilst 20 persons mainly sell but do retain some for household consumption (20 out of 62). This indicates the reliance on marine resources for basic food security. Inter-tidal resources are more likely to be kept for household use. Shackleton *et al*. (2007) found that 86, 8% of all households consumed fish, with 37,8% of households involved in selling fish. Most of this fish was sold to local villages (70 %), whilst 40% was sold to tourists and 20% sold to a local hotel (Shackleton *et al.* 2007:147). It was estimated that 94, 7% of all households consume shell-fish. Hobeni informants, now effectively cut off from access to the coast by the MPA report that they continue to fish and a small number of women harvest marine resources at full moon spring tide inside the MPA (FG H1, FG H2, FG H3). Due to the current prohibition on their harvesting, it is difficult to obtain accurate assessment of the quantities harvested but a group of 10 fishermen fish approximately once a week and catch on average 2-3 fishes each per week. Women harvest at the full

moon and harvest small amounts of oysters, mussels, octopus and redbait, generally a 10 litre bucket full.

Informants from both Hobeni and Ntubeni report that they have continued to fish and harvest in and outside the MPA according to their customary practices and norms, despite this bringing them into conflict with the statutory authorities. This conflict is explored further in Chapter Eight.

6.10. Conclusion

Since the dawn of democracy in South Africa in 1994, the communities living adjacent to the Dwesa-Cwebe MPA have struggled to secure their rights enshrined in the new Constitution. During this period their customary system of governance has undergone considerable changes, adapting to the new legislative and policy frameworks within which it is located. At local level they have established a range of new governance institutions which have continued to interface with their customary structures and processes, albeit unevenly. They have also begun to engage with a wider group of governance actors, drawing on a range of legal and governance instruments and processes in their actions towards reclaiming their rights to marine resources. In the process of engagement with the state, the boundaries of their customary communities and their territory have been re-drawn. The communities have straddled this fractured state, represented by a Trust, comprising seven different CPAs[40]. They have interacted with the state from within this new, imposed identity, whilst simultaneously integrating it into the fabric of their customary patterns of social relations at neighbourhood level to varying degrees in different communities.

[40] The Trust has been highly contested and two successor Trusts have subsequently challenged the legitimacy of the first Trust (See Fay 2013).

CHAPTER SEVEN: THE CUSTOMARY SYSTEM OF MARINE RESOURCE USE AND GOVERNANCE

7.1. Introduction

This chapter explores the characteristics of the customary system of marine resource governance at Ntubeni and Hobeni. It describes the nature of the local customary institutions, values, interactions and other social phenomena that constitute and are in turn constitutive of the social structures within which governance of these resources is located. It introduces the expressions of living customary law that lie at the heart of this customary system of governance, lending this system of governance its distinctive character.

7.2. Customary practices and expressions of living customary law

7.2.1. Marine resource use as custom and customary ritual

The harvesting of marine resources as one of several livelihood strategies is a taken for granted practice for many of the homesteads living closest to the coast at Dwesa-Cwebe.

"Fishing is a custom that our grandchildren have been born into because our grandfathers used to fish "(N 23).

*"They all used to fish. My father used to fish because he grew up here and that was what people from here did….I can say it was a custom because it was something that would just happen on its own and we all knew that if the sea has opened for us everyone will go to the sea even the people from Mpume would come down to harvest" (*H14*).*

"It was very common. It was very common among the family where myself, and other boys my age go with their grandfather. At times, we went together with our grandfathers and fathers … it was our tradition and customary law" (H 30).

Knowledge of how to fish and harvest is transmitted from one generation to another. Some indicated that they were not taught, but learnt through observing their elders (N6, N12, H37). Others learnt more directly from their parents and grandparents (N7, N9, N11 N12, H23, H39).

The concept of 'custom' is used in a complex, layered way by the informants. It is used to refer to habitual, taken-for granted practices, such as fishing, that are commonly undertaken by the community. This is '*isithethe*' (custom). *Isithethe* (custom) is referred to as a voluntary custom, distinguished from the term '*isiko*' (plural *amasiko*). *Isiko* is also a custom, but it is different to that of *isithethe* in that it refers to a custom that is also a ritual and conveys a sense of obligation and duty to perform the ritual and continue the custom. The concept of '*isiko*', whilst also referring to a custom and cultural practice, extends this obligation to continue practicing with a belief that if one does not practice this ritual, one will become sick as the ancestors will be displeased (N18, H40, H42). This concept of '*isiko*' thus summons a very direct reference to an ancestral interaction. Failure to perform such a customary ritual will have consequences for the people concerned.

Informants regard fishing and harvesting as *isithethe* (custom), however there were certain uses of the sea and marine resources that are considered *isiko (*obligatory rituals that are a part of their custom*)*. *"There are customs that we have that need the sea" (N10).*

In particular, going to the sea and using certain marine resources is *isiko* for traditional healers and for others when they are called to do so by their ancestors on specific occasions. The rituals performed in their community that are *amasiko* are regarded as part of their customary law, referred to as '*umthetho*' (H30, H36, H39, H42b). These obligatory customary rituals are integral to their culture (H42c). One traditional healer extended the understanding of custom. In her mind use of marine resources was not custom but rather was linked to her understanding of nature:

"*Its not a custom per se but its part of nature because we were born with things that way. But sometimes, as part of my tradition, (as a traditional healer) it happens that I have to go and perform a ritual in the water, isiko, but now we don't go anymore - like when you want to become a traditional healer your ancestors will send you to some part of the sea. But we cannot go in there anymore* (H28).

The sea is believed to hold healing powers and is an important source of medicine, known as *amayeza.* (N6, N7, N10, H31, H32). Residents refer to several marine

resources used as *amayeza* as well as those used in specific healing rituals. "*For us the sea was more like a clinic. Even our children knew that the sea is our clinic"* (N14).

Residents listed a range of resources used for amayeza as well as resources used during specific rituals.

Table 5: Marine resources used by traditional healers

Species	English name	Location where harvested	Use of species
Amayila	Unknown	Shell is collected from the shore- line (not live)	Shell is used in necklace for circumcision initiates
Ingwane	Octopus *(Octopus vulgaris)*	Rocks	This is a secret.
Ugrebe	Shark Shark Ragged Tooth (*Carcharius Taurus*) and Spotted Gully (*Triakis megalopterus)*	All along the coast – not targeted	Used to treat liver and lung disorders
Esteme steme	Skate/Blue Ray (*Dasyatis chrysonota*)	All along the coast - not targeted	Used to treat persons suffering from fits
Ubunyabenyanga	Cuttlefish *(Sepia vermiculata)*	Collected on the shoreline	To treat eye infection in cattle
Korofish eggs	Crayfish eggs *(Panulirus homarus)*	Inter-tidal	To treat infertility in cattle
Imbaza	Mussels (*perna-perna)*	Rocks	To promote fertility in women
Imbatysa	Oysters *(Striostrea margaritacea)*	Rocks	To boost libido in men
Amanzi elwandle	Sea water	Along the entire coastline	To cleanse the system, used as an enema
Umthonzima	Sea bean (*entada rheedii)*	Collected from the shoreline	Believed to hold a range of special powers

Sea water is used for healing by *sangomas* (traditional healers, also referred to as *amagquirha*), and by some churches for baptism rituals (H31). The sea is inseparable from the distinctive cultural identity of the *sangomas* of the region, who are recognised as having specific powers and connections with the ancestors in the sea (N7, N17). They play the role of linking people on the land and in the sea and undertake specific rituals in order to facilitate this (N4, N7, H39, H41). Dreams are considered central to the process of communicating with the ancestors and an ancestor might communicate

with a person via their dream and request that they go to the sea to perform a particular ritual.

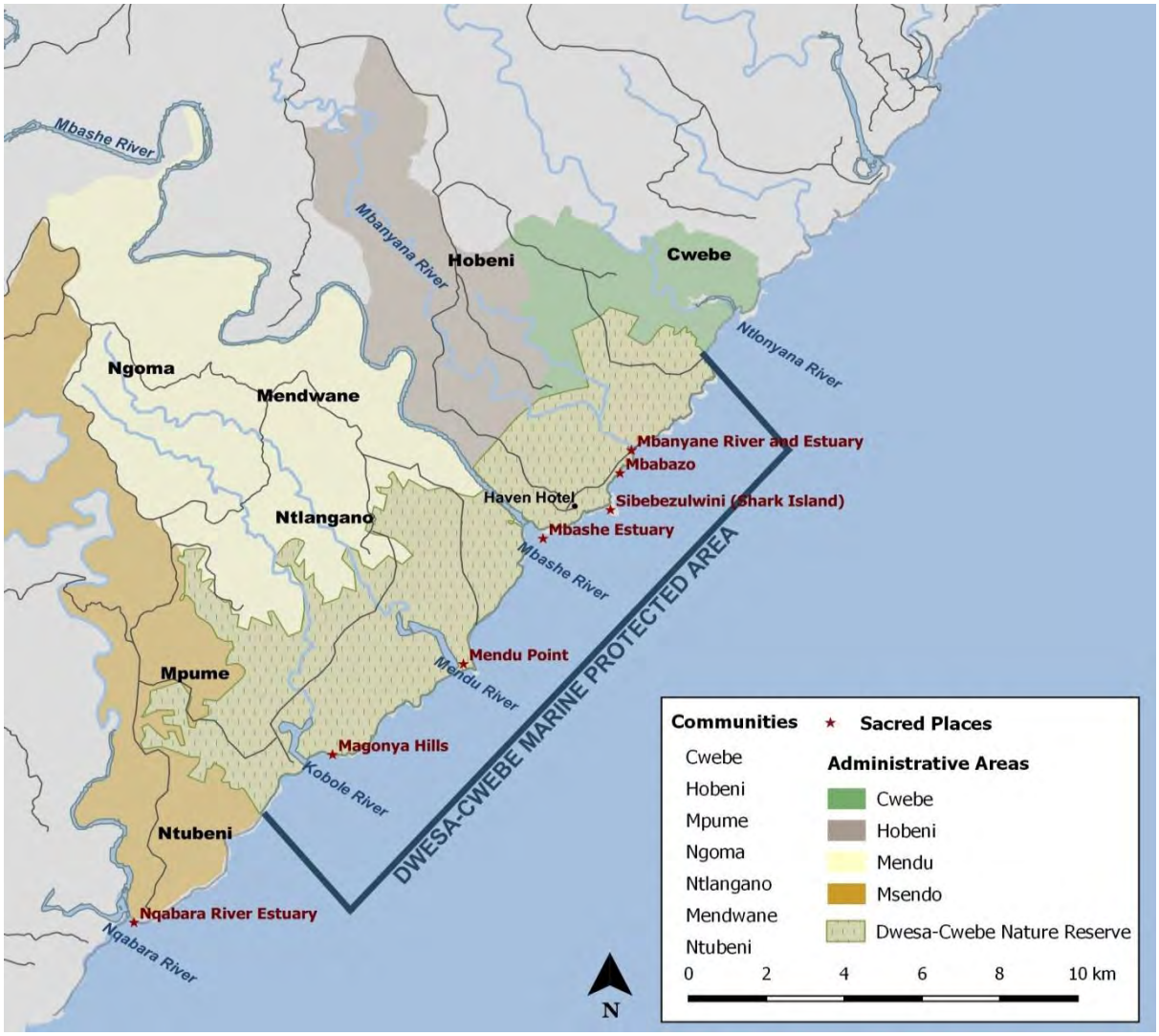

Figure 4. Map of sacred places along the Dwesa-Cwebe coast identified by Hobeni and Ntubeni fishing and harvesting groups

Several informants referred to the importance of the sea in the process of training to become a traditional healer, known as the *ukuthwasa* process (N7, N17, N4*).* Ordinary residents also participate in rituals involving the sea when instructed to do so by *sangomas*. These rituals are considered to be obligatory in terms of the authority of the ancestors. In most instances these rituals involve making a sacrifice to the ancestors such as the slaughtering of a goat.

Some residents express concern that the MPA has resulted in them not being able to perform these required *amasiko,* or cultural rituals. "*That is why we are sick because we are unable to go to those places (sacred places).The Ancestors are upset with us because we are not going there. Even when you want to do something (ancestral ritual or ceremony) and must first go to sea, now it is not possible to get in there" (*N36).

One informant suggested that it was only men who risked going into the MPA now. "*My grandparents used to go and sacrifice goats next to the sea and speak with the ancestors…..they used to do that, now it's only the men who do this customary law. I do not do it. But when I grew up, my grandparents were doing this but now we are not allowed to get in there (*H36*).*

7.2.2. The source of rights in Nature

Residents assert that because they live on this land created by God and Nature, they have the right to use the natural resources arising from and in this space. This is not a 'right' conceptualised in the Western legal sense of the word, giving them individual control over property. In fact, a local resident has argued that they do not have a concept of 'rights' similar to that used in western human rights language. "*it was not a right like we call it today, it was life. It wasn't given by the government. These words we use today are not even appropriate"* (FG H2). Rather, it reflects the existence of a system of patterning of behaviour derived from the laws of nature. When he said *'We know the law of the sea. We know the law of the forest* (H39*),* this resident was articulating more than merely an epistemological reference to their system of law. It was an ontological one, describing their distinctive way of living and knowing that draws on the natural laws of the sea and the forest.

The problematic of trying to understand these concepts of rights and law within a western legal framework is highlighted here and suggests that the use of western, statutory law to interpret expressions of living customary law at Dwesa-Cwebe cannot do justice do the meaning underlying the concept of rights unless it recognises the embedded nature of these rights within a broader system of social life, within a different ontology and epistemology. As noted by the above quoted informant, '*it was life. It wasn't given by the government* ". "*These words we use today are not even appropriate.*

Ideally we would like to live the way our grandfathers did. But perhaps we can't have that life again. Now we are living in a time of rights. So at minimum now we want our right" (FG H3). The current statutory concept of rights is seen to embrace only the minimum of the communities' relationship to the sea and its resources. In contrast, the entitlement to use natural resources and their relationship to these resources that they express is embedded in and arises from a qualitatively different set of norms and mode of interaction with each other and with their environment, including the metaphysical.

7.2.3. Rights and duties arising out of ancestral linkages

Informants refer to the customary rights that arise in the land and adjacent coastal areas as a result of the residence of their ancestors. For members of certain clans, their relationship to the rivers and the sea is strengthened by the presence of their ancestors, known as '*Mamlambo*' or 'people of the water' (N17 H32). *"We grew up being told we are People of the Water… lesiko (it is custom associated with obligatory rituals)… it is said the things of the water belong to my family' (H32).*

"Between Mbashe mouth up to Shark Island, there are sacred places that are known where certain members from different clans, from different families in the community would go and talk to their ancestors who are residing inside the water – the spirits that are living in the water. When you are sleeping some of your ancestors would come and tell you that you must go and perform a ritual there, a custom there, and he would show you how to perform or else he would tell you must slaughter a goat and stay up three days or five depending… (H39).

Residents of the Hobeni community recognise specific rocks as belonging to specific clans.

*"AmaDingatha have got their own rocks at the sea where they come for spiritual healing. They would come to that rock to talk to their ancestors. (*H 39).

7.2.4. Rights arising out of membership of the social group and associated familial duties and responsibilities

Whilst rights are held by individuals these rights are relational, given definition only through their membership of the larger group, which holds the rights as a collective

entity. The right to access and use marine resources is considered both an entitlement and a means whereby Dwesa-Cwebe inhabitants can fulfil their social obligations to feed and clothe their families, maintain their customs and give expression to the ethics underlying their worldview. Several informants emphasised the fact that the sea enabled them to meet their social obligations to feed their families and send them to school (N1, N3, N7, H42). Whilst not specifying equity explicitly, the underlying ethic that everyone should get access to the resources required to secure their well-being was hinted at in the words of another informant who said that *"The custom says everyone must eat and have access to the products that come from their community"(*H23).

It is apparent from the references to their obligations arising out of their culture, that the statutory concept of rights within which their continued exclusion from the MPA is motivated falls far short of capturing this ethical impulse underlying both their sense of entitlement to act (their right), and their duty to do so (their responsibility).

7.2.5. Rights arising out of heritage

Informants on the Hobeni side of the MPA reported that over time specific individuals acquired rights to particular rocks where they had a history of catching crayfish. *"We used to attach names to specific rocks – we called it so-and-so's 'impalu'. That is how the rocks were designated" (FG H2).*

"Everyone knew that was my father's rocks. After my father passed away, it became my rocks and everyone knew that. If someone went to my rocks without my knowledge, they knew that they would have to surrender the crayfish to me. And they would do that. Everybody knew that is how it works" (FG H2).

This practice of *impalu* was limited to Hobeni and to the practice of catching crayfish. It was however known by the whole fishing community and rights to these specific rocks were inherited (FG H2).

As can be seen from the above discussion, the customary right to fish or harvest resources draws reference from and is located within a broader customary system of local norms, institutions, expectations and obligations that shape social interactions in the community. There is no separate 'system of law'. The general living customary

norms structuring social organisation operating amongst the residents of this area give the entitlement to and practice of using marine resources its substance. It is simultaneously embedded in the larger customary governance system. In this way, what might be distinguished purely for analytical or heuristic purposes as 'law', is constituted by and simultaneously constitutive of the customary governance system. It is not a separate domain but rather constitutes a "repertoire" of norms and rules (Comaroff and Roberts 1981:9) ranging from those guiding behaviour seen to enhance the well-being of the group to those considered obligatory. This embedded nature of living customary law has been noted by the South African Constitutional Court in *Bhe*, where it was stated:

"The rules did not operate in isolation. They were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities" (Bhe 2005)[41].

Whilst this notion of the embeddedness of living customary law is often recognised, the full implications of this if one is truly seeking to understand the system on its own terms and *in its own setting*, seem to get lost. The informants at Dwesa-Cwebe articulate a world view and concept of the source of their entitlement to use marine resources and the guiding principles for how they use those resources that bears little resemblance to law as we know it in the western sense. Neither the MLRA nor the Policy on Small-scale Fisheries (DEAT 1998, DAFF 2012) reflect evidence of the above-mentioned ethical and philosophical perspectives that might inform interpretations of rights, group relations or expressions of culture along the South African coast. The implications of this for ensuring socially just governance of small-scale fisheries are discussed in Chapter Ten.

[41] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004), [para 75].

7.3. Patterns of social organisation

7.3.1. Membership and boundaries of the customary marine resource use communities[42]

Social organisation within the seven Dwesa-Cwebe customary communities is primarily but not entirely clan-based, organised broadly into groupings referred to as 'neighbourhoods' or 'sub-wards' (Fay 2003, H18, H41). The members of these Dwesa-Cwebe communities have exclusive rights to occupy this land, which is held communally, derived from their ancestors' occupation of this land. Access to marine resources is linked to membership of the neighbourhood groupings living in closest proximity to the coast and has historically been largely, but not exclusively linked to clan histories but is also gained through marriage and migration into the neighbourhood[43]. Membership comprises those homesteads living within approximately 5 km of the sea (H42). On occasions such as the full moon spring tide, residents from homesteads further afield might walk to the sea to harvest. For two of the seven Dwesa-Cwebe communities, namely Ntubeni and Cwebe, this was easier as they had immediate adjacency to the coast (See Figure 2). Those homesteads in the other five communities that access resources walked some distance through the coastal forest paths to access the shoreline.

Within the boundaries of the larger community comprising Dwesa-Cwebe (thus including all those residents who derive rights to occupy the land through their relationship to the clans who settled this land), there is flexibility in terms of membership of the group perceived as being 'fishers and harvesters'. Although the customary norm articulated by the group is that it is only the clans and homesteads residing in the neighbourhoods closest to the coast, this is also flexibly applied (FG H2, FG H3). This appears to be in part due to the fact that use of marine resources was only one of several livelihood sources. Users were free to mediate the intensity of their use over time, according to their own homestead needs (N1, H42). The system thus accommodated persons who harvested infrequently due to distance from the sea, as

[42] As noted in Chapters 3 and 5, this distinction and the term 'community' is used for analytical purposes only and in reality the boundaries of the groups overlap.

[43] This includes the neighbourhoods of Velelo, Mhlanganisweni and KwaDingata in Hobeni and Ngomane, Gume and Mkhulu in Ntubeni.

well as those who migrated away from the village for some period of time to seek work elsewhere (H42). These persons were free to harvest on their return to the village, albeit only for their annual vacation. Notwithstanding this flexibility, the customary community of fishers and harvesters is adamant that they know which clans have a history of use of marine resources.

"In the old days, like as today, not everybody was a fisher. Even today it is the people whose parents fished who are fishing. I can name the clans who were the fishers and they are still the fishers today. We all know who they are" (FG H2).

"If you went to the other side of the bridge, even today, and ask these questions to them, they wouldn't know what we are talking about. They called us bloodworms. They didn't know anything about the sea here so they wouldn't come here" (FG H2).

Whilst the use of marine resources is regarded as a defining characteristic of the groups now claiming rights to marine resources, this appears to be a distinction and identity that has gained significance largely for the purposes of their interaction with the statutory authorities in the past ten years, rather than a distinction asserted by the greater Dwesa-Cwebe communities. Although it is clear that neighbourhoods do distinguish those who harvest marine resources from those who do not, other shared aspects of their identities and material culture, such as common grazing lands and common forests, assumed greater importance. Two reasons for this are suggested. Firstly, the fishers and harvesters are embedded in a larger customary system of governance that spans the neighbourhoods, incorporating both harvesting and non-harvesting homesteads. Secondly, prior to and even after the introduction of conservation restrictions the group did not restrict the use of marine resources to an exclusive group within the Dwesa-Cwebe community, rather the sea was regarded as a resource used and shared in common (N14). Use rights were derived from membership of the group and were further defined on the basis of the needs of an individual in the context of his or her homestead requirements. The identity of a distinct 'fishing community' within the broader customary community is thus not immediately apparent.

Informants report that the coastal neighbourhoods that harvested marine resources, particularly mussels, were ridiculed for eating mussels. A very elderly man in his 90s

reported "*People as nearby as Dutwya used to ridicule us for eating seafood. They would ask us why we were eating food that resembled a woman's private parts*" (*pers.comm* Informant Research Feedback meeting Hobeni 2013). The above references to being ridiculed suggest that the taboo on use of certain marine resources documented by anthropologists (Whitelaw 2009, Hunter 1969), was prevalent in- land of the coastal areas and it was a relatively distinctive group of coastal dwellers that had consumed these resources historically.

