

# **BIG HOPES FOR SMALL-SCALE FISHERS**

## **A Critical Review of South Africa's Small-Scale Fishing Policy and Regulations**

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## **Abstract**

Some 18 years after the enactment of the Marine Living resources Act (18 of 1998), which gives express recognition to the subsistence or small-scale fisheries sector, a regime addressing the needs of this sector has finally been promulgated. That regime consists of the Policy for the Small Scale Fisheries Sector (20 June 2012) in South Africa and the Regulations relating to Small Scale Fishing (8 March 2016). Through a paradigm shift in small-scale fisheries governance, the regime seeks to put an end to the marginalisation and exclusion of these fishers from the fishing rights allocation process that has persisted in the absence of a formal regulatory regime. The Policy for the Small Scale Fisheries Sector purports to adopt and promote a human rights based approach and focuses on food security and livelihood. It seeks to employ co-management of the common pool resources and promote customary practices. It allocates a basket of multi-species rights to community legal entities allowing for a community based resource management with a strong developmental agenda. This paper seeks to reflect on the effectiveness of this regime by critically examining the regime governing the small scale fishing sector against the body of knowledge that has developed internationally regarding successful and effective management of the Small Scale fishing Sector.

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# Chapter 1

## Introduction

### 1.1 Background

Some 18 years after the enactment of the Marine Living Resources Act (MLRA) (18 of 1998), which gives express recognition to the subsistence or small-scale fisheries sector, a regime addressing the needs of this sector has finally been promulgated. That regime consists of the Policy for the Small Scale Fisheries Sector in South Africa (Small Scale Fisheries Policy) and the Regulations relating to Small Scale Fishing (Small Scale Fishing Regulations).<sup>1</sup> Broadly it seeks to put an end to the marginalisation and exclusion of these fishers from the fishing rights allocation process that has persisted in the absence of a formal regulatory regime.

Before 1994, predominantly coloured and black fishing communities along the South African coast line were subject to severe discrimination under the Apartheid regime. Decades of racism brought on by the white nationalist government meant that these communities were excluded from formal participation in the fishing industry. The government at the time achieved this through stringent policy mechanisms such as fishing quotas which were allocated to white owned fishing companies and in effect, brought about the privatisation of these resources.<sup>2</sup>

After 1994 expectations rose for these fishermen as the Apartheid regime had ended and a new fishing policy was to be created. The African National Congress (ANC) had created a National policy framework better known as The Reconstruction and Development programme (RDP),<sup>3</sup> in which it promised amongst other things, a new fisheries policy. As its primary objective this policy was to address the inclusion and upliftment of impoverished coastal communities through access to marine resources and the sustainable management of those resources through appropriate strategies.<sup>4</sup> The idea was to manage and control marine resources for the benefit of all South

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<sup>1</sup> Regulations relating to Small Scale Fishing (GNR 229 GG No. 39790 dated 8 March 2016); Policy for the Small Scale Fisheries Sector in South Africa (GN 564 GG No. 35355 dated 20 June 2012)

<sup>2</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 31.

<sup>3</sup> African National Congress (ANC) (1994) "The Reconstruction and Development Programme (RDP): policy framework" *Johannesburg Umanyamo Publications*.

<sup>4</sup> ANC (RDP) (1994) 4.5.3.2.

Africans, especially those communities whose livelihood depended on resources from the sea.

This would further promote a sustainable yield of fishing stock and the development of additional species. New legislation was to be introduced to establish democratic structures for the management of sea resources.<sup>5</sup>

The MLRA was to give expression to the post-apartheid government's goal of managing marine living resources for the benefit of all South Africans. Unfortunately, as far as the small-scale sector was concerned the MLRA did not bring about the relief that fishing communities had hoped for. The MLRA structured South Africa's fisheries around three primary categories: commercial operators; a recreational sector and a subsistence category which incorporated a wide range of fishers targeting near shore resources. This meant that thousands of small-scale fishers, unable to secure the limited individual commercial fishing rights available, yet were engaged in fishing as a commercial livelihood rather than just fishing 'for the pot' were still excluded from this sector.<sup>6</sup> Small-scale fishers did not fall under the regulatory framework and denied access to the marine living resources. Their fishing activities would now be illegal.