In his work on local land holding practices in Hobeni, Xhora District, Fay (2003) has indicated that access to land in the 3 southern most localities (closest to the coast), whilst based largely on kin, reflects variability. Here, the areas are diverse in their kin composition and ties other than just kinship such as friendship, church membership, and common employment are used as a basis for access to land and residence (Fay 2003). This flexibility within the customary land allocation system must no doubt impact the flexibility of the boundary around the marine resource use groups as the custom has remained that residence in the neighbourhoods adjacent to the sea was the primary factor shaping inclusivity of access to marine resources.

Membership of these coastal neighbourhoods is cited as the primary mechanism for defining access to marine resources, coupled with knowledge and skills which are transferred from one generation to another, usually amongst kin (FG H2 and H3). These norms are flexibly applied however and it is also possible to access resources in other ways (H 42b). The community notes that women who have married out of their villages but have retained the knowledge of harvesting are still welcome to travel to the area to harvest (FG H 3). Permission can also be sought from the headman for once off access from outsiders (N7, N17, N22). This flexibility is linked to the well-established norm of sharing (*ukuhlomlelana)* (N14, N18, H24, H 27, H29, H30, H31, H37, H423) and the core value of their common humanity (*uBuntu*), which underpins the customary governance system as discussed in Section 7.4. It was also a consequence of their concept of the sea as a common, shared resource (N10). A woman mussel harvester from Ntubeni reflected on the network and social ties that bind people and shaped access to marine resources prior to the closure of the MPA: *"All households went. Only elderly people wouldn't go as they couldn't go anymore but all households had young people who could*

go to the sea or if someone did not have younger people in their home or they could not go to the sea then we would harvest for them so that everyone gets something" (N14).

Prior to the establishment of the no-take MPA, few outsiders came to harvest resources along this coast due to the inaccessibility of the area and the long distances to be travelled. Those that did come were not turned away. This degree of inclusivity is attributed to the fact that the residents from the local areas did not perceive there to be limited resources. "*There is more than enough food and fishes so there's no problem…you don't think oh they are going to finish now (and) finish your food or something"* (N22). Several residents confirmed that there was no prohibition on outsiders coming to harvest. On the contrary, they accepted that traditional healers from other clans beyond their communities were obliged to come to the sea to perform certain rituals (N7, H32, H41). This inclusivity has changed more recently with the closure of the MPA and the restrictions imposed by the DAFF individual permit system for fishing. Some informants from Ntubeni resent the fact that outsiders were now coming in to harvest abalone but that they were not permitted to do so (N7, N22). Some expressed reluctance to exclude them however in the belief that they also experienced poverty. "*When people were harvesting abalone we had some disputes about it and some were saying that people from Qora don't have a right to come here and collect abalone and others were saying no those people are also living in poverty and the sea is not ours its God's (N10).*

Their responses were indicative of the understanding of common property inherent in their world view in which they do not own the coastal land and marine resources in the western sense of ownership. They do however claim entitlement to shared use of these resources as a result of their belonging to this land (H39, H40, H41, H42).

7.3.2. Size of the customary marine resource use community

7.3.2.1 Ntubeni

In the household survey conducted in Ntubeni in 2011 for this research, out of a total of 210 households in the neighbourhood, 61 out of the 62 households surveyed, had

someone who harvested inter-tidal resources and 42 out of 62 had someone who had fished in the past 12 months.

Survey responses in Ntubeni	**Ntubeni N = 62**
Number of homesteads harvested inter-tidal resources in past 12 months	61
Number of homesteads who fished in past 12 months	42
Number of homesteads that consume everything that they catch and harvest	37
Number of homesteads that mainly sell but do retain portion for household consumption	20
Number of homesteads that sell everything that they catch	5

7.3.2.2 Hobeni

In Hobeni, which is the largest village, the homesteads using marine resources are concentrated in southern Hobeni which comprises six neighbourhoods. There are 650 homesteads of which it is estimated that at least 15%, drawn mainly from the 3 neighbourhoods closest to the sea, utilise marine resources (Sunde 2011). Regrettably a household survey was not conducted in Hobeni due to the fact that fishing and harvesting was prohibited. Data collection in the southern neighbourhoods was reliant on individual interviews and focus group discussions. However, Palmer *et al.* (2002) surveyed both Ntubeni and Hobeni and found the following:

	Ntubeni N=57	Hobeni N= 80
Households collecting shell fish	92%	5%
Households with someone who fishes	47,5%	15%

(Adapted from Timmermans in Palmer *et al.* 2002:195-196)

The number of fishers who have historically fished in Southern Hobeni and are currently seeking access to the MPA is considered to be 34 persons, from approximately 34 households (*pers.comm* Gongqose 2011). This number fluctuates between 25- 34 as some of the fishers have sought temporary contract work in other areas so they are not always based in Hobeni. A core group of approximately 10 fishers fish very regularly (H42). This was confirmed by observations over the period August 2011 – December 2012 and was also confirmed by other non-fisher respondents (H42, HKI 45). Currently, because of the regulations prohibiting them from fishing, the fishers go on average once per week or when they require food. They catch as much as they can on each trip, on average 2-3 fishes per trip. One fisher reported catching 7 kob on one trip (H16). If they catch several fish in one trip and are able to sell these fish they will not go again for that week. There is another approximately 15 fishers who fish more irregularly, when they are desperate for food. Of these, only approximately 5 will risk going into the MPA. The others are older fishermen who do not run this risk as they are elderly and less mobile (N23, 24 N42). They fish on occasion in the Mbashe estuary above the MPA boundary. It is estimated that there are 40 women harvesters in Hobeni (H36). Only a few of the Hobeni women risk going into the MPA on a regular basis due to the harsh treatment that they have suffered at the hands of the rangers over a period extending back to when the regulations first came in for inter-tidal harvesting (FG H3). Small groups of young children go into the reserve sporadically on a Saturday or a Sunday and do fish in tidal pools with handlines however they are more likely to harvest crayfish and inter-tidal resources.

7.4. Customary norms and rules related to marine resource use

As noted in Chapter Three, the process of asking questions about rules for marine resource use and governance was problematic in several respects. Firstly, respondents were unfamiliar with the term 'rules' and associated rules with the restrictions that have been imposed by government. When asked if they had had their own rules they therefore immediately responded from this perspective; *"No there were no rules during that time, we were all allowed to go to the sea* (N1) "*no there was no discrimination*" (N2). On further observation, probing and enquiry over the course of the fieldwork period a more nuanced picture emerged. The informants differentiated between what they saw as 'government rules' and the norms by which they lived. The latter were largely described as originating from Nature, dictated by the sea which was regarded as self-regulating, thereby controlling their interaction with it as well as protecting the marine resources (N6, N12, N13, N14, H23, H24, H28, H29, H32, H37, H39, H40, H41). This was summed up by an informant in a focus group:

"We didn't have strict rules about how much to catch – the sea dictated that. We had natural rules. It was imposed upon us by nature. We could only get bait at low tide to fish at high tide so we were naturally regulated" (FG H2).

Limited and competing access to land for housing, cultivation and communal grazing has led to the emergence of norms and principles guiding the customary governance system related to land. In contrast, for marine resources, where abundance was still assumed and the limiting factor was the external imposition of statutory restrictions, rather than any endogenous limits placed on this access, very few norms and rules restricting access have evolved. Bigalke, conducting research on harvesting practices along this coast, confirmed this, noting that, in addition to the absence of any statutory legal presence, 'the collection and eating of shell fish is remarkably free of restrictions imposed from custom and belief" (Bigalke 1973:165). He did observe that there is a system of local knowledge operating in that " In every place visited along the coast informants claimed that they did not take immature molluscs as they wanted them to grow big so that they could be used at a later date" (Bigalke 1973:166).

Beyond the belief that they live according to "natural rules" that regulate marine resources (FG H2), there are very few explicit rules restricting the use of marine resources, rather the rules and norms are latent or tacit (Vandenlinden 1972, 1989), embedded in the expressions of customary law institutions and patterns of guidance for behaviour created by the broader customary system of governance. This is significant as it differs from many customary marine resource use and governance systems documented in the literature as discussed in Chapter Two where systems of very distinctive marine resource specific rules and associated institutions for enforcing these marine related rules can be discerned. The reasons for this are suggested by informants below and are analysed in Chapter Nine.

The established norm is that households are entitled to harvest and fish as much as they need to feed themselves (N1). Further, a strong norm of sharing the catch and the harvest with one's neighbours prevails (N14, N18, N24, N27, N29, N30, N31, N37, N42). As noted above in Section This norm of sharing, known as *ukuhlomlelana*, is taken for granted. It prevails in particular if there are elderly people living in the neighbourhood who can no longer go to harvest themselves. In this instance an informant reported that others would harvest on their behalf to ensure that "*everyone gets something"* (N14). A young 20 year old fisherman confirmed this: "*We always do that. If I get two fish, I can maybe give him one and I take one home. Or if the fish are small, I will say lets go home and we will cook them together and we eat as a family, with him included*" (H 31). One informant stated "We must share. This is '*umthetho*' (law), you must share. It comes from *abantu abadala*, (the old ones), the ancestors" (H 42c). Another stated that "*it is a way of doing things because we grew up knowing that we have to share what we ge*t" (N18).

The interpretation of this custom, as customary law, is nuanced and is expressed slightly differently by different informants. Some informants state that whilst this is not an obligatory custom (*isiko*), it is voluntary but it is what is practiced by most people and it is the behaviour they are taught that is expected of them. In this interpretation, it is still an expression of customary law (*pers.comm* Mponono 2014). Others indicated that its not obligatory per se but its interpretation as obligatory is context dependent. "*It's not a custom but if someone is asking for something from you, you do (it), but it also*

depends on the relationship you have with your neighbour, if they normally share with you, you also share with them" (N6). Several informants identified this practice of *ukuhlomelana* as an example of the value of *uBuntu* (N22, H31, 42c).

The absence of explicit rules around marine resources in general was interpreted as a result of the fact that there was little competition over resources (N22), *"we have never had anything like that*", the reason given was that it is because "*people harvest just enough for themselves*" (N1) and there was more than enough resources and the resources have not been depleted, nor are they likely to be depleted as the sea regulates the harvest through the tides and the weather (N14,H36,H28,H32)[44].
In this customary system, it was apparent that a range of norms and rules exist comprising guiding behaviour from custom (*isithethe*) through to obligatory behaviour (*amasiko*) related to the:

- tides and time of day for harvesting and fishing (*isithethe)* ,
- transmission of local ecological knowledge about the species and habitat (*isithethe*),
- nature of the gear used and skill of harvesting specific resources (*isithethe*),
- prohibition on using certain land based organisms for bait (*amasiko*),
- customary belief in the powers of the sea, associated with the ancestors and various taboos linked to the need to respect these powers (*amasiko)*,
- Cultural rituals and use of the sea for specific clans (*amasiko*)
- Cultural rituals incorporating use of the sea on instructions from the ancestors through dreams or instruction from a *sangoma* (*amasiko*)
- Cultural rituals involving the sea during the *twasa* (training) process for *sangomas*
- Specific cultural taboos in relation to access to the sea for twins (*amasiko*),
- Prohibition on girls and boys accessing and using the sea during the time when they are going through customary rites of passage associated with the onset of menstruation or initiation into manhood (*amasiko*).

[44] The disjuncture between this view and the view of many marine scientists who have conducted stock assessments on this coastline is noted and discussed further in Chapter Nine.

- Restriction on size of the species harvested (*isithethe*). Youngsters learn that they must leave the smaller organisms and fish to grow to maturity. No one may harvest female lobster with eggs.[45]
- Guidance on the amount harvested (*isithethe*). This includes the harvesting of resources for local sale in order to provide for household needs. This measure does not appear to have been defined or elaborated into guiding quantities and is left to the individual to establish.
- Guidance on sharing of resources (*isithethe*),
- Medicinal use of resources and knowledge associated with this (*isithethe* and in some instances, *amasiko*).
- In the Velelo neighbourhood, Hobeni, where residents have to walk through the coastal forest to get to the sea, the residents have a particular custom that requires that a child must wear a necklace drawn from the forest before he or she can greet the sea for the first time. This custom is no longer practiced continuously across the village, due to the closure of the reserve to the community (*amasiko*).
- Some women report that they must perform a cleansing ritual near the tidal area where they will harvest prior to harvesting if they are menstruating but this custom was not widely reported.

This repertoire of norms and rules outlining guiding behaviours and obligations are all considered to be expressions of customary law (*umthetho semthetwini*). It is seen as the guidance on how to live in their culture that comes from the ancestors (H39, H42b).

The above-mentioned norms were commonly known and verified by informants in the Focus Groups although it was noted that the norm related to the necklace, as well as that related to menstruation, are no longer evenly observed.

In the context at Dwesa-Cwebe, where the angling for fish off the rocks, and the harvesting of inter-tidal resources is undertaken by an individual and the techniques and equipment used do not require extensive co-operation amongst fishers and

[45] This contradicted local knowledge that I was given that crayfish eggs were useful as medicine to treat infertility in cattle (N18).

harvesters, relatively few rules have been articulated. The relative accessibility and perceived abundance of the marine resources available at Dwesa-Cwebe has not necessitated the elaboration of sophisticated rules of exclusion to manage competition. On the contrary, residents indicated that they are motivated by a need to be inclusive and ensure that persons from outside who might require marine resources be allowed to access these resources (N10). They indicate that their belief in the abundance of the resource and the natural renewable nature of the resource has precluded the need for tight restrictions on who could and could not access the resources historically and hence they have not developed rules related to exclusion but have maintained flexibility of the system. However, they have had *de facto* exclusivity as they indicate that, up until very recently, when abalone harvesters have come from outside their villages, there have been very few outsiders wishing to gain access to their resources. This is thought to relate partly to the communally owned nature of the land comprising the Dwesa-Cwebe area, on which the Dwesa-Cwebe communities that comprise the Land Trust have exclusive rights of occupation. Permission to occupy land in this area must be sought from the local neighbourhood authorities and is reported to the Traditional Authority. In addition, the very inaccessible nature of the area, with no transport infrastructure and very poor roads hampers visitors. The relatively recent incursion of abalone harvesters from outside the community is an exception[46]. The customary marine resource tenure system that has emerged at Dwesa-Cwebe is embedded within the broader architecture of social organisation and decision-making around natural resources. This system of tenure thus draws on the institutions guiding expressions of living customary law, social structures and processes of the customary system more broadly for its governance functions.

7.5. Customary authority and institutions of decision-making in the customary system of governance

The primary unit of organisation is the homestead, inclusive of all the households that make up this immediate kinship group. Whilst all individuals, both men and women, have the right to harvest or fish, agency and authority within the marine tenure system to make decisions regarding marine resource use is vested at the household level and

[46] The management of these intrusions by abalone harvesters into their territory is discussed in Chapter Eight.

individual households within these homesteads decide if they will harvest, when and what they will harvest (N1,N2,N10,H42b). This decision is influenced and guided by the obligation and duty on the male and female adults in this household to provide for their household, contribute to the maintenance of the homestead at large (N1, N7, H42b) and to honour their ancestral connections. Timmermans confirmed the findings of this research that kinship obligations, rights, duties and patterns of reciprocity are strong at this level of immediate kin and at the extended kin level (Timmermans 2004:125).

This layered, nested structure of access and use rights is reflected in the land tenure system. Informants confirmed that decisions regarding land allocations for residential purposes are also first managed at homestead level, thereafter activities impacting neighbours, such as allocation of additional land for a house, extension of gardens or fields and decisions regarding allocations of land for cultivation or grazing that impact neighbours are managed at neighbourhood level. They involve deliberation with the neighbourhood members, in most instances including the sub-headman. The group will then inform the Headman (N 1, N18, N22, H40, H 42b). Although in many areas, due to the powers conferred on chiefs under colonialism and apartheid, land is considered to be allocated by chiefs, this is not the case in Dwesa-Cwebe where control vests with the collective at neighbourhood level, under the authority of the sub-headman, but the Chief is informed (Fay 2003, H 40, H41, H42b). Norms and rules related to access to land within the various neighbourhoods are well established but are also flexible and dynamic (Fay 2003).

Management of communal grasslands for grazing was controlled at neighbourhood level. For example, in Ntubeni a decision to undertake deliberate burning of grassland to encourage productivity was taken in consultation with the local sub-headman (N18).

7.5.1. Structures of traditional authority within the customary governance system

Neighbourhood level authority is organised around the sub-headman, who derives his or her authority from the neighbourhood, usually represented by a group of male elders from the homesteads in the locality. This accountability is most visible in the everyday

interactions of the sub-headmen in most of the neighbourhoods where they tend to be surrounded by a group of men at any given time of the day. As noted above, at this level of the neighbourhood a number of shared decisions are made regarding natural resource use such as approval for land allocations or when the group should burn grass to ensure that there will be sufficient grazing for their cattle. In Gume and Mkhulu neighbourhoods of Ntubeni, the sub-headmen are fishers themselves and in Velelo, a neighbourhood in Hobeni where the majority of the fishers live, the sub-headman is also a fisherman.

The practice within the customary system of governance for the appointment of a sub-headman varies between Hobeni and Ntubeni. Whilst the stated customary rule in Hobeni is that the sub-headman is chosen for his leadership qualities, in practice this position was transferred along patrilineal lines from father to son (Fay 2003:168). In Ntubeni however, in practice the sub headman is chosen by the community for his leadership skills and if he is known to be a person of wisdom (Ntubeni Group discussion 2012). Fay notes that there are examples of cases in Hobeni in recent memory, where the subheadman has been replaced on the demand of the community due to allegations of corruption. In other instances the ruling lineage "lent the position to other families because the appropriate heirs were away as migrant labourers" (Fay 2003:165).

Most neighbourhoods also appoint a person who acts as a deputy-sub-headman who takes leadership in the absence of the sub-headman (N16, H24). The sub-headman is responsible for a wide range of activities: from identifying persons suitable to participate in the Expanded Public Works Programme[47], assisting with applications for identity documents (H24), to counselling a woman whose husband has cheated on her (N12). The sub-headmen are also involved in additional decisions related to the interaction of the neighbourhood with the Ward Committee, elected in terms of the new local government municipal structures. In all the neighbourhoods visited for this research in Hobeni and Ntubeni the customary structure works together with the ward committee (N12, N18, H24) in matters such as selecting beneficiaries for employment opportunities in development projects, in undertaking Census surveys, and in drafting letters of grievance related to access to resources.

[47] A state funded public employment programme

In Ntubeni and in Hobeni, the *Nkos*i, also referred to as the chief or headman in this district[48], both live inland of the coastal zone, neither are fishermen and they have not been involved in decision-making over marine resources (N18, N41). This was confirmed by the residents who indicated that "*going to the sea has never had anything to do with the chiefs*"(N3, N1, N2, N5, N9, N10, N11, N14, N23) and "*here was no chief who rules the sea. Not even now. It would be just a wish if a chief wanted to do that" (H24)*. *"It was already like that when we were born. The people used to do things on their own and the government didn't take part in anything. The government was just there and we used to have chiefs even back then so the government would communicate via them on some issues – (but) not the running of the whole community"* (N3).

The Chiefs are informed about what is happening at neighbourhood level regularly at a meeting at their homestead, also referred to as *komkhulu* or 'the Great Place'. These meetings are attended by sub-headmen as well as male elders who are considered the advisors of the Chief (H42). Their authority is summoned when there is a crisis or conflict that cannot be resolved at the level of the clan or by the sub-headman at local neighbourhood level. Asked specifically what happens when there is conflict *"The rule is that all matters are taken to the headman (meaning sub-headman in this context) and people have a meeting to decide on a way to solve a certain problem and then everything is resolved (N7).* It was reported by one informant that in the time of his father and grandfather, the elders were responsible for '*ukuqulunca umthetho wemveli'* (formulating customary laws) and this took place at the Great Place (H39).

In Hobeni the Chief has requested the local sub-headman residing closest to the sea, who is himself a fisherman, to assume responsibility for interacting with the government authorities on matters relating to fishing rights (*pers.comm* Chief Fudumele 2011). This appears to be perceived by both parties as more of a referral to the appropriate authority rather than devolution of power. This is reflective of the level of decentralisation of this customary system that has always existed in relation to marine resource use.

[48] See Table 1, Chapter Three. The term Chief or headman is used to indicate the Chief of the Administrative Area. The term sub-headman is used to indicate the traditional authority at the neighbourhood level.

When asked if use of marine resources was discussed at the regular meetings at either the Chief's kraal or those held at the sub-headman's kraal, a resident was adamant that marine resources were seldom the subject of discussion. When asked why she said *"it's just because they know you can just go on your own or you can go with someone, the neighbour, do what you want to do in the sea.* (N22).

7.5.2. Gendered nature of customary authority

Notwithstanding the existence of a woman Chief in one of the other 5 communities in the Dwesa-Cwebe area, informants confirm the patriarchal nature of customary authority structures which was very evident in my research. However, they also indicate that increasingly women are participating in neighbourhood and community meetings (N18, N22, N42c). Citing the example of land allocations, one male informant suggested that although the norm has been that women were not involved in land related meetings, because of out migration, women now often hold greater knowledge than men about the history of the neighbourhood, land tenure and related issues, and hence it was becoming evident that they needed to participate in these meetings and the sub-headman often refer to them on issues linked to the history of a piece of land (N18). In addition he noted that women's participation was now in the Constitution of the country (N18) whilst another referred to the gender equity requirements of the CPAs which secure women's involvement in decision-making (H42c). A woman informant confirmed that the norm has changed and that women are participating actively in many meetings at neighbourhood level and suggested that women may raise different points at meetings to those raised by men and this was increasingly appreciated by both men and women (N22). The prominent role played by women in harvesting marine resources appears to have shaped their power within more recent statutory processes related to these resources. Their right to access these resources and to participate in decision-making in relation to these resources was not questioned (Personal observation at the Community Mapping meeting, Hobeni 2012).

7.5.3. Neighbourhood governance institutions, processes and practices

Practices related to the on-going maintenance of the community through social organisation and institutions such as the custom of a weekly meeting of male elders at the homestead of the sub-headman; obligations and expectations around the reciprocal contribution of labour for neighbourly celebrations and rituals and the practice of specific values and norms provide the broader architecture within which customary marine resource use and governance is located.

The customary way of life in Hobeni and Ntubeni comprises an intricate weave of relationships within neighbourhoods that form the basis for the local institutions of governance. These relationships are sustained through a range of cultural rituals and ceremonies that bring residents together at neighbourhood level on a regular basis. A ritual to thank the ancestors for the birth of a new child and to ask for its protection, known as *imbeleko,* is commonly practiced. Usually a goat is slaughtered to offer to the ancestors. The ritual *ukubuyisa i*s held to make a sacrifice to the ancestors on the departure and burial of a loved one. Neighbours invite the entire neighbourhood when they wish to thank the ancestors, a practice known as *ukubulela abadala*. They brew beer, *utwayla*, and share this with their neighbours. These rituals and ceremonies are *amasiko, (N18b, H42c, Hobeni Report back group 2013)*. As obligatory rituals, they constitute part of the customary law of the community. When these rituals are held it is the norm to invite all the homesteads in the neighbourhood. In some neighbourhoods the male elders also customarily gather at least once a week at the homestead of the headman or the sub-headman to discuss the affairs of the neighbourhood (N12, N18). These many regular social interactions constitute local institutions and processes, reproducing the customary relations that comprise their local system of governance. Although the patterns of migration to the city in search of work has impacted homestead life and altered these rituals, they continue in all neighbourhoods. McAllister (1988) and Fay (2003) suggest that changes in homestead structure as a result of migratory labour, has increased neighbours' dependence on each other and the need to maintain the social relations that enable them to draw on each others' labour and resources when needed.

One of the most important customary rituals integral to the cultural identity of the neighbourhood clans is the ritual in which young men are initiated into manhood. This ritual is usually held when workers return for their annual leave. During this time even those households with the least presence in the area due to their migratory status once again becomes active in the affairs of the neighbourhood. The male elders appoint other young men who will act as guides and accompany the initiates in the weeks preceding their departure into seclusion. Prior to the initiates' departure, each of the initiate homesteads will brew beer and the entire neighbourhood is invited to come and share this beer. The entire neighbourhood is also involved in the celebrations and rituals at the end of the initiation. The female relatives of the initiates will brew beer and there is an expectation that women from the entire neighbourhood will contribute labour towards the cutting of grass for the preparation of the initiates hut, *imbombi*. The building of this hut is the responsibility of both men and women from the homesteads of the initiates but in most instances all homesteads assist with the building of this hut.
This ritual is considered a critical one for the transfer of the cultural obligations and duties of an isiXhosa man and the customary knowledge and laws, *imithetho,* of his culture (N18, H41, H42b).

In the past an important stage in the final ceremony when the initiates return to their neighbourhood, was the placing of a necklace around the initiates neck, normally by an older female relative from his clan, made from *amayila* shells, collected from the Dwesa-Cwebe coast. This ritual symbolised the fact that the young man was now initiated into how he must respect and interact with older women (H42b). This practice is no longer practiced by all families due to the difficulty of collecting *amayila* shells now that the MPA is a no-take area (H42b, N18).

In both Ntubeni and Hobeni these ritual neighbourhood gatherings span homesteads that harvest marine resources and those that do not and there is an assumption of a reciprocal duty to assist your neighbour during these rituals (H42c). These day to day interactions reflect a distinctive approach towards social interactions within this culture. Most significantly, the ethic and ideal of *uBuntu* underpinned social interactions and the functioning of these local level institutions. This value is foundational and stretches beyond the use of marine resources, providing an ethical

framework within which much social interaction resides. The workings of this ethic and its associated values emerged on my first field trip. When asking a group of young women in their early twenties to describe their actions when they go harvesting for mussels and what they do on their return to their homesteads the women described how, on their return, they will empty the mussels out on the grass near their houses and then will share them with any neighbour walking past or anyone who needs them (personal observation 2011). When asked what they called this and why they did this the young women laughed as they struggled to find words to describe this action which they said is just 'everyday life', it was 'how we do things', it was taken for granted interactions with the people around you. When asked if they had a word to describe this in isiXhosa they struggled until one young woman said '*its… uBuntu*'. The others agreed. They explained that this meant that you must share with your neighbours and they must share with you, this was how they grew up. Subsequently several informants volunteered the word '*uBuntu'* when asked what they called the taken for granted obligation to share marine resources with their neighbours. "*UBuntu is the way we grew up things happening. I can say it's our isithethe (*custom*)…I don't know… it is the way we grew up things happening in our community. Someone comes from that place there… …asks for help here and you can help him out or her out. If you've got maybe mealies in the garden and she has no mealies, you go to the garden and give a dish of mealies to her*" (N22).

Reference to '*uBuntu*' went further than this notion of sharing. It referred to a subtle perspective on the need to reach out to your neighbour, to participate in community life. In the words of another man:

"If something happens next door I have to go there to show support and to be told what has happened. If I don't go when something happens in my own house no one will come" and "My father taught me that if I am to have a ceremony I have to tell the other families about it so that the people can come and so that if something happens tomorrow those people can be able to help me….. so I shouldn't do my own thing" (H23).

UBuntu stretches beyond a simple imperative of reciprocity; it speaks to the understanding of the development of the individual in interaction with community. It was visible in a wide range of everyday interactions, including the sanctions that are

metered out by the elders when someone is accused of wrongdoing. The emphasis is on maintaining relationships with others.

As noted in Chapter Two, Fay and Palmer (2002) observe substantial socio-economic differentiation between communities in Dwesa-Cwebe. Significant differences present on either sides of the Mbashe River and these differences underpin the politics of the identity of the community in its interaction with the statutory authorities. Fay and Palmer (2002) assert that intra-community differentiation correlates with two key variables: the developmental cycle of the homestead and the gender of household heads (Fay and Palmer 2002). Power relations within both Ntubeni and Hobeni are largely centred on who has access to additional resources beyond the limitations currently imposed by the no-take MPA, the Reserve restrictions and the relative lack of livelihood alternatives. It was apparent that the predominantly subsistence nature of current levels of harvesting, coupled with the distance to markets, give few homesteads an advantage over others in relation to access to marine resources. Nonetheless, class differentiation is visible in the size of houses, ownership of vehicles and the number of cattle. Some households have leveraged additional power through their access to finances from pensions, remittances and outside employment, thereby enabling them to establish local shops, taxi services and taverns. One sub-headman has used his transport company to develop a sand-mining business which has evoked resentment amongst the local population as he is using sand from the coastline adjacent to their homes. However, there was no evidence during my fieldwork of social stratification in the marine tenure system of the community resulting in preferential access to marine resources or that the obvious power of these individuals and households has reduced the power of other fishermen and women harvesters in relation to access to and governance of marine resources.

7.6. Conflict resolution and management of disputes

With the exception of the example cited above, where outsiders enter their customary territory to harvest abalone specifically, the informants overwhelmingly asserted that there are no conflicts between residents about marine resources and could not cite one. When questioned as to how a dispute would be managed should one occur they said

that conflict and disputes in general are first managed at local level between the parties involved. This first level is the level of the household and at neighbour level. If this is not resolved, parties will go to the sub-headman. If the sub-headman cannot resolve this it will go to the Chief (N18). "*if someone had a problem she goes to the sub-headman and the sub-headman calls the meeting ….They try to sit down with them and talk it through but if they can't resolve it they tell them to go to the chief*" (No. 40). *" if we have a problem… we go to headman and then he directs you to the chief. If it is too much for the Chief to handle he sends you to the police in Willowvale (*N 9)[49].

If a dispute or problem arises and residents take this to the sub-headman, the process that will be followed is that the sub-headman will call a meeting, referred to as the sub-headman's court (*iinkundla*) (Fay 2003:168). He will request the elders to attend and anyone he thinks has knowledge that has a bearing on the meeting. The process takes the form of a deliberative consultation, with the sub-headman asking the persons present to air their views on the matter. The sub-headman first listens to everyone's opinions on the matter (H42c). The emphasis in the normative account given by informants is that the sub-headman will canvass the views of the group and take advice from them, thereby strengthening the levels of accountability in the system.

7.7. The transmission of knowledge, culture and the customary system of rights and duties

Transmission of cultural practices, customary norms and guidance on customary laws takes place in different ways. Key rituals contribute to the continuation of these customs through the transmission of knowledge of and respect for the customary structures, institutions and processes of governance as one is initiated into adulthood. Children are introduced to core values, knowledge and practices including their obligations to others and to the ancestors at an early age and learn from observation and participation in these rituals as to which are obligatory and which constitute guiding behaviour that contributes to the wellbeing of the group (N22).

[49] In some instances residents refer to the sub headman as the headman and the headman as the Chief.

7.8. Conclusion

This chapter describes and interprets the character of the customary system of governance in Ntubeni and Hobeni. It has attempted to explore the nature of this system *in its own setting* and *on its own terms*. The sea comprises an integral component of the cultural practices and identity of the Hobeni and Ntubeni peoples. Their social-ecological interaction with their marine environment is shaped by, and in turn, shapes, a set of shared ethics, norms, values, concepts and interpretations of human nature.

Their rights to use these resources arise through this socio-ecological interaction. Their distinctive governance system reflects these expressions of living customary law embodied in their culture and in the marine tenure system. These expressions of living law do not constitute a separate juristic domain or distinctive 'system of law'. Rather, this 'law' is rendered visible through the architecture of the social institutions, cultural processes and material practices which structure and are in turn structured by people's everyday interactions. This living customary law draws on the broader customary system of governance for its epistemic and ethical authority, for its institutions and its practices. As such it is an inseparable part of this broader customary governance system.

This governance system differs considerably from those normally espoused by fisheries governance and management models, where a distinctive 'fisheries governance system' is discernable, with fisheries institutions and regulations based in statutory law. Firstly, it is based on an ontological positioning of the individual in relation to the group that is itself rooted in relationship to the natural world surrounding it. This relationship is interpreted as the first principle structuring a person's entitlement to use the natural resources on the coastal land occupied by their ancestors. They are entitled through their ancestors' occupation of this territory, in-relationship-to-others and to nature, to use and manage the land and its resources that they hold in common. This is an expression of living customary law.

Secondly, this system of customary governance spans a different concept of juristic persons. It includes the ancestors who are believed to mediate and shape the relationships that people have with the land and sea-space. Thirdly, power is located at the level of the household and 'the people,' and moves upwards as authority for decision-making is derived from the local neighbourhood group. The relationships between homesteads at the level of the neighbourhood provide a frame for horizontal accountability. Disputes are managed at this level with the interests of the broader group in mind. Fourthly, there are relatively few marine resource use specific rules and norms as marine resource governance draws its patterning from the broader weave of norms, values, institutions and processes that constitute the customary governance system of the neighbourhood group as a whole.

CHAPTER EIGHT: THE INTERACTIONS BETWEEN CUSTOMARY AND STATUTORY LAW

" Here we were born ruling ourselves, not ruled by government. We are ruled by the sea. We are ruled by the moon – when it becomes full, when it has waned" (H39).

8.1. Introduction

As indicated in previous chapters, the customary system of governance of the Dwesa-Cwebe communities has interfaced with the statutory system of governance since the imposition of colonial authority in this region of the Eastern Cape as early as the 1890s. Whilst the full impact of the statutory system has been mediated by the relative lack of reach of these authorities, the customary system of governance and the expressions of living customary law that inform this governance system have developed and changed in interaction with the statutory system. This chapter seeks to understand the concept of 'law' within this customary governance system at its interface with other systems of governance and law.

8.2. Changing governance and the arrival of 'Nature's Law'

The interface of the customary and statutory systems of governance became more visible with the physical markers of exclusion, given substance with the fencing of the reserve and the introduction of regulations restricting access to the coastline from 1975 onwards.

The fencing of the Reserve between 1977 and 1982 signalled the imposition of a new approach to governance that was foreign to the Dwesa-Cebe residents (N5, N6, N14, H23, H 26, H28, H33). Most ironically, given the place of the laws of nature in their own cosmology and epistemology, statutory law came in the guise of 'Nature', the term that many residents use to refer to the Nature Conservation authority. 'Nature' arrived on their doorstep and fenced them off from the natural resources that they depended on for wood for building of houses and kraals, for grazing for their cattle and for access to marine resources.

"*No one came to talk to us as the fishermen. They just said that Nature was here to guard and reserve everything, even the material that we used to build our houses with from the forest. They just said we were not allowed to go in" (H23).*

This new system of governance under Nature Conservation introduced a new system of law:

> *"Perhaps Nature is using the law given to them by government. We do not know this law. All we know is that you are not allowed into the forest – from the forest to the sea "(H28).*

When asked where this new law came from informants were uncertain "*We don't know. We just think that it's the changing times now that the government has gotten involved in the use of the marine resources" (N6).*

The residents report a series of changing governance authorities over the past four decades since the establishment of the reserve, each with their own set of rules about access to and use of resources. They differentiate between the regime under the Transkei Department of Nature Conservation, when they had some access initially but had to pay a fee to enter the reserve, to that of the Eastern Cape Parks Board (ECPB), which they associate with the complete closure and prohibition on access to marine resources (H34, H36, H39). *"Previously the rangers just looked around the forest for wild animals and did not care what was happening in the sea….It changed when Nature Conservation came in, but we were allowed to go in although we must pay when entering the gate. The new situation, new experience, was the new company, Parks Board. We had no permission to go in, we would be caught" (H34).*

In 2000, following gazetting of the MLRA no-take regulations, ECPB was managing the Dwesa-Cwebe Reserve but had no legal or other capacity to enforce compliance with the MLRA in the MPA. This situation came about as the DEAET, to whom the ECPB was contracted to manage the reserve, had no contract with the national department to manage marine issues which were a national competency. There was thus still considerable overlap in the legal regime. The old 1992 Transkei decree had yet to be repealed and the DEAET and ECPB were implementing these provincial regulations. Simultaneously, the MLRA indicated that all MPAs must be managed in terms of the MLRA and its

regulations. In 2003 DEAET indicated that "there are no established processes within DEAET or between DEAET and Marine Coastal Management (MCM) in DEAT to address MPA issues and as such, MPAs are not properly managed" (Lemm and Attwood 2003:15). Further, they admitted that they were still operating under the old Transkei legislation and were not enforcing the MLRA as they did not believe that they had been adequately consulted about the MPAs in the Eastern Cape (Lemm and Attwood 2003:15).

8.3. The introduction of monitoring and enforcement

Following the provision of additional enforcement capacity to ECPB in 2004, compliance monitoring and enforcement commenced in Dwesa-Cwebe in terms of the MLRA regulations as gazetted four years prior to this. Residents, in particular those from Hobeni who had no other access to the coastline, report that they continued to fish and harvest "*but underground*" (H25). They had to "*sneak in during the night*" (H23, H29, H31), and "*you must hide yourself from the rangers*" (H25, N35), "*taking a chance*" (N22). Several women report that they were forced to harvest as they had no food in the house and needed to feed their children (N19, H38). One resident remembered a night when he went into the MPA because he was hungry: "*I was hungry and I could see that if I don't go there I will die. Then I said they must kill me if they want because I was going to harvest so that I can eat"* (H32).

During the past 10 years since the implementation of the MLRA in 2004 there have been numerous arrests and prosecutions; however the exact figure is unknown. Many residents reported being chased by the rangers (N22, N25, H32, H37 FG N3, FG H2 and FG H3) and arrested by the rangers (N4, N7, N15, N19, H28, H34, H38, H42, FG H3). A number of these persons report having been kept in the police cells and then released without being charged whilst others appeared in the Willowvale or Elliotdale Magistrates Court, the two local courts serving the magisterial districts within which Ntubeni and Hobeni are located. Several served periods in jail, including a young woman with children under the age of two years (H23, H38). During the period march 2009 to mid-2011 there were 25 persons apprehended in MPA cases recorded by the Dwesa Reserve Manager. Of these, 8 persons were fined in court for illegal fishing and received fines of R5000 and R6000 whilst four were fined by the Park itself for amounts

ranging from R 120 to R400. Ten persons were on bail with court cases pending. In 2011 ninety (90) incidents of illegal entry into the MPA were captured on the Conservation authorities' hidden cameras in one month (*pers.comm* Jan Venter 2011).

Prior to 1994, if someone transgressed a customary norm the matter would first be dealt with at the level of the neighbourhood customary authority. If need be they would be referred to the chief (N7). Such matters were dealt with and resolved at this level and only crimes that could not be dealt with at this level such as rape or murder were referred to the police after they had been referred to the headman (H42c).

Now the conservation management authority works closely with the police and matters are referred to the police in most instances, with little opportunity for addressing the infringement and seeking resolution at local level. *"Now they don't even take you to the headman; they take you straight to Elliotdale*" (FG H3). The shift in authorities has confused the community who are used to their customary system of authority. "*When we get caught no one takes us to the headman (now), they go straight to Dwesa or Willowvale* (N9).

"*It has impacted on us by the fact that the rules keep on changing now and everyone (has become) connected. For instance, if you get caught by the rangers from Dwesa they will call the police from Willowvale so everything that is governed by the government has everyone involved in it*" (N14).

Informants made allegations of physical abuse and violations at the hands of the rangers: "*they beat you"* (H34),"*they put plastic bags over people's faces*" (FG N 3). One resident noted four people who have been wounded by gunshot (H39). A young man reported being arrested with his friend. He said if this happens *"They will give you a stick and give me one, you have to beat me and then I have to beat you too. They will take the stick and show me how to beat you"* (N31). Four residents referred to the killings of three community persons by the rangers. Two men were killed by rangers whilst harvesting wood in the forest and one whilst he was fishing (H23, H26, H29, H38). In August 2011 TRALSO made a submission to the South African Human Rights Commission based on allegations of human rights abuses made to them by the Mendwane, Hobeni and Cwebe communities. This submission alleges two deaths at the

hands of the rangers, an alleged rape and 28 cases of unfair and brutal treatment (TRALSO 2011)[50].

The treatment from the rangers and officials in response to the communities' continued use of the MPA is very varied and appears to be inconsistent. "*It depends on what type of guy you've met on a particular day – some do not give you a warning, some give you warning* (H30) and "*They employ different people, some would open for us and others wouldn't*" (N6). Residents allege that some rangers target them but ignore the outsiders harvesting abalone (N7). They also implicate the local police in working with the outside harvesters complaining that "*we cannot harvest the abalone but they can and they come with connections to make the police lose the dockets when they get caught*" (N13). One fisherman alleged that the rangers discriminate against them: "*What we have noticed is that the white people can sometimes go and fish but when it is me who goes the people ask questions from the gate but the whites are allowed to go in with their fishing rods" (H23).*

8.4. The introduction of a statutory permit system for marine resource use in Ntubeni

In approximately 2003 DEAT began rolling out its policy on subsistence fisheries nationally, providing coastal communities in the Eastern Cape with subsistence exemptions to harvest resources for the first time (Raemaekers 2009). These permits finally came to the two communities living outside the MPA adjacent to the coast, Ntubeni and Cwebe, in 2009, permitting them to harvest outside the MPA. They have not rolled this permit system out to the Hobeni community or the other four communities to date. The Ntubeni informants report that the process was a haphazard one with an official coming to a community meeting and then informing them that those who wanted permits must attend a meeting at the local school and register by putting their names on a list (N1). They were merely informed that they had to get a permit.
"*The government came to tell us and give us a way of how we should do things and then they told us what they were going to do*" (N10). "*They only brought them. They did not come to ask anything about how we feel about them*" (N13).

[50] The Eastern Cape Human Rights Commission has yet to respond to this submission.

Several residents complained that the means of applying and distributing permits is haphazard, taking place annually at a meeting at the local school but with little prior warning (N7, N9, N10, N11, N15, N14 and FG N3). If a person does not attend that meeting and register each year, then they do not get a permit for that entire year and will be subject to prosecution (N15). Several residents reported not having permits as they were unable to attend or unaware of the meeting (N14, N11). "*I don't know where to get the permit because those people come there at school whenever they like. You can't say oh I must go there to Mr Mbola (*the sub-headman*) or I must go to Willowvale (*the magistrates court or post office*) to get a permit. You have to wait until they come*" (N14). During the period 2011-2012 DAFF officials allegedly only came to the community on two occasions for this purpose (N15).

8.5. Perceptions of statutory permits and 'the government's rules'

The informants had a negative attitude towards the statutory permits (N1, N2, N10, N11, N14, N15, N16, N17, N18) with one commenting *"I think it is just a way of troubling us* "(N1). Several of them did not believe that they needed one and hence had not bothered to apply for one (N22, N18). Others reported that they had only got a permit as they feared arrest and prosecution (N1, N15). Several residents have only ever had one permit as their permit has expired (N16, N17, N15, N22). These residents still go and harvest and fish but they are extra vigilant "*I do not have it (permit) right now, it expired. But I still go to the sea and we run because we usually see police there and we run for our lives so that we don't get caught"* (N17). They also warn each other when they see the enforcement officers coming (N22).

Residents complain that the permit conditions are not suited to the local social relations and "*The government just comes and tells us the rules and (the officials) didn't ask whether they were right for us or not. They just came and told us that this and that works"* (N10). The individual nature of the permit presents specific problems. It is a customary practice that children are allowed to go to the sea and harvest resources after school hours and over weekends and this contributes towards household food security (N15, N11). It is also customary that children assist older relatives with harvesting and fishing

outside of school hours (N5, N13, N14, N15). Where there is a household with a disabled person, or a household that for some reason can not go to harvest resources, another neighbouring household will harvest for them (N14, N22). The individual permit does not make provision for these patterns of social interaction that are important to the social structure of the community. An elderly resident complained

"*its not good for us because I want my grandchild to go harvesting when she comes back from school or during weekends when there is no school. I think that school going children should be allowed to go harvesting and fishing when they get back from school because they can still go and since we are now old we can't get any because we cannot go and they are also not allowed to go* "(N5).

Harvesters also complain that the bag limit of 5 litres per individual permit holder is insufficient for their needs (N3, N6, N9, N15). *"We were complaining when they said we should only harvest using 5 litres because we knew that we have children at home… you have a neighbour that has a disability who also wants these mussels. That's why we are saying that this permit is not right for us"* (N6).

8.6. The introduction of a new statutory marine resource governance institution

When the statutory authority introduced the permit system to the Ntubeni community in 2009 they insisted that the community establish what the government called a 'co-management committee' (N1). No discussion was held with the sub-headmen or other traditional authorities. "*The headman does not know anything either, he is just surprised about the way things are"* (N9).

The purpose, powers and role of the co-management committee, referred to by some fishers as the 'sea committee" are unclear. The committee was elected by the community under instruction from DAFF officials (N1). The chairperson of the committee stated that its purpose was to "*check if people are doing what they are supposed to do*" and to inform people about "the rules" of the permit. *"If the police find you and they ask if you know the rules and you say you didn't they will ask if you didn't meet with the committee because the committee knows the rules".* However, despite being the Chairperson, this fisherman stated "*I still don't agree with what is written there*" and

admitted that if someone is not complying with the permit conditions "*we let them go but if the officers see them then they will get arrested*". He added that the committee members do not have a problem with the fact that people do not comply with the permit conditions as people harvested what they needed for their families and 'the rules' provided for less than what was needed. He said "*the reason we let them take what they want is because we don't have the right to make things hard for them" (N1).*

The committee appeared to only function on command from DAFF on the very infrequent occasions when a meeting was called to register permit applications or hand out permits. Only 38 out of 62 households surveyed in Ntubeni knew of the existence of this committee and only 3 households out of 62 included a person who was a member of the committee. The informants overwhelmingly stated that the committee did not represent the interests of the community.