In December 1998 a Subsistence Fisheries Task Team (SFTG) was assigned to investigate the provisions that were inserted into the MLRA regarding subsistence fisheries and how they would be implemented.<sup>7</sup> Two of the key aspects that transpired from the SFTG's work was that 'small-scale commercial fishers' who regularly sold their catch in excess of the occasional sale or barter were not recognised by the MLRA.<sup>8</sup> Secondly, fishers who were recognised as subsistence fishers under the definition were overlooked in the rights allocation practice because no management regime had been created for this sector.<sup>9</sup> The individual rights allocation system

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<sup>5</sup>ANC (RDP) (1994) 2.10.7.

<sup>6</sup>Sowman M (2011) "New perspectives in small-scale fisheries management: challenges and prospects for implementation in South Africa" *African Journal of Marine Science* 33(2) 302.

<sup>7</sup>Harris JM *et al* (2002) "The process of developing a management system for subsistence fisheries in South Africa: recognizing and formalizing a marginalized fishing sector in South Africa" *South African Journal of Marine Science* 24 412.

<sup>8</sup>Young M (2013) "Achieving equity in the fishing industry: the fate of informal fishers in the context of the Policy for the Small-Scale Fisheries Sector in South Africa" *Potchefstroom se Elektroniese Regsblad* 16(5) 1-42; Clark B *et al* (2002) "Identification of subsistence fishers, fishing areas, resource use and activities along the South African coast" *South African Journal of Marine Science* 24(1) 425-437.

<sup>9</sup>Witbooi E (2002) "Subsistence fishing in South Africa: implementation of the Marine Living Resources Act" *The International Journal of Marine and Coastal Law* 17 (3) 295.

through medium and later long term rights allocation policies benefitted only the commercial sector together with their BEE joint ventures.<sup>10</sup>

The failure to recognise small-scale fishers as more than just subsistence fishers that feed their families, and their limited or no access to fishing quotas through commercial fishing right allocations resulted in legal action. During 2005 a group of fishers, together with NGOs and the support of academics approached the Equality Court in an action against the Minister of the Department of Environmental Affairs and Tourism (DEAT).<sup>11</sup> In 2007 the court ruled that the DEAT at the time had to allocate interim rights to fishers who had not been able to access fishing quotas and that a policy for small-scale fisheries would be developed. A new National Task Team (NTT) consisting of CBO's, NGO's, lawyers and researchers was formed to draft the policy.<sup>12</sup>

The Policy for the Small Scale Fisheries Sector in South Africa (Small Scale Fishing Policy)<sup>13</sup> was gazetted 5 years later on 20 June 2012. The Regulations relating to Small Scale Fishing,<sup>14</sup> together with amendments to the MLRA were promulgated on 8 March 2016 to give effect to the Small Scale Fishing Policy.

The aim of this new regime for the small-scale fishing sector established by the Policy and Regulations is to give express recognition to the importance of this sector and achieve effective participation by small-scale fishers and management of the sector. Whether this is possible will be answered against the backdrop of the rich plethora of literature regarding the effective management of the small-scale fishing sector. International instruments such as the FAO (Food and Agriculture Organization) Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries,<sup>15</sup> the FAO Code on Responsible Fisheries,<sup>16</sup> and regional instruments such as the Southern African Development Community Fisheries Protocol of 2001,<sup>17</sup> have indicated how important small-scale fisheries are internationally and the vast amount of academic papers on

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<sup>10</sup>Sowman et al (2014) 35.

<sup>11</sup>Kenneth George and Others v The Minister of Environmental Affairs and Tourism EC1/2005.

<sup>12</sup>Isaacs M (2016) "Multi-stakeholder process of co-designing small-scale fisheries policy in South Africa" *Regional Environmental Change* 16(2) 284.

<sup>13</sup>GN 564 GG No. 35355 dated 20 June 2012.

<sup>14</sup>GNR 229 GG No. 39790 dated 8 March 2016.

<sup>15</sup>FAO (Food and Agriculture Organization) (2015) "Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries" Rome.

<sup>16</sup>FAO (Food and Agriculture Organization) (2005) "FAO Technical Guidelines for Responsible Fisheries Increasing the contribution of small-scale fisheries to poverty alleviation and food security" Rome.