"*This committee seems like a joke because I have not seen any progress from it but we just formed it because when those people come with the laws and we ask them questions they don't have answers for us. We keep on asking them to bring the person who has sent them so that he can answer to us because we know everything when they ask us questions but when its their turn they can't answer us* "(N3).

When asked if they had informed government that they were unhappy one of the informants stated *"we don't have that power because all of these rules come from them and we cannot follow them because there is no truth behind them. The people get tired of meeting whilst they don't even have the full truth about what is happening. This is where the conflict comes in because they (*the government*) come to us with something that they have already set out on their own way and they come with it already written down and it is hard for us to question it. And the people from here don't know how these things work because they did not grow up with them so maybe only our children can understand what they are saying because now these people have these things written down in English and we have never been to school so we do not understand what is really happening" (N3).*

This new committee structure has yet to articulate with both the customary structures and the municipal governance structures that have been introduced since 1994.

In contrast to Ntubeni, in Hobeni neither the DAFF nor its predecessor, the DEAT, informed the Hobeni fishers and harvesters of their right to apply for permit exemptions in terms of the MLRA (H41). However, as outlined in Chapter 6, the DEAT

and ECPB, later ECPTA, engaged consistently with the Hobeni fishers from as early as 2005 with the stated intention of reviewing the no-take status of the MPA (DEAT 2006, DEAT 2007, DEAT 2008, ECPTA 2011, ECPTA 2012) and hence the Hobeni community was under the impression that a decision regarding their access to marine resources was imminent from 2005 onwards.

There appears to have been a steady increase in the DAFF interaction with the community since August 2011. In 2011 only 24 out of the 62 people surveyed (38, 7%), had a permit for at least one of the species that they reported harvesting. Currently in Ntubeni a total of 75 residents hold individual permits to access marine resources (DAFF 2013).

8.7. Awareness and understanding of statutory legislation and policy processes

Residents are unsure about the status of what they perceive to be a new law vis a vis their own customary laws and the rights that they believe their Settlement Agreement conferred upon them: *"When there is a new law maybe that they have passed by the chief and the chief tells me about it I write it down in the book, but that has not happened now"* (H23). As noted by one of the sub-headmen "*I do not know how this has happened". "The government has never come to us to tell us about fishing laws"* (H23).

Lack of consultation with the customary authorities at neighbourhood level has continued since the enforcement of the MLRA. In November 2011, after the completion of the Policy on Small-scale Fisheries public participation process, none of the residents including the sub-headmen interviewed for this research had participated in this process nor had they seen the new Policy on Small-scale fisheries (FG N3, FG H1, FGH2, FG H3).

In addition to having no knowledge about the MLRA and the policies and rights that flowed from this legislation, the individuals interviewed indicated that they had little knowledge of their cultural rights to enter the MPA, whether to collect sea water or to conduct ancestral and ritual ceremonies. Several said that they were no longer

permitted to enter for these purposes (H28, H27). *Others indicated that they were allowed to get water from the sea but that they had to have a permit or get permission prior to entering the gate (N26, N36, N37).* One elderly traditional healer complained that they are permitted to go in to perform rituals but that the rangers accompany them to the sea. He asked "*How can I greet my ancestors accompanied by a guard with a gun"*? (*pers.comm* participant in the Hobeni Report Back group 2012).

One informant highlighted the impact of this *de facto* exclusion from the reserve on their customary system stating "*these customary practices and law are now lost because of Parks Board*" (N39). In a focus group discussion in Hobeni participants stated "*our culture was distorted*" and "*our practices have changed*" following the closure of the MPA (FG H3).

8.8. Changing conditions impacting customary governance processes

Informants from Ntubeni reflected awareness of the changing social and economic conditions and associated challenges facing their customary system of governance. Most commonly cited was the increasing frequency of outsiders coming to harvest abalone in the Ntubeni area (N7, N8, N10). They state that these outsiders are largely groups of organised white abalone poachers coming from East London but they do on occasion use residents from communities beyond Dwesa-Cwebe communities' borders and more recently, even residents from their own communities to assist them in harvesting abalone. Informants resented the fact that outsiders were coming into their area when they themselves were prosecuted for harvesting abalone (N8). Several informants commented on the local customary group's inability to prevent this (N7, N8, N10, N22). They indicated that the sub-headmen and elders, as their local customary governance institution, had discussed this and the matter had been taken to the Chief as it involved outsiders and required high level intervention. They noted however that there was increased conflict as a result of this issue as there were differences of opinion as to how to deal with this issue when it involved local residents. Significantly, some informants appear to have developed a counter-narrative to the one of 'poaching', 'open access' and to the perception even amongst themselves that their customary governance system was not robust enough to manage this problem. These residents advanced a range of

reasons for the perceived failure of their customary system to be able to manage this issue. Predominant is the argument that people's rights are not recognised; they are denied access and hence are reluctant to protect the resource from outsiders (N7, N8, H39). Several informants argued that they would be able to protect the resources on their own if they were also benefiting and if they had '*ilungelo*' (rights) (N8, H42b, H39). One informant stated "*We can make law for ourselves"* (H32). Closely linked to this, informants believed that one of the key problems was that they do not currently have the authority to enforce exclusion but "*if we could be given the authority to do so we would but we don't have the power to do it now because the government thinks that we are overtaking their rules"* (sub-headman, N13) and *" if we as the people who live in the coast could be given the power to guard the place from within the community to look out for people who are not from here*" (N13). However, some felt that their customary governance system would not be able to manage the conflict around abalone on its own and they would need to work with government on issues of enforcement, particularly for issues such as unauthorised abalone harvesting (N 7, N8, N11) as this "*could not only depend on the headmen and the chief but to Dwesa as a whole and the government*" (N8).

The majority of informants asserted that their marine resources would not be depleted by their customary harvesting and fishing practices (N1, N14, N22, H23). This belief was closely tied to their understanding of "*the laws of the sea*" (H39) and the belief that since the time that their ancestors first settled on this land the sea had protected itself and would regenerate. "*The mussels have been here since the time of our forefathers so we can never finish them*" (H23). Despite the expressed customary norm that no one should harvest juvenile resources in practice this occurred regularly. I observed the taking home of undersized fish and very small mussels and yet informants largely denied concerns that current harvesting levels might not be sustainable. In practice food security needs appear to be over-riding this rule. The collective rationale provided for the continued regeneration of resources is closely linked to their cosmology and ontology in which the fishers and harvesters locate their actions within the context of the 'laws of nature'. They see this as part of '*indalo yethu*' (their human nature).

The extent to which the statutory concept of 'rules' and regularised limitations on harvesting that have been introduced by DAFF since 2009 have influenced the

informants was apparent when contemplating a new system in which their customary system of governance and customary rights might be recognised. Although this appeared to contradict their assertion that their harvesting was sustainable, several informants indicated that they would need to introduce limits, such as temporal restrictions and some effort controls (N7, N8, N9, N13, H23, H32) and one informant referred to the need to introduce rules about selling of catches "*people who sell can finish the resources so I think that if people did not sell them there wouldn't be a problem. I think they should bring rules with the selling*" (N13). One informant asked "*why not set rules for people to go in instead of closing people out?* (N8).

Davies (2009) working further along the Eastern Cape coast documented a similar phenomenon and has argued that 'there are two worlds of knowledge and context' that interface for many poor, rural coastal communities when faced with evidence of depleted stocks. Davies argues strongly that the historical roots of harvesting practices reach back into the political struggle of these communities and hence "the social justifications for these practices are perpetuated as these rural communities struggle to survive" (Davies 2009:199).

8.9. The response of the customary system of governance to the imposition of statutory governance

The communities of Hobeni and Ntubeni have responded to the presence of two different governance systems in their everyday lives in varying ways, gradually coming to straddle this plural system, adjusting to living in this inter-tidal zone of fluctuating and inconsistent institutions and legalities. At one level, as noted above, resistance to the new system is evidenced in continued harvesting and fishing in the MPA. On the other hand, 75 residents from Ntubeni have registered for permits and some of them have elected a 'co-management' committee. However, in practice, informants refer to regular flouting of the permit conditions as they do not enable them to harvest enough for their families (N1, N2, N5, N6, N12, N15) and as indicated above, they do not recognise the co-management committee as a legitimate structure of governance that represents their interests. They have continued to assert their power through their regular resistance to the imposition of the statutory system and in other areas of

community life, they reference their customary laws and engage with their customary institutions and processes of governance.

When the no-take regulations were enforced from 2004 onwards Ntubeni residents still had access to marine resources along the stretch of coastline outside the reserve so the urgent need for the intervention of their traditional authorities was not apparent. On the Hobeni side the fishers did not have a history of appealing to their Chief for support in matters related to marine resources. Instead they responded as a group, submitting a letter in the name of their fishers association, which included their sub headman, to advocate for their right to access (H34, H42). "*We decided to form the committee so that Park's Board could open for us just a small portion in the sea, just to fish*" (H34).

The Hobeni fishers had historically had a close relationship with the Haven Hotel management who had employed many of them or members of their families. The fishers and the hotel management staff joined together and submitted a series of letters to the fisheries and conservation authorities following the 2005 enforcement of the MLRA 'no-take' status, requesting that this decision be reviewed. In this correspondence to the authorities from 2007 to 2011, the fishers of Hobeni cited their livelihood needs and dependence on the hotel for employment as the key motivating factors (*pers.comm* letter sent by Hawkins to DEAT MCM DDG 25 July 2005, *pers.comm* letter sent by Majambe 2006, *pers.comm* letter send by Juza to Chuman Mancu, DEAT MCM on 7 May 2008).

Despite numerous arrests and prosecutions, there is no indication that the informants used their customary system of governance or expressions of customary law in their defence prior to 2011. On the contrary, most appear to have admitted guilt or "*asked for forgiveness*" (N4, H23, H31), or "*for mercy*" (H28) in the hope that this would lead to a reprieve (N4, N23). Others pleaded guilty "*because we didn't know what else to do because we were hungry*"(N7). A young mother said "*We told the magistrate that we were hungry and the magistrate told us that the sea is under government, we are not allowed to go and take something from the sea*" (H38). Similarly, documents from the period prior to the Settlement Agreement in 2001 suggest that the discourse of rights and restitution articulated by the seven communities during the negotiations reaffirmed

their historical use of marine resources and their customs in this regard but their basis in living customary law per se was not motivated explicitly (ECNC 1995, DEAET1998).

8.10. Defending living customary law

In 2011 the Hobeni communities' expression of living customary law shifted when TRALSO returned to undertake research on land issues in the Dwesa-Cwebe community. The Mendwane, Cwebe and Hobeni communities used this opportunity to request TRALSO' to enable them to get legal support in the face of human rights violations (TRALSO 2011:2). TRALSO referred these cases to the Legal Resources Centre (LRC), including that of the case of David Gongqose and two other fishermen who had been arrested in 2010 on charges of trespassing in the MPA and allegations of fishing in the MPA (*Pers.comm* Wicomb and Smith 2011). David argued that he was fishing in terms of his customary practice and to meet his family customary obligations.

A dossier of alleged human rights violations was compiled by TRALSO and submitted to the Human Rights Commission (*pers.comm* Khumalo 2011). The LRC decided to defend the three fishermen, on the grounds of the Constitutional Court recognition of living customary law (*pers.comm* Wicomb 2011). Through David Gongqose, the Hobeni Fisher's Association thus began an interaction with a broader network of legal practioners and activists working on customary law issues and in so doing expanded the context of their living customary law to engage with national, regional and international articulations of customary law.

The decision of the LRC to represent David Gongqose and his co-accused began a process of discussion amongst the fishers and harvesters of Hobeni themselves as well as in their interactions with me with the research that I was engaged in and also with the LRC about the nature of their customary governance system and living customary law.[51]

[51] The fishers and harvesters met with the LRC for two meetings prior to the first day of the trial on 13 March 2012. I interviewed David prior to LRC's decision to represent him however following their decision I continued with my fieldwork in Ntubeni and Hobeni, interviewing David again twice and facilitating several focus groups in the community prior to the opening of the trial.

8.11. Court in the Act: Living customary law on trial

In 2010 when David Gongqose, a 49 year old father of four from Hobeni was arrested in the Dwesa-Cwebe MPA on criminal charges of entering the Dwesa-Cwebe Nature Reserve illegally and attempting to fish in an MPA, he was one of many fishers from the Dwesa-Cwebe community who had faced arrest, detention and prosecution. However, no fisheries related case had ever placed a defence on the grounds of living customary law before a small, rural court as did the *Gongqose* case in the Elliotdale Magistrates Court on the 13th March 2012[52].

David and his two co-accused fishermen from Hobeni, Siphumle Windase and Nkosipendula Juza, were charged in terms of the statutory act governing marine living resources, the MLRA, and the Transkei Environmental Conservation Decree No. 9 of 1992 (*State versus Gongqose 2012*)[53]. LRC requested me to be an expert witness for the defence in this case.

My own interview with David prior to the court case highlighted many of the characteristics of the system of customary use and governance that I had heard from other informants[54]. David Malibongwe Gongqose was born in Hobeni in 1962. He traces his lineage back five generations to the father of amaDingata, one of the first clans to settle the area between the Mbashe and Mbanjana Rivers in the 17th Century (See Figure 2). David's grandparents were born on land that subsequently became part of the Dwesa-Cwebe reserve. David was born on the site of the old Haven Hotel inside the reserve. His mother worked at the Haven Hotel and this was his first home. His grandparents are buried in the reserve but his parents were forced to move from this homestead in the 1970's when the Dwesa-Cwebe Nature Reserve was established (Gongqose 2011:1).

[52] Exact numbers of fishers prosecuted since 2004 are unknown but it is estimated from anecdotal evidence emerging through this fieldwork that over 100 fishers have been prosecuted and convicted with many more arrested, warned and some fined by the conservation authority itself.

[53] As David Gongqose was the main applicant in this case, this discussion uses him as primary referent in the case and in citation of the case, as is the legal custom. The case is referred to as *Gongqose* 2012.

[54] The information presented here from my interviews with David is referenced as Gongqose 2011. This information about David has been made public in several legal documents with his permission.

David grew up initially inside the reserve area. His father was a fisherman and from as early as he can remember he accompanied his father fishing and his father taught him to fish. He began fishing himself at the age of 11. Both his parents harvested a range of marine resources, selling some to earn cash but relying on these resources to supplement their food source. David attended primary school but left school and began fishing full time when he was about 14 years of age in 1975. David said that he grew up knowing that fishing was part of his culture. When he was approximately 20 years old he left home to go to work on the mines in Johannesburg. He stated that it was the practice in his community that a young man must go and work for his family. However he lasted only one year in the mines and quickly moved to Cape Town to be near the sea, where he worked as a fisherman as well as obtaining a subsistence fishing permit in 1999. Throughout this period, as was the custom for young men, he would send money home and he would come home every year for several weeks, during which time he would go fishing. In 2005 David came back to live in the family homestead in Hobeni as his father was not well and David had to come and take care of the homestead. David began fishing full time again on his return in order to provide for his parents and his own children. He said "this was expected of me. This is what my father had done and this was what I had to do" (Gongqose 1: 2011). David's father died in September 2010 and in order to obtain the cash to buy his mother the customary black mourning clothes for a widow, David went fishing to catch fish. David stated that he had entered the reserve and the MPA to fish in order to fulfil his familial obligations to take care of his mother and the homestead, as was the customary practice of his community (Gongqose 1:2011).

David subsequently repeated this assertion about his customary system of marine resource use and governance which guided his actions on the 22 September 2010 to the LRC attorneys and this was used in his statement in his trial which took place over four days; two days in March 2012 and another two in April 2012. The magistrate delivered his judgement and there was argument on sentencing on a fifth day on the 22 May 2012.

8.11.1. The Accused, the Experts, and the Others

From the outset of the trial, the customary governance system and way of life of the Dwesa-Cwebe community was presented to the court as the fishers' defence against the charges that they had acted 'illegally'. At the opening of the trial the state prosecutor put the charges to the three accused (*Gongqose Vol* 1:9-10)[55]. Their legal representative from the LRC, Advocate Brickhill, then informed the court that David and his co-accused had instructed him to inform the court that all three pleaded not guilty to these charges however they also wished to enter a statement into the court proceedings. This statement was read to the court:

> "We enter a plea of not guilty. Each of the accused is a member of the Hobeni community forming part of the broader community at Dwesa-Cwebe. Our community is governed in part according to customary law. The system of customary law in operation in our community also regulates access to the use of marine resources. Under the system the Hobeni community enjoyed a customary right to have access to marine resources along the coastline and stretching from Mbashe River to Ntlonyane River. When we were arrested we were intending to fish according to our customary rights" (*Gongqose 2012 Vol 1:13*)[56].

The Gongqose trial reflected a microcosm of the interactive customary and statutory systems currently shaping both the legal system in South Africa as well as governance in the country more broadly. At this interface, the tensions between the customary and statutory systems of law and governance and their respective histories, methodologies and philosophical foundations were keenly felt by those present in the court room. The process and structure of the court itself was a reflection of a country that is not only struggling to recognise another system of law, but, as noted by Cornell (2009), is struggling to transform the very structure, institutions and culture of the dominant legal system.

[55] The source of all the information presented in this chapter from the court proceedings is from the transcript of the court proceedings (*State versus Gongqose and two others* 2012), supplemented by the researchers own notes where specifically indicated.

[56] Hereafter the court proceedings will be referred to by volume and page number, citing *Gongqose 2012.*

As noted in Chapter One, in its judgement in *Shilubana* the Constitutional Court recognised that it is necessary to examine customary systems of law "*in their own setting"*, and not subject them to the terms of the common law paradigm (*Shilubana 2008*). This aspect appeared particularly contradictory in the context of the proceedings in this trial. The case was held a distance from the coast, approximately one hours drive from Hobeni, in the Magistrates Court in the District of Elliotdale. The three accused stood before the court, presided over by the Honourable Justice Nel, a white magistrate, which, in the context of the apartheid past, raised fears amongst those watching proceedings that he might come from a particular generation who would not accept their customary system as a legitimate system of law. Whilst these fears proved unfounded, the impact of this initial impression on the community in attendance at the court was evident with several members of the community expressing such fears to me after the first day. The structure of the court process itself was a visible contradiction to the intent of the Constitution in recognising the right to culture and customary law of someone like David, a black, African fisherman living in a remote rural village who has had very little formal education. The proceedings were in English. IsiXhosa interpretation was provided for the accused however the quality of the interpretation was questioned at several intervals during the proceedings and the Magistrate himself noted of David's testimony "he is saying a considerable amount and by the time the interpretation comes, I doubt we are even getting half of it"(*Gongqose 2012* Vol 1:40).

In contrast to the system of justice and dispute resolution that the community view as part of their customary system, where the sub-headman or headman will call the elders of the community together and the person accused of an offence can call others to attend and participate in his defence, outside White academics and scientists were the expert witnesses. The state expert was a white, male marine science consultant who had conducted the evaluation of the Dwesa-Cwebe MPA in 2010 and had found that the MPA should not be rezoned for use by the community (Fielding 2010). The two expert witnesses called by the defence comprised a white male Associate Professor, Dr Derick Fay, who had undertaken his PhD research at Dwesa-Cwebe on land related issues, and myself, a white female PhD student. These 'expert' witnesses occupied the dominant role in this case and there was considerable reliance on written reports and documentation that was submitted and placed as evidence on the court record.

David's defence team deliberately chose to call him as a witness to the stand as well as an additional witness from the community, Vuyelwa Siyaleko, a 56 year old woman mussel harvester who is also a trainee traditional healer, in order to strengthen the voice of the community in court. Beyond the testimony of David and Vuyelwa, there was no further opportunity for their community to participate in the proceedings and the approximately 21 men and women from the Dwesa-Cwebe communities who had come in support of the accused men were silent witnesses.

The question of who speaks on behalf of the accused, what evidence is considered valid and of relevance, who the experts are and how the meaning of the world of the accused is presented, re-presented and translated in court is of direct relevance to the recognition of customary legal systems in a context of legal pluralism where the State legal system is still regarded as the dominant system (Bennett 2012). On whose terms was this trial held? During a court recess one of the elders of the community, a 79 year old man who had been taught to fish by his own father, approached me and asked if he could speak in the court case? Subsequently in an interview with this man he informed me that

> "During the court session where Mr Fielding was talking some myth to the magistrate about the tradition of our community, I was volunteering myself, with other people in the community, … to be allowed to explain exactly to the magistrate because he (Mr Fielding, the state expert) is misleading the court and the people about fishing" (H39).

The nature of the evidence used to provide proof of the existence of a system of customary law has been the subject of considerable debate and dispute in many international contexts (Corrin 2011) as well as in South Africa. In 2009 the Constitutional Court ruled that

"the practice of a particular community is relevant when determining the content of a customary law norm. As this court held in Richtersveld, the content of customary law must be determined with reference to both the history and the usage of the community concerned. "Living" customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice

of the community before the courts, and courts have a duty to examine the law in the context of a community" [57]

In the court proceedings in Elliotdale, at several intervals, the state prosecutor expressed a tone of sarcasm, doubt and incredulity at the nature of the evidence presented by the defence in support of the existence of a customary system. At the opening of his questioning under oath, David was asked by his own defence advocate to tell the court about his family lineage. He had barely commenced informing the court that he was a descendant of Chief Bashe when the state prosecutor interrupted him and questioned the relevance of this line of questioning. Once the defence advocate assured the Magistrate that this evidence was "at the heart of the defence" as it was related to the need to establish that the accused person was part of the community that has practiced customary law for generations he was permitted to proceed (*Gongqose* Vol 1:27). The impression was created however at this early stage that the state prosecutor doubted the relevance of this aspect of David's testimony. When the community witness who is training as a traditional healer informed the court quite distinctly that at times the ancestors tell her to go and perform a ritual in a particular place by the sea the state prosecutor asked: "**Who** tells you?" using a tone of complete disbelief that the ancestors might be considered in this way, revealing his inability to accommodate another system of legal norms in which both the authorities (in this case the ancestors) and the temporal context (in this case persons deceased) are so different to those of his own legal system. In another instance the defence drew the attention of the court to sarcasm in the Prosecutor's tone and line of questioning when he asked David if he knew where England was (*Gongqose* 2012 Vol 1:66). The state prosecutor's reference to English law appeared particularly ironic in the context of a rural magistrate's court, within a former apartheid established self-governing African Bantustan, where the statutory authority was now still drawing on out-dated apartheid law[58] to charge the accused fishermen with acting 'illegally'.

The state expert, in his efforts to convince the Court that David's ancestors did not have a lengthy history of fishing along this coast said to the Magistrate "everyone in this room

[57] *Shilubana 2009 para 28*

[58] The Transkei Environmental Decree of 1992 predates the 1994 democratic elections and the re-incorporation of the former homeland into the Republic of South Africa.

would have been wearing blankets sixty years ago" (*Gongqose 2012* Vol 4:268). The state prosecutor expressed doubt about the evidence presented by both the accused and the defence witnesses that marine resources might be used in a customary ritual that was considered obligatory (*isiko*). He said "I have never heard of such a tradition where you use fish for that…..I know you use cattle and sheep and that kind of thing" (*Gongqose* Vol 3:219).

8.11.2. Evidence of the characteristics of the customary system of marine resource use and governance

As noted previously, the distinctive characteristics of the customary system of governance were evident in David's oral history interviews with me prior to his court case[59] , much of which he repeated in the opening hours of the trial.

After he had explained his lineage to the court, David proceeded to inform the court that he had learnt to fish from his father who in turn had learnt to fish from his father. He informed the court that fishing was important in his culture as it enabled them to "feed our families, so that we could send our children to school and buy them clothes" (*Gongqose* Vol 1:28). He said "'*isithethe*' (custom) is something that lives inside you" and went on to distinguish this from "*isiko*" (an obligatory customary ritual) which refers to when the ancestors are "ordering you to perform some traditional ritual somewhere, maybe they send you to the sea to perform that ritual there" (*Gongqose* Vol 1:29).

In answer to the question who owns the sea, David stated that "only God is the owner of the sea and fishes" however he proceeded to explain to the court that he has the right to use these resources derived from his ancestral links to Hobeni because "I grew up there" and "my great grandfathers were fishing there" (*Gongqose 2012* Vol 1:29).

Throughout his testimony in the court case, David located himself in relation to his community and his ancestors, as opposed to expressing himself as an individual. His use of the collective 'we' and 'our' when responding to a question about his own

[59] I conducted three interviews with David in 2011 prior to his appearance in court in 2012.

circumstances was noticeable. When asked about his lineage he ended his testimony noting "that is our history" (*Gongqose* 2002 Vol 1:7).

8.11.3. The rules of governance

The prosecutor used reference to English law of the road to explore the issue of the 'right' law and used the terms 'right' and 'good' and 'bad' repeatedly in his cross-questioning of David on David's knowledge of what he asserted was 'the law.' This was most evident in the following statements and questions:

> The prosecutor, addressing David: "The law says you are not allowed to fish in the Dwesa-Cwebe Reserve. (Do) you know it?
>
> David responds "Yes, they made a law without consulting the committee members."
>
> Prosecutor: "Right, so if you don't like the law but you are aware of it, it's the law?"
>
> David: "I like the law if its 50:50, - (if) its balanced".
>
> Subsequently the Prosecutor asks him: "Do you believe that you have to follow the rules of government?
>
> David: Yes, we follow government rules, but ours, the government does'nt follow our rules."
>
> Prosecutor: So if there is a rule of government that you must follow, you will follow it?
>
> David: Yes, we follow (these), but he left (out) our rules that the government must follow"
>
> Prosecutor: If the government has a rule that says so and so, you will follow it, right?"
>
> David: "Yes, yes I will follow that rule but not leaving us behind".
>
> Prosecutor: "Yes, because if you don't follow that rule you are acting unlawfully, am I right?
>
> Prosecutor: "Why don't you just say yes, or no? Why does it need a big explanation?"
>
> David: "The reason (is) because I want to give clarity".

Prosecutor: "Let me ask you Sir, if government says I cannot drive on the right hand side of the road, you will follow that?

David: "Yes, I will follow it".

Prosecutor: "Because we drive on the left hand side of the road, that is the rule?"

David: "Yes, I understand I will follow that but the Government must also understand our own law, our own rules."

Prosecutor: "But if your rules are in conflict with Government says what are you going to do?"

David: "Yes, yes we do obey the rules of the government but we want the Government to also look at our rules because we are the committee members there."

Prosecutor: "So if government doesn't look at you…how do you resolve it? By having meetings, am I right?"

David: "Yes, yes, we have been calling (for) a meeting for some time and asking the government to come so we could have a discussion".

(Gongqose 2012 Vol 1:62-64).

This excerpt from the transcript of the trial highlights several decisive themes that have emerged in this research in relation to the characteristics of the statutory system of governance and those of the customary system, and the dynamics of the interaction at the interface of the two very different systems of law embodied by these systems of governance. These include:

- **The power and authority to 'make law'**

David's immediate reaction to a question about whether or not he knows about a particular law is to acknowledge that he knows about it but to subtlety question the legitimacy of a law that was made without consulting the committee members (in this instance meaning without consulting the local institution in Hobeni).

- **Knowing the law and accepting the law**

Unlike the prosecutor, who equates knowing the law with acceptance and obedience to the law, David makes it clear that knowing the law is only one aspect, accepting this law as law will depend on other factors and principles. In this case, the criterion that he would use, would be to judge if it is was 'balanced' – '50/50'.

- **The rule-based versus processural nature of laws**

The rules based nature of statutory law, and the close adherence to these rules, is evident in the exchange between the Prosecutor and David. However, in contrast to the statutory approach of obedience to the law, David presents the possibility of an alternative processural approach (Comaroff and Roberts 1981), suggesting that "consultation" and a meeting in which "we could have a discussion" would be appropriate. This highlights the deliberative process inherent in the customary system.

- **The positivist concept of a 'right' and a 'wrong'**

Contrary to the positivist notion that there is a right rule and a wrong rule, David asserted the need to give clarity to the situation, to give "a long explanation", despite the Prosecutor's disdain for such. This is indicative of the need to situate the event within the 'total socio-cultural logic' (Comaroff and Roberts 1981) and context of the community and to adjudicate the merits of the situation from this standpoint.

- **The relational component of doing justice**

Throughout this exchange it is clear that David assumes that statutory and customary law are both equally valid systems of law, that both need to be considered by both parties, and that they need to co-exist. He believes that government must also understand his communities' law, "our own law, our rules" (Gongqose Vol 1:63). His way of resolving the conflict is to have a meeting "with government" in order to discuss the situation.

8.11.4. Law as a mechanism of governance

The changing, dynamic and evolving nature of systems of law as they interact was very evident in the evidence led in the court proceedings as well as in the Magistrate's judgement. The contradictions in the fact that although the state prosecutor was at pains to present the state law as 'the right law', the very uneven and inconsistent application of state law itself was apparent in the fact that, on admission from a state official himself, as quoted in Chapter Six, the legitimacy of this state law (the MLRA), was questionable due to the lack of consultation. The provincial authorities themselves chose not to apply it. In addition, this law was only implemented by state officials four years after it became 'the law'. With regard to the continued application of the

Environmental Conservation Decree No. 9 of 1992 of the former Transkei homeland, in terms of which the accused men were also charged, the Magistrate observed in his judgement that this "is a piece of legislation of questionable significance and importance in the jurisprudence of modern day South Africa…It is this court's humble submission that this piece of legislation is from a bygone era and should be relegated to the shelves of antiquity and laid to rest alongside the other legislation which existed prior to reaching our constitutional democracy" (*Gongqose 2012:* unpaginated).

In his judgement the Magistrate also questioned the constitutionality of the MLRA. As a magistrate does not have the authority to pass judgement on this issue he was forced to find the accused men guilty in terms of violating Section 42 of the statute (*Gongqose 2012*).[60]

The repeated attempt of the Prosecutor to present the government's rules as 'the law' and the government's law as 'the Law' was most apparent. The use of law and the legal system as a tool for governance was clear when he referred to the need to use the Courts "as tools" stating that "its us (speaking as a state prosecutor) that has to tell these courts…tell the courts to enforce the legislation, to use the tools we have" (*Gongqose 2012* Vol 3:229).

However, the marginalised system that was on trial, in this instance, the customary system of law of the Dwesa-Cwebe communities, represented by the fishermen, similarly used their own power to assert the legitimacy of their governance system, paradoxically at times using the tools of the dominant system to describe their own system, evident when David referred to "our own law, our rules" (*Gongqose* 2012 Vol 1:64).

8.12. Law as a strategy of struggle

The communities' own use of law as a legitimating tool and as a strategy of power and resistance was evident shortly after the fishermen had engaged the LRC's support in defending them. A shift in the way in which law was referred to was evident to me. In

[60] An Appeal has been lodged by LRC on behalf of the three fishermen in the High Court. They have also launched a Review of the Minister's decision in 2000 to declare the MPA a no take MPA

the initial stages of my fieldwork, particularly with the Ntubeni residents and those Hobeni residents who did not know about the Gongqose case, the informants very seldom used the term 'law' in the context of describing their own governance system and entitlement to access, use and control marine resources, rather they referenced the repertoire of customary norms ranging from those considered to be *isithethe* (voluntary custom) to those that were *isiko (obligatory custom)*. Similarly they described the events and processes that had taken place in their communities over the past decade, without a deliberate self-consciousness regarding the significance of their living customary law. Through these narratives I was able to trace the ways in which expressions of living customary law had been woven into the nature of the new local institutions and processes that they set up post 2001, as well as how it had shaped their interactions with the state in negotiations over the MPA. This shaped my analysis of the nature of the customary system of use and governance, and the distinctive nature of the expressions of living customary law. In particular, I observed the complexity of its embeddedness and interconnectedness with other dimensions of governance. In contrast, those persons with whom I interacted after they had met with David's legal team, or who had heard about the case, were more likely to reference their customary laws specifically, although as noted in Chapter Three, few made direct references to customary rules or law. Through the court process, listening to the evidence and cross-questioning, and discussions with the legal team during the court recess, the Hobeni community members who engaged with the legal team clearly became aware of the language and power of law in a new way.

The LRC attorneys and advocate only had two community meetings and one additional meeting with David prior to the first court appearance. Notwithstanding this, it was noticeable that Hobeni residents with whom I interacted after this made increasing references to their rights and to their 'law' when expressing their hopes that government would recognise their customary rights to marine resources[61]. This was summed up by an elderly informant who reported to me several days after the final judgement in the *Gongqose* matter:

[61] I observed this at the meeting with ECPTA when they mapped their traditional fishing areas and resources and also in David's presentation to the MPA Forum in November 2012.

"*I am very happy that the Magistrate has said that the traditional law is relevant and government law is relevant, almost like equal. The only dilemma from the community customary law is that at the moment it is not being recognised. The community is suffering because their law is not being recognised"* (N39).

8.13. Imagining a revitalised system of customary governance

"We wish for a body that we ourselves would establish here. It would listen to our law of old, our very good law. It will rule under us, for this is our land" (N39).

Over the course of my field work, both prior to and after the court case, informants captured a number of distinctive principles and characteristics when describing the system of governance that they wished to see recognised. Their responses evidenced several of the underlying principles, processes and practices upon which their customary system of governance is based and which I had observed in my fieldwork. These include:

8.13.1. Power and authority

The fact that the power of decision-making vests with the people and that the authority of the sub-headmen, headman or chief is derived from the people was evident in a comment from one of the sub-headman when asked how the future institutional arrangements should be managed: "*Even if it's the people from the Trust because they are all related to the chief, and the chief will be present anyway because he works under the Trust. So the people will decide who to elect and then we can go into business*" (N12). This echoed the words of the resident quoted above, who wished for a body that would "*rule under us"* (H39).

8.13.2. Accountability and participation

Several informants argued for deliberative and accountable governance and processes in which "*government would first sit down with the chiefs and the people*" (N8) and that if any external management agency is appointed, that agency or company must manage

'with the people'[62]. "*I would say if government is proposing any company that is determined in terms of the law that could come to manage with the people, he could do that – to appoint that company and that company must account to government and to us – but it must listen to us – so that if it is not acting according to our agreement we are able to chase him away. Then I would say that government must appoint companies that would talk to community in the process of managing resources*" (N39).

"W*hat's important I think [is] the government should work with us since we are the people here who have our eyes on the sea … they should involve us in the decisions they take and also appoint people from the community to work with them because as people we welcome anything that comes from someone who is one of us* " (N10).

Inherent in their suggestions is an awareness of the need for interaction with a level and scale of governance and a set of governance actors beyond that of their own local system (N7, N10).

8.13.3. Principles determining need and adjudicating rights

Many informants referred to the principle underlying their customary system that provided some guidance as to how much a person should harvest. This should be enough for their households needs, but not so great that it impacts the rights of the next generation. It should ensure that "*everyone can get something*" (N14), particularly the elderly, the disabled and the poor (M14, N22, H39). "*If I was the one in the management spot I would make a new rule for fishing ….when someone goes fishing I would not count how many fishes one takes because we all come from different homes and I don't know everyone's home situation so if someone is doing it for selling, or eating with their families that would be for them to decide, but when someone is fishing they have to keep in mind that they want to keep the resources for the coming generations and not just fish to finish everything so that the fishes can grow*" (N23).

[62] Several informants used the term 'company' to describe ECPTA, possibly due to it being a parastatal organisation and not a government department.

This reference to inter-generational equity and the need to balance environmental rights was reflected by another resident:

" We agreed, signed the (settlement) agreement that there would be some limits but the limits would be discussed with the community – so any law which comes to the community and talks about the community right with community participation is a good law. But the only thing we don't want is the law that is totally preventing us from benefitting from access to the natural resources that we grew up using. Then in fact that law is not good. But if we are conserving for the purpose of the current and future generation benefiting them – that law is a good law. But if the law is denying community people alone, (whilst) some other people (from) elsewhere come poaching or are fishing in this thing that we are being denied …then it is not a good law with us. Law is good but must talk to the people who are currently suffering – the community that is poor" (N39).

8.14. Conclusion

The laws of 'Nature' that have been imposed on the Dwesa-Cwebe community by successive statutory governance authorities are very different to those laws of nature that the community consider to hold validity for themselves as a group: they included no consultation, are individual in orientation, do not accommodate their social relations that promote community well-being and are exclusionary by nature. In contrast, the system of living customary law operating at Dwesa-Cwebe does not operate as a separate juristic domain of law, it is shaped by and responsive to their governance system. In turn it also shapes this governance system. It is woven into the texture of the social interactions at neighbourhood level, into the interpretation of their relationship to the sea, into the customs and rituals that guide behaviour towards the well-being of the group and into the deliberative and dialogic approach to decision making and the solving of problems and disputes. It also includes an ethical orientation towards each individual's welfare as part of the group's welfare.

The imposed statutory system has undermined their own system of governance and its associated ethics and expression of customary law, but the community has also used it strategically, accommodating the statutory system selectively as a strategy of struggle in

order to protect their interests. This is most evident in the way in which the Ntubeni community have interacted with statutory permits that give them 'permission' to fish along this coast and the requirement that they form a new local 'co-management institution'.

The Hobeni communities' engagement with statutory law since the start of legal proceedings in the Gongqose matter has contributed towards an increased awareness of the power of law amongst the Hobeni community. They have begun to articulate a more distinct concept of their own law than the previously embedded expressions of living customary law I had evidenced in my initial fieldwork with them, suggesting the steady 'legalisation' of their own customary system of living law. The Gongqose trial brought the contradictions inherent in the plural legal context of South Africa into focus. In particular, it highlighted the paradox inherent in the Constitutional recognition of living customary law: that to seek and gain recognition for its legitimacy within a broader governance system that is as yet untransformed, living customary law is forced to speak the language of its former oppressor, a system of law that simply cannot do it justice.

CHAPTER NINE: DISCUSSION: UNDERSTANDING CUSTOMARY GOVERANCE, ITS RELATIONSHIP WITH LIVING CUSTOMARY LAW AND ITS INTERACTION WITH STATUTORY GOVERNANCE

9.1. Introduction

An exploration of the governance of marine resources at Dwesa-Cwebe highlights the interfacing of two systems of governance in this context: a customary system of governance which has existed since time immemorial, gradually coming to interact with a statutory system that was first introduced in the 1890s but has changed in its reach and rules considerably in the intervening years.

In the preceding chapters Five to Eight, the very distinctive nature and characteristics of the customary system of marine resource governance has been investigated and described. The structures, dynamics and complex interactions constituting this governance system have been explored. This includes those social phenomena referred to as living customary law. The interaction between this customary system of governance and that of statutory governance has been interrogated, in particular through the interfacing of 'customary law' and 'statutory law' in the case of *State versus Gongqose* in 2012. This chapter discusses the findings of this research, deepening the understanding of the customary system of governance in the context of its past interaction with the statutory system as well as with regards to the contribution that customary governance can make towards the development of contemporary small scale fisheries governance in South Africa. These findings are discussed in relation to the theoretical perspectives and literature presented in Chapter Two.

9.2. Characterizing and conceptualizing the nature of the customary system of marine resource governance

9.2.1. A socially embedded and nested system of governance

As described in Chapter Five, the residents of Dwesa-Cwebe have used marine resources since time immemorial. This use of marine resources takes place within the context of the communities' own customary system of governance. It does not

constitute a separate system of fisheries or marine resource governance; rather it is nested in the overall customary governance system that exists in this community.

During my research I observed a range of social, cultural, spiritual and livelihood practices, dynamics and processes that make up this governance system and give it its distinct form. I observed the social and cognitive phenomena that the community regarded as norms, rules and customs guiding behaviour as well as those customs and norms that are considered obligatory by the larger community. As my research unfolded I discovered that, *in this setting*, and from the perspective of this community, these customs and norms do not constitute a separate, distinct legal domain, but rather are embedded in and expressed through the structures that constitute this governance system. For this reason I refer to those processes, dynamics and structures resembling 'law' as 'expressions of living customary law'.

Living customary law in this governance system exhibits the characteristics of a system of law as identified by Franz von Benda-Beckmann in that it includes "objectified cognitive and normative conceptions for which validity for a certain category of people or territory is asserted" (Benda-Beckmann 2002:48). It includes rules, principles, categories, concepts, standards, notions, schemes of meaning" (Benda-Beckmann 2002:48) and refers to those norms and rules actually practiced by this community. This conceptualisation of law is similar to that of Benda-Beckmann who conceptualises law as "one dimension of social organisation, rather than a specific domain" (Benda-Beckmann 2002:48). It is embedded in these broader dimensions that make up the governance system. This complex quality of embeddedness speaks to process and structure; to the dialectic, mutually reciprocal nature of these structuring processes (Giddens 1984). Living customary law is given substance and expression through a range of principles, ethics and social processes and simultaneously gives these phenomena substance. As argued by Kooiman and Bavinck (2013), a range of structures, including amongst others, law and culture, constitute governance and give it its distinctive nature. In this way, living customary law exists in a dialectical relationship with governance: it is both constituted by governance and constitutes governance.

9.2.2. The customary tenure system and its inherent 'design principles'

The informants in this research confirmed that in their customary system of governance, their entitlement to access the sea and the coastline of their territory (access rights) and to harvest and fish for a range of intertidal resources (withdrawal rights) was recognised (Schlager and Ostrom 1992). These rights were derived from their historical occupation of this land and their relationship to both their ancestors and to this land. In this perspective, these communities belong to this land, with its adjacent forest and sea, where their ancestors and these resources were created by God. To them this is the 'law of nature' within which their occupation of, belonging to and rights to use the land, forest and sea are derived. This interconnectedness of human-nature is the *Grundnorm* of this system (Benda-Beckmann 2002), it is a foundational philosophical principle drawn from their symbolic ordering of the laws of nature.

The Dwesa-Cwebe community hold a distinctive set of customary tenure rights that can be considered commensurate to Western property rights, albeit that they are conceptualised very differently. Whilst they do not perceive their tenure rights as one of ownership in the Western sense, they have a shared, common entitlement to access marine resources and to devise norms and rules that regulate the use of these and other natural resources within the frame of reference of their broader customary governance system (management rights), (Schlager and Ostrom 1992). Within this particular context they do not perceive themselves as having exclusive use rights to marine resources (the right to exclude)[63]. A range of reasons have emerged in this research regarding the reason why these users have not felt it necessary to assert exclusivity or to develop an elaborate system of operational and collective-choice rules for marine resources as has been developed in many other countries (Aswani 2005, Cinner *et al*. 2012) . These include the following reasons:

- The Dwesa-Cwebe communities occupy and hold their land in a common property system. Outsiders have to gain permission to come and reside on their land.

[63] The one exception to this is the very localised system of exclusive rights operating within the group in Hobeni, called *impalu,* whereby individuals and families established exclusive rights to particular rocks. As a result of the closure of the MPA this practice has largely disappeared.

- The membership of the neighbourhood groups fishing and harvesting marine resources is nested within membership of this larger group comprising the seven communities. Their rights to occupy, access and use the natural resources associated with this land and adjacent coast are derived from their communal ownership of their land as it is conceptualised within their customary system of governance.
- The communities do not assert a claim to 'ownership' of marine and coastal resources in the Western sense of ownership, but rather that they have a common entitlement to access, occupy and use them. The very remote and relatively inaccessible nature of this coastline means that neither the 'border' of their marine territory nor their access to sufficient resources within this turf has been contested by other communities to date. It has only been contested by the state itself.
- Whilst they require access to and use of the sea for the maintenance of their culture, the fact that marine resources are only one of several rural livelihood sources does mean that the extent of their dependence on them for basic food security fluctuates, depending on their access to other food sources.
- The world view, values and ethics of this community emphasises the interconnectedness of beings. Flowing from this foundation, the philosophical principle of *uBuntu* shapes their sense of self in relation to others, as well as their understanding of rights and obligations. This is given expression in their culture through, amongst other processes, their ethic of sharing resources with others in need. This is cited by several informants as the reason why they cannot exclude others in need from the sea.
- In the culture of this community, access to the sea is regarded as central to the performance of cultural rituals (*amasiko*) and is necessary for the training of a traditional healer. The obligatory nature of these rituals is recognised and residents do not believe that they can exclude traditional healers from areas beyond their community as this will interfere with the authority of the ancestors. Traditional healers from outside Dwesa-Cwebe are required to inform the traditional authority that they wish to enter for ritual purposes.
- The users believe that the sea 'regulates itself' according to the laws of nature and they argue that the sea has always replenished resources sufficiently. This

has been their experience to date and hence they do not believe that their use of resources is unsustainable.

Rights to access and use resources in this system are layered and relational; they are vested in each individual, nested within the context of each household, itself nested within largely clan-based clusters of homesteads, further nested within the neighbourhood as a whole. This pattern of nested, layered rights is reflective of the patterns of land tenure in much of Africa (Cousins 2008, Bennett 2008, Okoth-Ogendo 2008), with the distinction that access and use rights to marine resources specifically are not patrilineal, but rather both men and women hold rights in their own right although these rights arise through their duties and obligations to care for their family.