<sup>17</sup>SADC (Southern African Development Community) (2001) "Protocol on Fisheries" Available at <http://www.sadc.int/index/browse/page/150> accessed on 15 August 2016.

the topic guarantee the necessary guidance in order to distil the imperative elements needed for the successful management of the sector.<sup>18</sup> Many jurisdictions around the globe have operative small-scale fishing regimes which also provide practical guidance and valuable lessons. This literature can therefore be utilised to distil critical design elements for an effective small-scale regime. These elements will form the basis against which we can determine whether or not the vital elements needed for the successful management and participation have been encompassed by South African policy makers and legislators.

## **1.2 Scope Ambit and Purpose**

The time has now come to review this regime after the Regulations relating to Small Scale Fishing were promulgated in March 2016. Elements distilled from contemporary theoretical discourse as aforementioned provide a useful lens through which to critically analyse South Africa's small-scale fishing sector. The purpose of this dissertation is to review South Africa's small-scale fishing regime against a series of generally accepted elements and, most importantly aims to evaluate whether South Africa's small-scale fishing regime is likely to be effective in its operation and management. It will also evaluate whether more equitable access to marine living resources will be available to small-scale fishers and whether they will participate in the regime.

## **1.3 Methodology and Structure**

This dissertation will comprise of a desk-top study involving a consideration of relevant policy, laws, regulations, jurisprudence and academic commentary relating to small-scale fisheries management. As highlighted above, the main purpose is to critically review South Africa's small-scale fishing regime against a set of elements which commentators have indicated should inform the key areas on which to base a successful small-scale fishing regime. The elements selected for this structure are not exhaustive, but represent legal components that may influence the form, nature and successful management of the sector. In order to fulfil this purpose, the dissertation is

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<sup>18</sup>Pomeroy RS and Rivera-Guieb R (2005) "Fishery co-management: a practical handbook" *CABI Publishing* Oxfordshire; Kooiman J *et al* (2005). "Fish for life: interactive governance for fisheries" *Amsterdam University Press*.

effectively categorized into three main parts, each dealing with different key aspects of the main aspect.

Chapter 2 of the dissertation introduces and reviews the broader theoretical discourse from which the essential elements necessary for the successful governance of a small scale fishing sector will be distilled. These elements include: a clear definition of the sector; the nature and type of the allocated fishing rights; the institutional structures; the management approach; capacity building and education; types of resources and fishing areas; customary rights and marine protected areas; and compliance and enforcement provisions. In respect of each of these elements, their purpose and relevance will be explained as well as how they are to be designed in order to contribute to the successful management of the regime. This effectively creates the necessary theoretical framework against which South Africa's small-scale fishing regime will be evaluated in subsequent parts of the dissertation. To ensure consistency between the different components of the dissertation, this critical review uses the same elements listed above as the basis of its structure.

Chapter 3 and 4 comprises of a review of South Africa's small-scale fishing regime. The elements discussed in chapter 2 will be dealt with further in chapter 3 to establish if and how these elements have been incorporated into the Policy for the Small-Scale Fisheries Sector in South Africa. Thereafter the same elements will be transposed into chapter 4 of the dissertation which will seek to critically reflect on if or how these elements have been implemented in the Regulations relating to Small-Scale Fishing and the Marine Living Resources Amendment Act.

Chapter 5 concludes the paper by providing an overview of the discussion points highlighted earlier. All the elements are viewed holistically as it seeks to draw together the assessment of the Policy and the Regulations.

## Chapter 2

### Elements of an effective small-scale fishing regime

The small scale fishing sector is globally recognised as an important sector both economically and for providing vital human needs. The management of this sector has in many parts of the world historically failed and as a result thereof a growing body of literature has emerged that addresses the design elements and issues for consideration critical for the successful management of this sector. Knowledge that has emerged over recent decades suggests that the elements discussed in this chapter are critical for an effective and efficient small scale fisheries regime.

#### 2.1 Defining the Sector

When one designs or wishes to manage a fishing sector, it becomes necessary to decide what types of fishers will form part of the sector. In this case the sector in question resides at the bottom end of the larger structure of the fishing industry. In a small-scale sector we often come across terms such as subsistence, artisanal, aboriginal, informal and small-scale. These terms are often used interchangeably and without definition. It seems however that most commentators have opted to use subsistence as the most generally accepted term.<sup>19</sup> This generally accepted term has common elements such as, that fishing occurs in a certain range; their practices stem from their cultural, traditional and customary history and fishing or harvesting marine resources are undertaken to sustain their families; It also implies that the resources are used primarily for nutrition however, excess is bartered for security; the fishing gear, tools and technology used to harvest are very basic; the fishers are poor and the activities are not recreational nor are they commercial.<sup>20</sup>

However it may be relevant in the context to specifically define terms such as artisanal and small-scale, as the true lack of understanding of these terms in the South African context contributed to the need to develop a new policy and regulations.