Whilst rights are held by individuals these rights are relational, given definition only through their membership of the larger group, which holds the rights as a collective entity (Cousins 2008, Wicomb and Smith 2011). This system of tenure may have both individual and communal features (Sunde *et al.* 2013:6). In this way both common property rights and individual rights are accommodated in the customary system. Bennett has observed that in this type of system, rights can be seen as "a system of complementary interests held simultaneously" (Bennett 2008 in Sunde *et al.* 2013:6). This is reflective of many customary marine tenure systems established elsewhere, such as in the Solomon Islands (Hviding 1998). The communities' concept of ownership differs considerably from that of Western property and tenure regimes (Bromley 1991, Schlager and Ostrom 1992). Peters (2013) has argued that despite tenure rights in Africa being conceptualised very differently to those within a Western property paradigm, tenure rights in Africa should be accorded the status of property rights (Peters 2013).

Rights are not firmly defined according to age. Young children have the right to harvest, and an obligation to assist their parents with harvesting prevails. Ostrom has suggested that this quality of nestedness is important in strengthening the resilience of a governance system (Ostrom 1990 in Cinner *et al.* 2012:279).

9.2.3. Boundaries and membership of the customary marine resource system

Contrary to the literature on the management of common-pool resources which has argued that the establishment of clear boundaries and membership of the group is a key 'design principle', characteristic of long-lasting local institutions (Ostrom 1990, Cinner *et al*. 2012), the boundaries and membership of the customary marine resource system at Dwesa-Cwebe are relatively flexible. The marine resource users as a whole have not asserted a single identity as a 'fishing community' to date. Rather, each of the seven communities of Dwesa-Cwebe (who themselves have exclusive rights to this land that is common-property), can identify the neighbourhoods and clans considered to be marine resource users. The boundaries around these groups, within the larger communities, are relatively flexible and the user groups do not assert exclusive rights to the marine resources. This feature of flexibility of customary systems has been observed elsewhere (Ruddle 1996, Hviding 1998), as well as in relation to African land tenure systems (Cousins 2008). Peters and Kambewa (2007), observing social-differentiation and conflict over land in Southern Africa comments that conflict over land produces stricter definitions of those with legitimate claims to resources, that is, group boundaries become more exclusively defined as conflict increases (Peters and Kambewa 2007). This observation would support the conclusion advanced above that to date the relative lack of direct conflict with other marine resource users has led to the situation in which most of the operational rules speak to the culture and customs of the group, rather than to the function of managing conflict or limiting competition over scarce resources.

It is noted however, that the very recent intervention of the ECPTA through the rezonation process, has required of the seven communities that they identify a list of the marine resource users in their communities (*pers.comm* Mhlangana 2011). This process imposes a process of 'making legible' (Scott 1998) and visible the boundaries (and hence rules for membership) of the marine resource users in a manner that will define membership of the marine resource user group in a more static manner which is not entirely consistent with the flexible approach under the customary system. This statutory governance process imposes a technical rationality onto the group that may have two consequences: that of undermining the social basis of the customary system and 'rendering it technical' (Li 2007), as well as eclipsing the larger political questions

underpinning the boundaries of the resource regime at Dwesa-Cwebe, rendering invisible the broader political economy within which policy choices regarding marine conservation are embedded (Ferguson 1990, Cousins 2007).

9.2.4. Institutional arrangements, authority structures and processes

Contrary to the widely held, apartheid-based official customary law assumption that authority for decision-making on issues related to all natural resources within former Bantustan areas rested with the chiefs, in Hobeni and Ntubeni these traditional leaders are not involved in the direct governance of marine resources at all. However, Fay (2003), drawing on Ainslie (1998) in relation to land tenure, observes that this does not mean that there is an "institutional vacuum" (Ainslie 1998 in Fay 2003:7). Rather, power and authority in this instance is vested with existing, local level traditional authority at the level of neighbourhoods. This is a tacit rule rather than an explicit one (Vanderlinden 1989 in Jentoft *et al*. 2009). Kepe (1997) reports a similar system of authority operating in terms of the governance of wildlife resources in Mkambati.

As noted in Chapter Seven, this neighbourhood level traditional authority is constituted through the male heads of clans and senior members of homesteads, who advise the local sub-headman. Power is thus vested at this level and accountability flows upwards. This system is adaptive and whilst for general matters decision-making institutions tend to be patriarchal, with respect to marine resource use, women's knowledge of and role in marine resource use is acknowledged and they are consulted in relation to decisions affecting harvesting of inter-tidal resources. This was most notable in the process organised by the conservation agency in 2012 where the communities were asked to participate in a process of mapping their fishing and harvesting spots. The community insisted that women be included in the process of mapping inter-tidal resources. The local level institution established by the Hobeni fishermen, whilst lobbying for men to get access to the MPA to fish, has increasingly included women harvesters in some of its advocacy actions and interventions with the State (*pers.comm* Gongqose 2012).

The repeated reference by informants in the research interviews as well as by David and Vuyelwa in the court hearing to the ancestors as one of the authorities within the

customary system operating in Dwesa-Cwebe signalled the existence of a very different epistemology and ontology underlying their system of governance to that which underpins the statutory frame of reference for the MLRA. Throughout my research I heard and observed references to the way in which the wishes of the ancestors are communicated and how this shapes behaviour, at times enforcing social compliance. Several activities are seen as directly linked to the obligations and duties required by the ancestors and beliefs about the consequences of failing to comply with these obligations has the effect of placing sanctions on behaviour. This system presents an authority that differs in space and time to other authorities in conceptions of authorities involved in collective choice actions proposed by Schlager and Ostrom (1992) and others working on systems of governance (Aswani 2005,Cinner *et al*. 2012).

My understanding of this dimension of systemic interactions is one of symbolic ordering that draws on post-structural theory (Bourdieu 1989) to understand the processes whereby human beings construct patterns of meaning in their worlds, thereby creating symbolic structures. These shape conceptions of one's place and space (Bourdieu 1989). Drawing on the neo-Kantian philosopher Cassirer, Bourdieu posits the "***relational*** mode of thinking", "which identifies the real not with substances but with relations" (Bourdieu 1968 in Bourdieu 1989:15) against that of the substantialist mode, which excludes the possibility of a reality other than the one immediately available (Cassirer 1923 in Bourdieu 1989:15). Cornell (2008) has similarly drawn on understanding of Cassirer's 'symbolic ordering' to understand the processes whereby certain ethics shape living customary law (Cornell 2008). For the informants, the source of their rights to access and use resources and to manage this use lies in the interpretation of their relationship with nature. It defines their particular ontology. It also informs their interpretation of the interconnectedness of individual and collective identity. Cornell posits that the ethical underpinnings present in expressions of *uBuntu* suggest that *uBuntu* summons a set of relational values about how the individual interacts with others and in so doing gives substance to his/her, and their, human dignity and humanity (Cornell 2008, 2012).

As noted in Chapter Eight, throughout his testimony David Gongqose located himself in relation to his community and his ancestors (*Gongqose* 2002 Vol 1:7). This perspective

of interconnectedness and belonging to both one's clan and to the territory of one's ancestors is indicative of the cosmologies and epistemologies underlying the systems of knowledge and law of many indigenous peoples and local communities (Hickey 2006, Westra 2008). It also echoes the worldviews underlying systems of customary marine resource governance of many of the indigenous coastal communities that have been documented in the marine resource governance literature (Ruddle 1996, Hviding 1998). In looking at the nature of living customary law and the process of its recognition in South Africa, Cornell has argued that "living customary law has its roots in the ancestors" and that this symbolic world must be taken into consideration (Cornell 2008:4). This distinctive component of the dynamic of customary governance adds an additional layer of complexity to this system, further emphasizing its difference to the statutory system of marine resource governance.

9.2.5. Operational and collective-choice actions

Schlager and Ostrom (1992) qualify rights by identifying the nature and the level of action that a group or community embarks upon in relation to the above-mentioned 'bundle' of rights. They identify operational and collective choice levels of action (Kiser and Ostrom 1982 in Schlager and Ostrom 1992:250). Operational level rules are rules introduced to regulate operational activities whilst collective-choice rules are rules that shape how decisions are taken and who has the authority to make them.

An immediate observation is that in contrast to the characteristics of customary marine resource use and governance systems documented in the literature referred to in Chapters One and Two, few specific marine resource-related rules that restrict resource use have been defined in the Dwesa-Cwebe context. In this system, a repertoire of norms and rules guides behaviour from custom (*isithethe*) through to obligatory customary rituals (*amasiko*). With the exception of a few of the rules related directly to the extraction of marine resources, such as one may not use animal matter from the land for bait and harvesters should not harvest crayfish when they have eggs, most of these norms and rules reflect the broader cultural beliefs and practices of the larger group (not just those who harvest marine resources). In this way these norms and rules are embedded in the broader social and cultural structures within the customary

system of governance (Ruddle 1998). Vanderlinden (Vanderlinden 1989 in Jentoft *et al*. 2008) has observed that rules are not always explicitly stated and might not be readily apparent. In this instance, they are implicit in the broader customary system although not visible in the marine specific user system.

Collective-choice actions refer to the levels of participation in decision-making, dispute resolution and the ability of the group to devise and implement accountable mechanisms for developing operational rules to restrict resource use, monitoring resource use as well as effect sanctions for infringements of the operational rules (Ostrom 1990). Whilst few examples of marine resource specific collective-choice actions were offered by the informants in this research, evidence of this was provided in the descriptions of how decisions are made within the customary system and how disputes of a general nature are resolved. The letter written by the Hobeni Fisherman's Association to DEA was indicative of the group's ability to take a measure of collective-choice action. In this instance the expression of their threatened collective action "*we will do things our way*" (*pers.comm* letter written by Hobeni Fishermen's Association 2011 to DEA October 2011), was itself an expression of living customary law in opposition to the dominant rule-driven statutory system. In Ntubeni, where the State has attempted to impose an institution for co-management, but within a prescribed, top-down set of rules and regulations, the fishers and harvesters feel that "*"we don't have that power because all of these rules come from them" (*N3*).* However, they have inverted this institution and use it as a strategy of struggle by deliberately using the meetings as an opportunity to shift the power inherent in this relationship. They indicated that they place the DAFF officials in a compromised position, by repeatedly asking questions of the local officials who they know do not have the answers to these policy questions (N3).

The factors influencing the design of the Dwesa-Cwebe system described in the sections above reflect the distinctive character of living customary law in this system as a flexible, processual-orientated set of principles that are determined by the "socio-cultural logic" of each context (Comaroff and Roberts 1981). In this regard it can be argued that there is congruence between the 'socio cultural logic' of the local context, and the rules and local conditions (Ostrom 1990). That is, the scale of the institutions

and levels of action have appeared appropriate for the local conditions (relatively little competition and sufficient resources) until recently. This issue is highly contested however by marine scientists who have researched and recorded over-exploitation of inter-tidal resources along the coastline at Ntubeni since the late 1980s and who argue the need for increased restrictions and enforcement (Fielding *et al*. 1994). Arguments by those conducting research within the MPA suggest that continued high levels of what is termed 'illegal' fishing of line fish species is threatening the objectives of the MPA (Venter and Mann 2012). Whilst this research on the customary governance system does not aim to research or argue the contribution to ecological sustainability of this system, it is apparent that there is a disjuncture between the informants' perceptions of the natural laws of the sea and the scientists perceptions of the ability of the stocks to sustain the current levels of harvesting.

This emphasizes dissonance between the marine science principles and objectives underlying the existence of the MPA as a conservation and fisheries management tool, and the communities' understanding of the objectives of this MPA and its link with stock status at national and international levels. In Chapter Five I observed that only one out of 62 of the informants interviewed for the survey linked the establishment of the MPA to the objective of protecting marine resources. From their perspective on an immediate local scale, the sea protects itself through the high tides which make most of the inter-tidal rocky ridges inaccessible for many hours. The residents that I interviewed appeared largely unaware of the consequences of their harvesting from the perspective of a systemic approach to biodiversity protection operating at national scale. In the context of the dispossession of land and resources that they have experienced, and in their understanding of restitution and redress within the new South Africa post democracy, they have little understanding of the concept of closing their coastline and prohibiting resource use in order to provision the coast further afield as part of protecting marine resources for the larger 'common good' as indicated in global instruments such as the CBD. Wiber and Milley (2006) observe that "many common problems experienced by local management groups can be directly traced to this disconnect between the management objectives embedded in the nation-scale politics and diverging local priorities" (Wiber and Milley 2006:3). Notwithstanding their apparent lack of awareness of national level biodiversity conservation imperatives

however, the informants' own responses were slightly contradictory. Whilst they argued that the sea protected itself, several of them did suggest that restrictions would be necessary should they be given the right to manage their own resources. This would appear to support Davies' (2009) findings that the socio-economic and political context of resource use shapes residents' ontological perspective in relation to the resource, irrespective of the actual reality of stock status.

9.2.6. Ethics and principles underlying the customary governance system

Informants described a range of customary practices that emphasise interconnectedness amongst people and that are considered the norm within the culture of this community. As presented in Chapter Seven, Section 7.4, the way in which community members grow up understanding that they are connected to and have certain customary obligations to their families, as well as to their ancestors, was apparent from the outset of David's oral history when he confirmed that he had gone fishing in order to meet his customary obligation to provide mourning clothes for his mother (*pers.comm* Gongqose 2011). In contrast to the statutory individual permit system implemented in Ntubeni under the MLRA, this relational component of the customary system provides a framework for local, horizontal accountability between users. The informants did not provide any examples of when this mechanism had been used to hold a community member to account to the stated ethics and values underlying the system. However, they did provide examples of how the individual permit system did not accommodate their specific social relations, underpinned by the principle of *uBuntu*, which required of them that they share their resources, and harvest on behalf of the disabled or for elderly household heads who are no longer able to harvest for themselves. The existence of this principle was confirmed by Timmermans (2003) who observed that in Ntubeni, "Even at the non-kin level, a morality of mutual assistance prevailed. Social values represented by the terms *uBuntu* (humanness) and *uBumelwane* (neighbourliness), placed an obligation on the better-off to assist those that were destitute" (Timmermans 2003:126). This is reflective of the principles of reciprocity underlying customary systems of marine resource use documented elsewhere in South Africa (Kepe 1997) as well as internationally (Johannes 1978, 2002).

9.3. The relationship of customary governance to living customary law

The expressions of living customary law described in Chapters Seven and Eight that have been heard and evidenced in the research interviews and focus groups and in the testimony given in court, have highlighted the nature of living customary law embedded in this governance system. This is a very tacit system of living customary law, largely with 'latent rules' (Vanderlinden 1989), that has not developed explicit expression through rules regulating and restricting marine resource use, for the suggested reasons outlined above. However, marine resource use and governance is embedded in the broader system of norms and rules guiding behaviours and obligations within the customary system of governance as a whole, which simultaneously constitute expressions of customary law (*umthetho semthetwini*). This character of the expressions of living customary law thus reflects the approach to understanding of social ordering and control in African systems proposed by Comaroff and Roberts (1981) in which there exists "an undifferentiated repertoire, ranging from standards of polite behaviour to rules whose breach is taken extremely seriously" (Comaroff and Roberts 1981:9). In these systems "indigenous rules are not seen a priori as "laws"", they guide behaviour and dispute resolution in a processual manner according to the distinctive socio-cultural logic of each system (Comaroff and Roberts 1981:14). Thus, rather than being a definitive system of 'law', in this context, living customary law reflects a 'repertoire of norms and rules' (Comaroff and Roberts 1981) linked to the customary system of governance.

Drawing on Cornell (2008, 2009), the expressions of living customary law within this governance system highlight the fact that what is referred to as 'living customary law', as articulated in this system, is more than merely a system of 'law'. It is simultaneously a set of philosophical principles, ethics and values derived from the cosmology and epistemology upon which this system is based. They are given legitimacy through their acceptance by local level institutions such as the homestead group of elders and the sub-headman in a given neighbourhood. They are regarded by the community as their custom. They are both constitutive of their culture as well constituting their culture.

Whilst they may change over time, they are still seen as customs derived from the guiding norms of the elders (H 43c)[64].

In the perspective in this analysis, the expressions of living customary law at play within the Dwesa-Cwebe community are immersed in the social milieu and 'total cultural logic' (Comaroff and Roberts 1982) of the customary community. They constitute one component of how order is patterned but not the only one. Drawing on the understanding of governance as referring to "interactions taken to solve societal problems and create societal opportunities", (Kooiman and Bavinck 2005:17), the expressions of living customary law can be seen to shape these interactions, however, a range of other social processes are also at play in shaping the well-being of the community. Customary law constitutes but one of the mechanisms of governance in this complex system.

As noted in Chapter Two, theorists in legal pluralism have long debated what the defining characteristics of law are (Moore 1998, Benda-Beckmann 2002). Moore has posited that law comprises "norms and rules in semi-autonomous social fields with the capacity to produce and enforce rules" (Moore 1973 in Tamanaha 2007:393). The presence of an institution with the capacity to enforce rules has been central to many theorists definition of law. In contrast, Woodman observed, "law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control" (Woodman 1998 in Tamanaha 2007:393).

The bundle of social phenomena present in and holding validity for the Hobeni and Ntubeni communities, as described in Chapter Seven, is reminiscent of the phenomena referred to by Benda-Beckmann as 'law' namely "rules, principles, categories, concepts, standards, notions, schemes of meaning" (Benda-Beckmann 2002:48). However, in the expressions of living customary law in the Dwesa-Cwebe communities, in relation to marine resources specifically, the latent nature of the institutions, norms and rules of this system, embedded in their culture, make it difficult for outsiders, particularly those operating within a Western paradigm of law, to recognise the existence of a system of

[64] This interpretation was confirmed by an independent isiXhosa interpreter and translator, Naledi Mponopono on listening to a sample of recordings of the original interviews (*pers.comm* Mponopono 2014).

law. 'Law' in the Western sense of the word is not a separate juristic domain in this society, but is embedded in and part of the larger governance system. This customary governance system is thus made up of an extremely complex constellation of processes and structures. For example, one of the principle authorities in this system, derived from living customary law, is the authority of the ancestors. In this regard this system operates within a differently located temporal and spatial relation that includes the metaphysical. In this context, the concept of 'enforcement' takes on an entirely different logic to that of the monitoring and enforcement of obligatory rules in a Western legal context. This disjuncture in the systems of symbolic ordering and in the socio-cultural logic of the statutory vis à vis the customary legal system was most apparent during the court case described in Chapter Eight where the prosecutor was unable to conceal his disbelief of the symbolic place of the ancestors and their power through ritual in the customary system.

Schlager and Ostrom (1992) suggest that the source of rights in a natural resource property regime might be "lawful recognition by formal, legal instrumentalities" or, it might originate amongst resources users (Schlager and Ostrom 1992:254). In these communities, the norms and rules inherent in the customary governing system, and the processes for enacting these norms, were recognised by the defence attorneys in the *Gongqose* trial as constituting the Dwesa-Cwebe communities' system of "customary law" (*Gongqose 2012* Vol 1:13). This mirrors the interpretation of the source of rights in most other customary marine governance systems documented internationally, where rights are located in customary law (Hviding 1998, Johannes 2002, Aswani 2011).

In South Africa the Constitution and the policy on SSF recognise customary rights arising from customary systems of law. The SSF policy states "the state must

> *a) recognise 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;*
> *b) recognise rights guaranteed by custom and law and access to, and use of natural resources on a communal basis to the extent that these are consistent with the Bill of Rights" (DAFF 2012:14).*

In the context of legal pluralism in South Africa therefore, customary marine resource rights have *de jure* recognition however they do not yet have *de facto* recognition within the legal statute governing marine resources (the MLRA). Nor do such customary systems have recognition by some of the key governance and legal actors within the legal system, such as the government officials within DAFF and DEA and the officials within the ECPTA conservation agency managing Dwesa-Cwebe MPA on a day to day basis. In *Gongqose*, the legal status of customary law, and the rights arising from this law, was contested by the conservation authorities. As observed in Chapters Four, Five and Six, these authorities have a history of operating within a different legal and temporal frame with regard to compliance with national law. This was also evidenced in the magistrate's judgement when he referred to the law of the former Transkei homeland used to charge David as a law "from a bygone era" (*Gongqose* 2012 unpaginated). Wiber (2014) conceptualizes and describes this phenomenon of the "temporality of law" in natural resource governance, noting that the implementation of certain laws at different scales is often out of sync (Wiber 2014).

In the light of the fact that the South African Constitution recognises systems of traditional authority that operate under customary law and recognises rights that are conferred in terms of customary law, this research aimed to try and understand this customary system of governance in relation to its system of customary law. Attempting to understand the logic of this customary system, *in its own setting*, the research revealed a system of governance and expressions of living customary law based on a set of foundational principles that interpret, guide and shape interactions throughout the governance system. In this system, a separate legal domain is not in evidence, rather, these foundational principles are woven throughout the system and constitute and in turn are constituted by the system. In the logic of this system, it is not logical to separate out what is 'law' as a distinctive domain. Rather it must be considered in the total socio-cultural logic of the system. It is now a well-established fact that customary law in South Africa has, to date, comprised official customary law, as recognised by the colonial and apartheid authorities, and living customary law, now recognised by the Constitutional Court as customary law that is lived by the people (Mnisi 2007, 2009). The Constitutional Court has stressed the importance of recognising the dynamic, developing nature of living law and not to interpret it through the distorting lens of

other legal paradigms[65]. Viewed from this perspective, I would therefore argue that the recognition of living customary law, within the current context of a legal and judicial system that has not yet transformed in accordance with this Constitutional recognition of customary law in an African context, presents a paradox. Using the tools and interpretation of a statutory, Western inspired approach to understanding what law is, a system of 'law' in the form of a collection of norms, rules and customs that hold validity for the group is recognizable in Dwesa-Cwebe. However, if one is to truly hear and recognise the meanings inherent in the system of governance described by the informants in this research, "*in its own setting*" [66] and "*on its own terms*" (recalling van Vollenhoven in Benda-Beckmann and Benda-Beckmann 2011:175), as an African customary system, then one has to acknowledge that living customary law is not a 'system of law' as known in the statutory sense of the word. However, in order to gain recognition for their customary governance system within the current Constitutional context, this community is required to give expression to living customary law in a form that the dominant system of law can recognise. Ironically it is thus forced to use the language of statutory law. The SFF policy recognises customary rights on paper but yet, as noted in Chapter Four, the DAFF has stated that "No evidence has been presented, nor has any been suggested, to indicate the existence of a system of customary law adopted and observed by certain fishing communities" (DAFF 2011:1).

9.4. The interface of customary and statutory systems of governance

As noted throughout this thesis, the customary system of governance of the Dwesa-Cwebe communities has interfaced with the statutory system of governance, operating at varying levels, since the imposition of colonial legislation and administration in the 1890s. Claassens (2013) amongst others has noted that the integrity of living customary law in South Africa more broadly has been altered and distorted through its articulation with the dominant system of law. In the context of the governance of Dwesa-Cwebe MPA, a system of legal pluralism has existed, with multiple and overlapping laws and mandates operating at many levels. Whilst this research highlighted evidence of the distortion of this customary system, such as through the

[65] *Bhe 2005 para [45-48].*
[66] *Shilubana 2008 para [44].*

imposition of new statutory institutions for the governance of their land and co-management of the reserve and in the imposition of the statutory individual permitting system, overall the system of customary governance appears to have retained its integrity.

As noted in Chapter Eight, the court case provided useful insight into the dynamics at play when two very different systems of governance, underpinned by two diverging systems of law, with contrasting world views, interface so immediately. This brought into focus the way in which law, as a tool or mechanism of governance, is used by both the dominant and the marginalised system to assert power. Bourdieu (1989) uses the term 'symbolic power' to describe the ways in which dominant discourses assert not just physical force, but assert the power of their discourse onto other systems through discursive practices and legitimating knowledges. The expression of this power, with its associated symbolic violence, reverberated throughout the court, as the state prosecutor hammered at David and the defence witnesses, demanding that they admit that statutory law was the 'right' law, attempting to provoke them into admitting that customary law was 'wrong' in this instance. Bourdieu notes the particular power that law specifically has in society in that "the legal consecration of symbolic capital confers upon a perspective an absolute, universal value, thus snatching it from a relativity that is by definition inherent in every point of view" (Bourdieu 1989:22). In this instance, symbol making is "world making" (Bourdieu 1989:22).

The politically embedded nature of both statutory and customary systems of governance in this context (Cousins 2007), the power of discourse and the legitimating practices of governance systems are most visible in this case study through the response of the state fisheries department to the issue of customary fishing rights. As observed in Chapter One and Chapter Four, the DEAT and more recently, DAFF, have taken no action to recognise the customary systems of marine resource use of the Dwesa-Cwebe community. Instead, they have asserted the dominance of a statutory approach to governance and management, in part through the absence of any policy instrument that would give effect to the Constitutional recognition of customary law. Their power to do this is asserted through their silence on this issue, even on the Traditional Leadership and Governance Framework Act, which they fail to reference in

the policy (DAFF 2012). Whilst one might anticipate that they might reference this and interpret it through the lense of 'official' customary law, their choice not to do so at all would appear to reflect more particularly the power relations within the fisheries department, where a worldview that has little space for any form of legal or epistemic pluralism dominates. This reveals the very specific interpretation of statutory and customary law within the dominant governance regime and how it is being used as an expression of power in the context of the small-scale fisheries policy. As noted by Ferguson (1990), understanding of the workings of power through development discourse necessitates hearing the silences within development discourse.

The response of the Hobeni and Ntubeni communities to the imposition of statutory law in the context of marine resource governance has been described. I noted that contrary to the embedded nature of their system of law that I had observed during my fieldwork and that was indicated in my discussions with informants in interviews and focus groups, the residents of Hobeni have begun to articulate a hitherto unexpressed concept of 'the Law'. The informants' engagement with statutory law over the past two decades, through their land claim negotiations and particularly since the start of legal proceedings in the *Gongqose* matter, highlights this paradox of the steady 'legalisation' of their own system. It has forced them to create new legal entities and engage in new legal contracts around their access to and management of their own land (Fay 2013). However, critical to this study, it has led to them amplifying living customary law beyond the context of the customary governance system in which it is normally embedded.

9.5. Contribution of the customary system towards socially just small-scale fisheries governance in South Africa

Jentoft *et al.* (2009) note that legal pluralism increases complexity. Kooiman and Bavinck (2013) have argued that the levels of complexity, dynamics and diversity in a system pose challenges to the 'governability' of a system (Kooiman and Bavinck 2013:14). This is largely because the complexity of the system interactions makes predictions of the outcomes of these system interactions difficult. They note however, that a reductionist approach that is unable to accommodate the complexity of a system

will fail accordingly (Kooiman and Bavinck 2013). This seems particularly true of the interactions between the statutory and customary system of governance contested at Dwesa-Cwebe, where the failure of the statutory system to understand and accommodate the dynamics and complexity of the customary system results in conflict between these two systems. The customary system here is a complex one that requires what Cornell (Cornell 2009:408) calls a "process of carefully deciphering a view of law that is different than our own".

This research suggests that the customary system of governance itself offers an order of governance, elements and processes that can contribute towards bridging the gap and facilitating engagement between these divergent systems of governance as they interact within a contemporary, constitutional law context that provides an imperative for an interactive approach to governance. This potential remains largely unrealised however, due to the current approach of the state administration and other actors who consistently chose to ignore this customary system, or at best, view it through a particular mode of governance that fails to see the different images that it offers.

Exploring a range of papers on natural resource management from a plural legal perspective from around the world, Wiber and Milley (2006) identify three overarching issues that they discern as critical to the governance of the interaction of diverging systems: "clarity, legitimacy and respect". They suggest that "these terms provide both insights into the nature of the conflicts and into potential ways to resolve the conflicts" (Wiber and Milley 2006:4). This relates to clear understanding of and clarity on the principles and values underpinning each system that guide decision-making, itself dependant on improved dialogue amongst managers and resource users. Further, it requires an understanding of the rationality underpinning different values associated with decisions. This impacts how the legitimacy of each side is perceived. If this clarity and legitimacy is absent, the trust required to build a respectful approach is unlikely to exist (Wiber and Milley 2006:6). The findings of this research are consistent with this approach that implies that governance in complex plural legal contexts requires a measure of reflexive enquiry of all governance actors prior to and in the process of any governance interaction. The following key contributions of the customary governance

system towards promoting socially just small-scale fisheries governance in the context of the new policy for SSF in South Africa are identified:

9.5.1. Giving expression to a new ethic of social justice in marine resource governance

Customary governance as evidenced in Dwesa-Cwebe, and its particular expressions of living customary law, presents the possibility of infusing a new ethic of social justice into marine governance through its foundational principles. These core principles influence governance content and processes, including the substance and procedures for interpreting rights. Amartya Sen has observed that "importantly, social justice does not relate solely to distributive outcomes. It is also an issue that relates to institutions and their governing principles, processes and procedures "(Sen 2009 in Jentoft 2013:112). This research has highlighted the distinctive perspective on nature-human interactions and the principle of interconnectedness that lies at the heart of the customary governance system. This is operationalized in the customary system of governance through the ethical principle of *uBuntu. uBuntu* is cited here as an example of an expression of living customary law that extends understanding of legality beyond conceptions of individual rights to understanding the interdependencies between individuals and the reciprocal, mutuality of our humanity (Cornell 2008, Cornell and Muvangua 2012). Expressions of the foundational principle of interconnectedness, as expressed through the ethic of *uBuntu*, shape how access to and use of marine resources is ordered in that residents are guided to only take what they need for their own livelihood needs. Implicit in this is a duty to ensure that there is sufficient for everyone. Further, those who are unable to harvest, such as the disabled, are catered for by others who are able to harvest on their behalf. It is accepted that these persons will need to harvest more in the light of this obligation. In this way the ethic underlying the system influences the outcome in terms of distributional equity. Whilst it is accepted that increasing penetration of market system dynamics might change this principle in future, as evidence elsewhere has indicated (Johannes 2002, Cinner and Aswani 2007), some customary systems have demonstrated their flexibility and adaptiveness in developing in response to social and political changes and maintaining their integrity (Hviding 1998).

The contribution that this principle of *uBuntu* can make to governance of small-scale fisheries, even within a commercial context, is apparent. The new SSF policy is committed to promoting social equity. Currently there are no mechanisms inherent in the statutory legislation or the policy to operationalize this principle beyond the merely *de jure*. This research suggests that it is in *the living* and operationalising of these social principles that these legal principles are realised. Living customary law as it is expressed through customary governance offers examples of instances where these ethical principles are being lived, practiced and enjoyed. Whilst this research does not pretend that these instances are continuous, and that there are not other power relations that do impact equity and well-being within and between women and men, families and clans, however the frequency within which this expression of this principle was observed suggests that it continues to be an ethic that exerts a powerful guiding influence on behaviour. Whilst detractors of customary systems are quick to point out the failures of these systems to achieve this equity, and the many examples of where power relations within customary systems of governance have skewed resources in favour of elites, or this ethic has not contributed towards environmental justice and sustainability, Cornell (2008) reminds us that *uBuntu* is also an ethical *ideal.* In Dwesa-Cwebe, the imposition of statutory regulations that have distorted the system of customary governance has meant that this system has not been able to flourish, adapt to external changes and achieve its ideals 'in an ideal way'. Nonetheless these principles have been resilient and remain integral to the customary system of governance in Dwesa-Cwebe in both Hobeni (where access is currently prohibited) and in Ntubeni, where access is permitted. In contrast, fishers living in small-scale fishing communities in the Western and Northern Cape, where the individual quota system and individual permit system have been implemented have highlighted the divisive and pervasive individualism inherent in these statutory policy mechanisms. This policy approach has undermined social relations of reciprocity and mutual support in these communities (Masifundise 2010).

9.5.2. Promoting an ecosystems approach to resource governance

The principle of the interconnectedness of human-nature, and a relational mode of being, resonates with the ecosystems approach to fisheries that has become a core principle in several international instruments for the protection of biodiversity and fisheries governance (FAO 2003, Aswani 2011). The policy on SSF commits the state to implementing an ecosystems approach (DAFF 2012). To date however, the application of the ecosystems approach in South Africa has tended to focus on the ecological component of the marine ecosystem only (Sowman *et al*. 2014b). The concept of interconnectedness and belonging expressed by the Dwesa-Cwebe community when describing their relationship with land and the marine resources associated with this land locates humans in interaction with the ecological system. Whilst to date they have not felt the need to develop many operational or collective choice rules to limit their use of marine resources, they draw on the shared value of *ukulondeloza* (to care for nature) as a core value inherent in the customary system of resource governance in general when asked about their approach to sustainable use and conservation. The disjuncture between their expression of this norm, and the policy approach to the zonation and management of the MPA is apparent. The Settlement Agreement of 2001 includes the principle of co-management; nonetheless to date the community has not participated as co-managers of the reserve or of the MPA .

9.5.3. Recognising traditional ecological knowledge, co-learning and integrating diverse systems of knowledge into biodiversity protection

Enabling the local customary system to extend its application of *ukulondeloza* (to care for nature) to the marine environment, and working together with the conservation authorities in an adaptive learning approach to develop a shared set of knowledge and common understanding of the limits of the marine stocks in this particular location would provide an opportunity for this shared value to be brought into the governance process. Most significantly, it would enable their local and traditional knowledge to be recognised and contribute towards the management of the MPA. The importance of the integration of such knowledge systems and the co-development of knowledge has been recognised in international law and governance processes (Westra 2008, UNEP 2010,

Vieros *et al.* 2010). Integration of local knowledge is an integral component of the right to culture and the right to the environment and the loss of these systems of knowledge impacts the sustainability of biodiversity. "Ironically, a key factor driving the erosion of traditional knowledge and cultural values relevant for biodiversity conservation is the alienation of indigenous territories to create state-run protected areas without adequately recognising traditional land access, and by forcibly removing peoples from their lands in some cases" (CBD 2005a in Swiderska *et al.* 2009:14). Integration of this knowlege is thus a social justice and environmental justice imperative. As discussed in Chapter Eight, there are two systems of knowledge at play at Dwesa-Cwebe, seemingly in conflict with one another. Davies (2009) has argued that the ontology and histories of social struggles of local communities must be considered when understanding their current expressions of knowledge about the sustainability of marine resource stocks. The ontology and political reality of these communities has to be engaged in processes that simultaneously acknowledge their context whilst integrating other knowledge systems such as evidence-based scientific knowledge (Davies 2009).

9.5.4. Recognizing relational systems of rights and common-property systems of resource governance

Recognition of the systems of governance of indigenous peoples and local communities has significant implications for how law, property rights and responsibilities are conceptualised as well as how the individual as legal person and 'rights holder' in relation to his or her community is understood (Westra 2008, Peters 2013). This in turn has important social justice implications. The marine science literature and policy makers have, to date, characterised the property rights regime existing along the Eastern Cape coast as one of 'open access', described as a "free for all" (Raemaekers 2009:32). Whilst it was acknowledged that African residents of this coastline had historically depended on marine resources as one of several livelihood options (Branch *et al*. 2002), and as such they had a rightful claim to access as part of the post-apartheid legal reforms of the 1990s, the possibility that they might have had a customary system of governance, with an associated system of tenure within which the inshore coastal waters and inter-tidal resources were regarded as shared, common property, with associated rights, has not been considered. Viewed through the "Hardin-ed' eyes of a

Western trained fishery scientist (Hardin 1968), the apparent absence of a clearly defined system of fisheries rules shaping access and use was interpreted as 'no system' at all, or 'open access'. Yet 'open access' does not adequately capture the nuanced, tacit set of norms and rules that existed on land but exerted influence on and shaped the context for marine resource use and governance at Dwesa-Cwebe. It does not capture the interlinkages between the actions of fishers and harvesters and the knowledges and network of meaning which is simultaneously the source of their actions and the outcome of their actions. The failure of both post-Apartheid land restitution and fisheries reforms of the past 20 years of democracy to recognise the nature of the customary system of this community adds urgency to the need for the implementation of the policy on SSF to recognise and give effect to the principles inherent in the SSF policy.

The SSF policy calls for a recognition of rights established in terms of customary law, common law and legislation (DAFF 2012). However, any such recognition or a 're-interpretation' of rights in the process of implementing this policy runs the risk of making the state the primary actor and legitimizer of rights. Recognition will still be limited to a narrow 'legal' conceptualisation of 'the law' if it fails to also understand the qualitatively different *nature* of these customary rights. As noted by Cornell (2008), citing Judge Sach's Constitutional Court judgement (*Port Elizabeth Municipality),*[67] the ethic of *uBuntu* requires us to go beyond mere legality in giving effect to the principles of social justice. It has been noted that in African customary law, in general, 'rights' are largely expressed as duties or obligations rather than as rights (Bennett 2012:32). This sense of duty to one's family is so strong in African customary law that it has been incorporated into Article 27 of the African Charter on Human Rights (Bennett 2012:32). It is these distinctive social and ethical expressions inherent in living customary law that call for an approach to law, policy making, policy implementation and administration that reaches beyond 'the law' and 'rights', into a deepened understanding of 'governance', whereby the ethical and social principles underpinning customary systems can be given expression at all levels of the 'governing systems' and 'systems to be governed' (Kooiman *et al.* 2005). This understanding of governance speaks not just to the obligations on the state as actor, but to those of social actors in the

[67] (*Port Elizabeth Municipality v Various Occupiers 2004*).

public and private sphere, such as NGOs and community based organisations and institutions as well. It requires at minimum, that these principles in the policy are operationalized through an approach to implementation of the policy that allows the distinct character and qualities of the customary system to gain expression. There is a need for transformation and capacity building in the fisheries administration itself so that statutory officials are aware of, respect and understand the customary system and customary communities' right to develop their own system, in accordance with the Bill of Rights.

9.5.5. Promoting an accountable, process-orientated, dialogic approach to governance and 'doing justice'

One of the key strengths of the customary system of governance as it is operationalized in Dwesa-Cwebe is its local structures of accountability. Power to make decisions about resource use is vested at the local level of the household. It then cascades outwards and upwards, to the level of the homestead, then the neighbourhood level. Whilst the power of the sub-headman is recognised at this level, this position is regarded as an elected one, in which he is chosen by the people and he is accountable to them.
Structures of accountability are thus built into the system through the nested nature of each layer of administration and decision-making.

In the system of customary governance decisions are taken, problems solved and disputes are resolved at different levels, depending on the nature of the problem or dispute and the level at which it arises. The principle of subsidiarity is thus built into the decision-making system. The layered nature of rights gives rise to a similarly layered system of institutions for problem solving and dispute resolution. In addition, the emphasis in both decision-making and dispute resolution is informed by the ethics underlying the expressions of living customary law. That, is, it is deliberative and processual and creates an opportunity for the socio-cultural logic in the context to be understood. The relational mode is encouraged in dispute resolution and the outcome of disputes is to restore the relationship between those in dispute. This principle of restorative justice extends the concept of legality beyond the narrow constrictions of

merely 'the legal' and highlights the interconnectedness of the different dimensions of governance given expression in living customary law.

9.6. Contributions to the understanding of marine resource governance theory

9.6.1. Understanding the linkages between different orders of governance

The findings of this thesis contribute towards marine resource governance theory on a number of different levels. At the level of 'meta-governance' (Kooiman *et al.* 2005), the research highlights a critical thread linking the different orders of governance, showing that if the principles and values of a system at meta governance level are not analysed and understood, this will distort governance interventions throughout that entire system, at all levels. It will distort interpretations of the nature of the rules and institutions inherent in that system and it will distort the images and instruments developed to operationalize the values and goals of that system. It thus adds emphasis to the assertion by Kooiman *et al*. (2005), that "Principles and values give structure to governance. They provide a value structure guiding fisheries governors in assessing where fisheries are, where they should be and what means can be used to get them there" (Kooiman *et al.* 2005:365).

9.6.2. Understanding the relationship between law and governance in different contexts

The research contributes to an understanding of how rules, structures and institutions might operate differently from different perspectives, depending on the principles and values underlying the meta order of governance (Kooiman *et al.* 2005) as well as the images of governance that flow from particular perspectives. It has demonstrated that in the context of the perspective of the customary system of governance operating in Dwesa-Cwebe, 'law' is only one dimension of governance, is not the only structure that shapes the outcomes of interactive governance, of how people live together, albeit an important one and one that is gaining in strength in the current neoliberal governance context (Comaroff and Comaroff 2009). This shows the need for a more nuanced understanding of law, and that analyses of how expressions of law operate in different paradigms of governance and how law itself may be mediated by particular histories

and other structures such as culture and social relations of power needs to be included in analyses of fisheries governance systems. This adds to recent insights from the literature on legal pluralism and governance. Wiber and Bull (2009) note that in respect to fisheries and ocean governance reforms in Canada, although the law was seen as "the tool for devolving powers, roles and responsibilities to the grassroots level," it has "more often been deployed in ways that block participatory governance of resource management" (Wiber and Bull 2009:152). They suggest that "unless and until the political will exists to shift the real barriers to participatory governance, significant changes to governance structures will not emerge" (Wiber and Bull 2009:152). Similarly, Jentoft (2013)'s discussion of Sami tenure rights in Norway highlights the role of factors beyond the law, such as vested power in the fisheries industry, in shaping governance choices in the light of competing legal imperatives.

Linked to the above, the research contributes to a refinement of the understanding of the complexity of rule-making and institutions of authority. Across different cultural epistemologies these may differ vastly, including processes of symbolization and meaning that challenge Western notions of rationality and the linearity of time, such as those presented by governance systems that include ancestral relationships. If the principles underlying this order of governance are not also explored, the logic inherent in this perspective may be lost. In contrast, if it is explored and understood, this logic may offer a new opportunity for synergy with other principles shared by governance paradigms, even if these are expressed in very different ways.

9.6.3. Understanding the diversity, dynamics and complexity inherent in the design of governance systems and the implications for policy design

The research shows that boundaries of customary systems may be flexible and that this might contribute towards achieving social justice imperatives in a way precluded by the tight definition promoted by some theorists exploring resilience (Ostrom 1990, Cinner *et al.* 2012). Further research is needed on the way in which this flexibility might act as a safety net for the more vulnerable and how it accommodates fluctuations in well-being as is suggested elsewhere in Africa (Bené *et al.* 2010). However it confirms that

the dominant policy approach of introducing individual, privatised rights regimes should be approached with caution in this context.

Contrary to much of the literature on natural resource governance and customary institutions elsewhere in Africa (Sikor and Lund (eds.) 2009, Ubink 2011), and despite versions of official customary law reinforcing notions of chiefly traditional authority (Delius 2008, Claassens 2013), the customary institutions in Dwesa-Cwebe have retained their integrity at local neighbourhood level where the chiefs and headmen have never played a significant role in the governance of marine resources. Rather, powers of decision-making about these resources, similar to those for land and other natural resources in this region of the Eastern Cape (Kepe 1997, Fay 2003), are vested at the local neighbourhood level. This has important implications for how official recognition of customary law, through the Framework on Traditional Governance Act, is interpreted and implemented in coastal communities and how this Act articulates with the SSF policy in future.

The system of authority that is inherent within this customary system of governance differs substantially from the institutions and systems of authority and social control described in the literature on governance of complex systems (Ostrom 1990). It thus requires an expansion of the earlier conceptualisation of law influenced by Weber (1954) as processes of normative ordering through the structuring of rules, processes of legitimization and the social enforcement of these rules by authorities and institutions.

My own conceptualisation of the distinctive nature of the systemic interactions in these processes of normative ordering was prompted by Fay (2003), who in turn drew on the interpretation of institutions developed by Leach *et al*. (1999). This approach gives attention to structure and agency (Giddens 1984), but extends the understanding of the workings of structure and agency to include not only the enforcement of rules but also the 'regularised practices' whereby groups of people deviate from rules and validate their actions (Leach *et al.* 1999:16). In this conception of systems, many "institutions are informal, and consist more in the regularized practices of particular groups of people than in any fixed set of rules; as such they are also dynamic, changing over time as social actors alter their behaviour to suit new social, political or ecological

circumstances" (Leach *et al*. 1999:16). It is illustrated through my research in the ways in which ethical principles and values, such as *uBuntu* were given 'regular expression' through social practices and interactions, in many instances bearing little resemblance to a rule such as the fishers' sharing their catch. However, in addition to this extended understanding of these institutions and authorities, this thesis has explored the role played by the authority of the ancestors in the everyday lives of the informants. In the Dwesa-Cwebe marine governance system there are no marine resource specific institutions of social control; however, in addition to the local customary authority of the sub-headmen and the clan and homestead elders, the authority of the ancestors plays a key role. I argue that in this context, the foundational principle of interconnectedness and the ontological mode of being linked to it, that of a "relational mode" (Cassirer 1923 in Bourdieu 1989:15), shapes the subsequent symbolic ordering of structures in this customary system. In this way, notions of 'belonging' and relatedness to the land and to the ancestors exist beyond ordinary time-space interactions. From this perspective therefore, I argue that a theoretical conceptualisation of 'authorities' and 'institutions of social control' such as those in expressions of living customary law that inform customary governance must accommodate this dimension of symbolic ordering and its consequences for developing culturally appropriate elements and mechanisms of governance.

At the level of the first order of governance, that is, the day to day problem solving and management (Bavinck *et al*. 2005:33), the research has highlighted the mismatch and its consequences that may arise if the thread of underlying principles is not drawn across all levels and orders of governance. This is illustrated in this research clearly in the way that the image of a property rights regime is distorted and projected as one of 'open access' to common pool resources, in a context where the underlying interpretation of the laws of nature, an ethic of shared interconnectedness, belonging and common duties and rights differs from a Western concept of ownership but is still a property right (Peters 2013). Similarly, the statutory policy instrument selected to operationalize this interpretation (the second order of governance), in this instance an individual fishing permit, distorts the values of shared responsibility and the ethic of *uBuntu* inherent in the customary system.

9.6.4. Understanding the 'ecology of knowledges' in interactive governance

Most significantly, this research illustrates how critical an analysis of the epistemology, ontology and cosmology underlying different systems of governance is for governance processes. In particular, such an analysis highlights the deep complexity of the interactions of different systems within a plural governance context such as Dwesa-Cwebe, particularly where it involves a culturally divergent customary system in interaction with a statutory system, itself interfacing with Constitutional law and international law. These two systems are fundamentally different, each located within a different paradigm of governance, with diverging ways of knowing and being in the world with concomitant differences in how interactions with nature are interpreted and how principles and values are constituted.

The implications of this for marine resource governance theory and for the practice of fisheries and marine resource management are profound as this raises a moral question that references the common humanity of people across epistemic and ontological boundaries: is it possible to bring together two divergent systems of governance in a mutually respectful way that retains the integrity of different ways of knowing and being in order to imagine a third, harmonized interactive mode of governance?

Much of the existing interactive governance literature has focused on the interaction of different legal systems, sometimes even between conflicting legal systems, within an overall context of a state-centric governing system and a 'system to be governed' (Kooiman et al 2005). To date this question has not been adequately addressed in the fisheries governance theory literature in instances of both plural legalities and poly-centric governance where two governance systems, from radically different epistemological and ontological perspectives, but both recognised as equally legitimate, collide. Although there has been more than enough opportunity for this, in the many countries struggling with questions of how to harmonise indigenous peoples' tenure systems with statutory systems, the real depth of these differences has often been ignored or "rendered technical" (Li 2007:123) and eclipsed by an emphasis on the need to develop tools for policy implementation. In this way the politically embedded nature of these tenure systems within the larger political economy often remains hidden and unchallenged. More often than not the philosophical logic of the dominant state centric system has prevailed and "fisheries and coastal governance rarely commence with a

deliberation on what constitutes social justice, what meta-principles should be central, what is negotiable and non-negotiable, and what are the social and cultural thresholds" (Kooiman and Jentoft 2009 in Jentoft 2013:111).

Mahon *et al.* (2005) and Jentoft and Kooiman (2009) amongst others propose that the interactive governance approach offers the processual methodology through "communicative rationality", an "adaptive learning" and a dialogic approach that makes harmonisation ultimately possible. They state that "values and principles, if agreed to and explicit, help make hard choices easier for governors. They provide a value frame that helps governors make choices between two acceptable but conflicting options by suggesting the preferred option on the basis of a higher level of logic" (Mahon *et al.* 2005:364).

Others have emphasised that an intercultural project of this nature demands a much deeper level of self and collective reflexive praxis than that which scholars and practioners working on issues of governance and legal pluralism have undertaken to date (de Sousa Santos *et al.* 2008, Eberhard 2009, Cornell 2008, 2012). Cornell suggests that a deep interpretation of legal pluralism demands more than a "neo-liberal view of reconciled plural world views and value's" within a "thoroughly rationalized state and order of civil society" (Cornell 2008:1). She suggests that it is not just a higher level of logic that is required, but openness to an ***alternative*** logic, (my emphasis), that "can only be known by an intricate study of the symbolic form in its actual workings" Cornell (2008:2). It is this "intricate study" that is required to understand the symbolic form and imagination behind the articulation of different principles. Drawing on an understanding of *uBuntu* that asserts the interconnectedness of humanity and suggests that we cannot enjoy individual freedom without the freedom of others, she argues the significance and importance of recognition of this ethic on a philosophical level. Extended in this context of governance, we cannot imagine a socially just system of governance if it rests on a denial of our common humanity.

This dialectic between individual freedom and the freedom of others echoes de Sousa Santos' assertion of the need for an "ecology of knowledges" (de Sousa Santos 2009:116). De Sousa Santos suggests that "each way of knowing exists only in that

infinite plurality of knowledge, none of them is able to understand itself without referring to the others. Knowledge exists only as a plurality of ways of knowing, just as ignorance exists only as a plurality of forms of ignorance. The possibilities and limits of understanding and action of each way of knowing can only be grasped to the extent that each way of knowing offers a comparison with other ways of knowing. Such comparison is always a reduced version of the epistemological diversity of the world, the latter being infinite. What I call ecology of knowledge lies in this comparison" (de Sousa Santos 2009:116).

The findings of this research support this call to an exploration of the philosophical and moral ethics underlying customary systems of marine resource governance in complex plural legal contexts with this view of seeking alternative ways of knowing and of governing through dialogue. An interrogation of the distinctive nature of the customary system of governance in Dwesa-Cwebe, '*in its own setting'* and from a perspective of its own logic, demands recognition of the fact that it draws on a very different set of underlying interpretations of nature, of the 'laws of nature,' and of how these laws influence interpretation of both individual and collective ontology and socio-ecological interactions. Further, in the context of South Africa, where living customary law competes with official customary law, both reflecting politically embedded responses at the nexus of customary and statutory systems, it demands a very dynamic, nuanced understanding of the plurality of governance and its expressions.

CHAPTER TEN: CONCLUSION

10.1. Introduction

In the past three decades there has been growing international interest in customary systems of marine resource governance (Johannes 2002, Kuemlangan 2004, Jentoft *et al.* 2009, Vierros *et al.* 2010, Cinner *et al.* 2012). This new focus on these systems has politically and theoretically very divergent origins. It has come in part through the struggles and advocacy efforts of indigenous coastal peoples and local communities in post-colonial contexts who have fought for the recognition of their customary systems of tenure in relation to their lands, forests and marine territories in post-independence democratic states (Cordell 1991, Ruddle 1998, Zerner (ed.) 2003). In addition, in the face of growing environmental threats impacting their bio-cultural diversity, caused by both rampant development as well as climatic changes, communities are increasingly turning to international human rights and biodiversity protection instruments to seek recognition for and protection of customary systems and environmental rights (Westra 2008, FAO 2012, Kothari *et al.* 2012).

Coming from a different perspective, growing concerns regarding the state of the world's fish stocks, with a concomitant awareness of the weaknesses in existing governance and management frameworks in many countries, has pushed global institutions, state and non-state parties involved in marine and coastal governance and conservation to seek ways to reform the dominant fisheries governance and conservation frameworks (Ratner and Allison 2012). Critics of the neoliberal development paradigm underlying many of these failing frameworks have argued that modernity, in the guise of Western development, has failed to deliver on its promises of a sustainable world. This has opened space for counter-narratives inspired by alternative, previously marginalised epistemologies, practices and perspectives to surface (de Sousa Santos and Rodriegues-Garavito 2005, de Sousa Santos *et al.* 2008, Fairhead *et al.* 2012). Insights from these counter-narratives on governance and law in times of neo-liberalism have suggested that dynamic approaches to governance that recognise the legitimacy of diverse ways of ordering human interactions, that enable interlegality and that offer alternative conceptualizations of rights may offer new ways

of thinking about ethics and may provide guidance on 'doing justice' (de Sousa Santos 2006, 2009, Cornell 2008, Westra 2008, Eberhard 2009).

These divergent strands of influence have given impetus to trans-disciplinary enquiry into the histories and nature of customary systems of marine resource governance in different parts of the world (Zerner (ed.) 2003, Techera 2008, Govan *et al.* 2009). This has highlighted the need for scholarship on customary systems of marine resource use and governance that can deepen theoretical understanding of the nature and characteristics of these systems, their relationship to systems of law and their contributions to interactive governance in plural legal contexts (Jentoft 2012).

The need to contribute to this scholarship has informed the aim of this thesis which has been to describe and understand the customary marine resource governance system of the Dwesa-Cwebe communities living adjacent to the Dwesa-Cwebe MPA in South Africa and its relationship to living customary law. Further, the research aimed to explore how this customary system of marine resource governance has interfaced with statutory law in the past and how it continues to develop in the current context. It aimed to use this understanding to make recommendations as to how this customary system of governance might contribute towards promoting socially just small-scale fisheries governance in South Africa.

This final chapter presents a summary of the main findings and conclusions from this research.

10.2. Overview of this study

Frustrated by the failure of post-apartheid fisheries and land reform to provide restitution of their rights to resources lost during colonialism and apartheid, coastal and small-scale fishing communities have begun to protest their continued exclusion from their marine commons (Sunde *et al.* 2013, Sowman *et al.* 2014b). Increasingly they are referencing customary rights in their claims to marine resources in the context of the new SSF policy in South Africa. The recognition of customary law in the Constitution of South Africa, and more recently, the recognition of customary rights in so far as they are

consistent with the Bill of Rights in the new policy on SSF, has raised the importance of understanding customary systems of marine resource governance in South Africa.

This thesis sought to ascertain the nature of the system of customary marine resource governance of the communities living adjacent to the Dwesa-Cwebe MPA and how it might contribute towards promoting socially just contemporary small-scale fisheries governance in South Africa. In so doing it aimed to respond to the following research question:

What is the nature of the system of customary marine resource governance at Dwesa-Cwebe MPA, its relationship to living customary law and how has it interfaced with statutory law?

The research aimed to fulfill the following objectives:

1. To investigate and describe the customary marine resource governance system in the case study site selected;
2. To identify and analyse the historical, political and legal context in which this customary marine resource governance system has developed;
3. To contribute towards understanding the nature of the customary marine resource governance system and its relationship to living customary law;
4. To examine the way in which this customary marine resource governance system has interfaced with statutory law and other law;
5. To identify how customary systems of marine resource governance might contribute towards promoting socially just governance of small-scale fisheries in South Africa;
6. To contribute to the development of theory on customary systems of marine resource governance and living customary law in the plural legal context of contemporary small-scale fisheries governance in South Africa.

Drawing on theoretical work on governance that has been influenced by understandings of complex systems theory, critical legal pluralism, political ecology and interactive governance, this thesis has attempted to distil a transdisciplinary perspective on

governance and law applicable to the marine and coastal governance context of two rural African communities that comprise two out of seven of the larger Dwesa-Cwebe community living adjacent to the Dwesa-Cwebe MPA on the Eastern Cape coast of South Africa.

The methodology developed for the research undertaken in this study comprised a qualitative approach, located within a grounded theory and critical-activist perspective. The evolution of this methodology was an iterative one: although I started out with a grounded theory, action-orientated methodology in mind, the nature of this methodology deepened and developed substance as the research evolved and challenged my understanding of research methods and process in distinctive ways. I used a range of methods to gather research data including individual interviews and oral histories, focus groups, a household survey, participant observation and analysis of existing documentation. The research process mirrored the findings of this research: it held up the possibility of a different epistemology and way of being in the field, and presented an alternative research ethic. Confronted with the request to provide evidence in a legal process on the customary system of marine resource governance in the communities within which I was conducting my fieldwork, I was forced to consider my data and the role of academic research in a broader system of law and governance. The court action created the opportunity for me to be a participant and observer in this legal process. This contradictory standpoint, as expert witness, and yet, as outsider to the customary system on trial; as supposed 'objective researcher' and yet subjected to cross-examination by the statutory system unsettled my pre-existing understandings of the nature of law and governance. It drew my attention to the philosophical, political and practical implications of the current dynamics of legal pluralism at play in the marine governance context in South Africa and the potential contribution that a customary system can make towards socially just small-scale fisheries governance in this country.

10.3. Conclusions on customary governance, its relationship with living customary law and its interaction with the statutory governance system

The communities of Ntubeni and Hobeni, two of seven communities that comprise the Dwesa-Cwebe communities living adjacent to the Dwesa-Cwebe MPA on the Eastern Cape coast of South Africa, practice a distinct system of customary marine resource governance. This system is in part constituted through expressions of living customary law, in part through broader social and cultural processes in interaction with their environment. The nature of this system of governance is foundationally different to that of a Western statutory governance system. Whilst similar in some respects to systems of governance that have been evidenced elsewhere in the world, this customary governance system differs in relation to a range of characteristics linked to the complexity, dynamics and principles underlying the design of these systems.

This customary system of governance has interacted with the statutory system for over a century, in part distorted by this system but retaining its integrity. In the context of the Constitutional recognition of customary systems of authority and law, this interaction of these plural governance systems now requires understanding, recognition and harmonization in a new system of marine resource governance in South Africa.

10.3.1. Understanding the customary system of governance

The customary marine governance system is embedded in the broader system of customary governance operating within the communities of Dwesa-Cwebe and as such it draws its substance from this broader system. In this system, everyday practices linked to use of marine resources are embedded in a range of dynamic, interacting social, legal, cultural, spiritual and economic processes which in turn are nested in the broader governance processes and structure. This system of governance is based on an epistemology, cosmology and ontology that regards humans and nature as interconnected. In turn, this foundational principle shapes the governance system and the other principles, ethics and practices that flow from it. In addition, and directly linked to the above foundational principle, this governance system has its roots in a

symbolic interpretation of the laws of nature that are given expression through and in living customary law.

10.3.2. Understanding the relationship between customary governance and living customary law

In this customary system of governance the entitlement to access, use and manage marine resources is derived from the communities' historical occupation and beneficial use of the land and adjacent coast and their symbolic interpretation of their interaction with this natural environment. This interpretation shapes the basis of their interactions with each other and with their natural environment and in so doing it constitutes their knowledge and their culture.

The Dwesa-Cwebe communities' system of living customary law has its origins in this symbolic interpretation of their belonging to this environment. This complex quality of embeddedness relates to both process and structure; it reflects dialectic, mutually reciprocal process whereby meaning is instantiated in the culture of the community and this culture in turn shapes this meaning. Living customary law is given substance and expression through a range of principles, ethics and social processes and simultaneously gives these phenomena substance.

The research undertaken for this thesis explored these expressions of living customary law, *in their own setting*, as they are given effect in and through the customs, social interactions and 'everyday ways of doing things', known as '*isithethe*' (custom) and '*amasiko*' (obligatory customary rituals) in Ntubeni and Hobeni. In addition, I observed and explored the nature of the patterns of norms, rules and authorities that give shape and meaning to these customary practices and the local institutions and mechanisms for enforcing social control. The collection of cognitive and normative conceptions, expressed through their norms, rules, ethics, values and other social interactions do not constitute a separate juristic domain, known as 'law'. Rather, living customary law in Dwesa-Cwebe is woven into and woven out of these social and cultural phenomena, thereby constituting the fabric of everyday life.

10.4. The interface between customary and statutory governance and its implications for the theory and practice of governance

There are several theoretical and practical implications of the insights into the nature of this customary governance system, its relationship with living law and its interface with statutory and other systems of law. The theoretical insight into governance that this complex relationship of living customary law provides us with is that, paradoxically, an examination of living customary law in relation to governance emancipates us from 'the law' as we, (in Western, neo-liberal dominated approaches to marine governance contexts), have known it. A perspective of living customary law from "*its own setting" (Shilubana 2008)* challenges the dominant theoretical and political conception of law as a separate domain of social organisation, regulating human behavior. The embedded nature of living customary law puts law back into its place – it locates it within the larger context of the social, political and cultural cognitive schema and social relations that we construct. This prevents us from pretending that 'governance' and 'law' are neutral spaces or structures and that somehow the 'governing system' is outside the 'system of governance' (Jentoft 2012:164). Rather, we have to interrogate the distinctive relationships of power that operate within each system, at each level.

It suggests that if one is to truly understand this governance system on its own terms, then one has to dispense with notions of law as a separate system, distinct from other dimensions of governance. Instead one has to conceptually accommodate expressions of what might be regarded as obligatory norms and customs in the customary system of governance as a whole, in a more conceptually complex, interrelated way.

The legal and policy implications of this for attempting to operationalize the harmonization of statutory and customary systems in an emerging democracy such as South Africa, are significant. As noted in Chapter Nine, currently, in terms of the Constitutional recognition of customary law and the recognition of customary rights in the new SSF policy, communities living under customary governance face a paradox. They have to jump the hurdle of proving a system of law in order that their customary rights will be recognised. Further, the interpretation of customary law upon which the legislation developed to give substance to the Constitutional recognition of customary rights rests, reflects largely 'official' versions of customary law and distorts living

customary law. In this process of distortion, the ethical values and principles inherent in living customary law are similarly distorted.

These conclusions reinforce the observation that governance within a plural legal context makes very specific demands on governance actors: it requires a heightened capacity for an engaged, "reflexive praxis" (*pers.comm* Bennett 2011). In this regard it demands *uBuntu*, an awareness of the interconnectedness of people and an ethical attitude of interest in the other, knowing that one's own freedom is inextricably linked to that of others (Cornell 2008). As such, the application of this theory is of immediate relevance to the deliberations on the implementation of the new policy on SSF in South Africa which is due to commence in the latter half of 2014. In addition, the findings are of relevance to the other epistemic communities and networks working on marine resource governance and biodiversity conservation in the context of the struggles to develop praxis that contributes towards socially just systems of governance.

10.5. Conclusion: Constituting customary governance and living customary law

This research has explored the nature of the customary system of governance and living customary law in Dwesa-Cwebe in the context of interaction with the statutory system of governance. As concluded in the discussion on the findings in Chapter Nine, the interfacing of these two systems over the past century has distorted aspects of the customary governance system but it has retained its integrity nonetheless. This has been due in part to the lack of reach and capacity of the statutory system as well as the ways in which the community has responded, inverting the power of this system, adapting and drawing on aspects of the statutory system in its own strategies of struggle. In the *State versus Gongqose* (2012) the tensions in this dialectic between structure and agency and the interplay of power through these strategies of resistance was clearly visible. This legal inter-action captured the paradox inherent in the recognition of living customary law in South Africa, by and in, a post-apartheid state. The state governance system appears unable to recognise living customary law *in its own setting* or to imagine an alternative way of knowing and governing marine resources.

This thesis concludes that an interpretation of the expressions of living customary law in the customary system of marine resource use and governance in Dwesa-Cwebe, *on its own terms*, demands a radically different interpretation of 'the law' to that which has been explored to date in post-apartheid South Africa. To describe this as a 'system of law' and to subject it to interrogation through the frame of statutory law, in the context of the current, as yet untransformed legal system in South Africa, cannot do justice to the spirit and nature of customary governance or to the living customary law embedded in it. It runs the risk of distorting this system completely. Rather, this interpretation of the expression of living customary law needs to happen beyond the domain of 'law' as well, *in its setting,* in the interstices of the social, cultural, political and economic dimensions of governance that constitute it and in turn, are constituted by it – this is where law lives and where constitution really takes place.

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ANNEXURE ONE: LIST OF INTERVIEWS AND FOCUS GROUPS

No	Male/Female	Place	Date of interview
N1	Male	Ngomane	05/08/2011
N2	Female	Ngomane	06/08/2011
N3	Male	Ngomane	06/08/2011
N4	Female	Mkhulu	06/08/2011
N5	Female	Mkhulu	07/08/2011
N6	Male	Ngomane	15/08/2011
N7	Female	Gume	17/08/2011
N8	Male	Gume	20/08/2011
N9	Female	Gume	20/08/2011
N10	Male	Gume	22/08/2011
N11	Male	Mkhulu	19/08/2011
N12	Male	Gume	17/08/2011
N13	Female	Mkhulu	22/08/2011
N14	Female	Mkhulu	26/08/2011
N15	Male	Mkuhlu	28/08/2011
N16	Female	Mkhulu	07/08/2011
N17	Female	Mkhulu	27/11/2011
N18	Male	Ngomane	06/08/2011
N19	Female	Mkhulu	18/04/2012
N20	Male	Gume	22/08/2011
N21	Female	Mkhulu	27 11/2011
N22	Female	Gume	20/08/2011
H23	Male	Mavundleni	22/11/2011
H24	Male	Velelo	24/11/2011
H25	Male	Mavundeleni	25/11/2011
H26	Female	Mhlanganisweni	22/08/2011
H27	Female	Velelo	01/12/2011
H28	Female	Mhlanganisweni	22/11/2011
H29	Female	Velelo	22/11/2011
H30	Male	Mavundleni	29/11/2011
H31	Male	Mavundleni	30/11/2011
H32	Male	Mavundleni	22/11/2011
H33	Male	Mavundleni	21/11/2011
H34	Male	Velelo	23/11/2011
H35	Female	Velelo	24/11/2011
H36	Female	Mabambeni	23/11/2011
H37	Female	Velelo	23/11/2011
H38	Female	Velelo	23/11/2011
H39	Male	Mhlanganisweni	24/05/2012
H40	Male	Mhlanganisweni	22 Nov 2011
H41	Male	Mhlanganisweni	30/11/2011, 01/12/2011
H42a b H42c	Male	Mhlanganisweni	25, 26/08/2011, 23/11/2011
H43	Male	Mhlanganisweni	25/08/2011
H44	Female	Velelo	22/11/2011
H45	Female	Gume	28/11/2012
H46	Female	Hobeni	24/11/2011

List of Focus Groups Conducted

Code	Place	Type of Focus Group	Date
NFG 1	Ntubeni	3 Women crayfish harvesters over 75 years of age from Gume, Ngomane and Mkhulu	15 Aug 2011
NFG 2	Ntubeni	4 young women inter-tidal harvesters from Gume and Mkhulu	16 August 2011
NFG 3	Ntubeni	16 Male fishers from Mkhulu, Ngomane and Gume	21 Nov 2011
HF G 1	Hobeni	9 Male fishers	24 Nov 2011
HF G 2	Hobeni	10 Male fishers	20 January 2012
HF G 3	Hobeni	9 Women harvesters	20 January 2012

List of community meetings and feedback sessions conducted

Hobeni	25 Men and Women	16 Nov 2012
Ntubeni	4 Men and Women	19 Nov 2012
Hobeni	31 Men and Women	12 Nov 2013
Ntubeni	9 Men 11 Men and Women	16 Nov 2013