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<sup>19</sup>Branch *et al* defining fishers in the South African context: subsistence, artisanal and small-scale commercial sectors *South African Journal of Marine Science* 24(1) 476.

<sup>20</sup>Kuperan K and Abdullah NMR (1994) "Small-scale coastal fisheries and co-management" *Marine Policy* 18 309.

Artisanal fishers are fishers who use 'art as a skill, experience and intuition when applying their fishing effort, others recognise their traditional dimensions as the defining factor.<sup>21</sup> Does this mean that artisanal fishers are by no means commercial fishers? In the author's opinion artisanal fishers are clearly local fisherman with strong traditional and cultural ties, but there are many examples of artisanal fishers that have engaged in commercial operations when they are part of strong cultural communities and have seen opportunity in expanding. The term small-scale is used as the opposite of commercial in that it employs the use of low technology and is far more labour intensive than its commercial counterpart.<sup>22</sup> It is used to include a wide range of fishers including subsistence fishers at the lower end of the spectrum as well as artisanal fishers and formal businesses operating below full-fledged commercial companies at the upper end.<sup>23</sup> If the continuum for small-scale is thus all encompassing, it may be criticised for not creating enough protection for the sector it wishes to manage. Therefore it is important for an official definition of the sector to be established within a particular socio-economic, cultural and institutional context.

### 2.1.1 The South African context

Originally the goal of the MLRA was to Recognise the subsistence sector as a unique sector with its own needs; Also to allow the sector to sell their catch at a modest level and allow for certain marine areas to be set aside and be used exclusively by the sector and further also ensuring that the resources are used sustainably.

Before the new amendments the MLRA contained the following definition for subsistence fisher: "a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch, but does not include a person who engages on a substantial scale in the sale of fish on a commercial basis."<sup>24</sup>

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<sup>21</sup>Demuyneck K (1994) "the participatory rapid appraisal on perceptions and practices of fisher folk on fishery resource management in an artisanal fishing community in Cameroon" *FAO Technical Report 60 Cotonou FAO*.

<sup>22</sup>Sowman M "New Perspectives in small-scale fisheries management: Challenges and prospects for implementation in South Africa" *African Journal of Marine Science* 298.

<sup>23</sup>Berkes F *et al* (2001) "Managing Small Scale Fisheries: Alternative Directions and Methods" *International Development Research Centre IDRC*.

<sup>24</sup>MLRA s1

This definition created a large restriction as it catered only for those who fished for local consumption with a very limited provision for local sales. It thereby excluded artisanal and other small-scale fishers who catch and sell fish on a small-scale for their livelihoods.<sup>25</sup> This definition also only included those who directly fished and harvested but left out people, in this instance, mainly woman involved in pre- and post-harvesting activities such as bait preparation, processing the catch and marketing the fish.

The Subsistence Fisheries Task group appointed by the Marine and Coastal Management Department to make recommendations regarding definitions and types of management. Concerns with drafting definitions for a small-scale sector or a subsistence sector included but were not limited to:<sup>26</sup>

1. Whether the difference between subsistence and artisanal were large enough to form two different formal definitions and whether there should be a small-scale commercial sector?
2. If a fisher is part of the subsistence or artisanal sector, could they move into a small-scale commercial bracket when they are capable of doing so?
3. Should the artisanal/subsistence sector only be allocated low value resources?
4. The nature of the fishers themselves:
  - a. Should seasonal fishers be included?
  - b. Can a fisher hold a commercial right and a subsistence/artisanal right?
5. The definition must be unambiguous.

Based on these concerns the SFTG decided on the following principles:<sup>27</sup>

1. Subsistence and artisanal should be grouped together and should reflect the essential parts of both in that they cater for the poor, the catch may be consumed

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<sup>25</sup>SFTG (2000) "Draft recommendations for Subsistence Fisheries in South Africa" *Marine and Coastal Management Cape Town* 11.

<sup>26</sup> Branch *et al* defining fishers in the South African context: subsistence, artisanal and small-scale commercial sectors. *South African Journal of Marine Science*, 24(1) 479.

<sup>27</sup>SFTG (2000) "Recommendations for Subsistence Fisheries Management in South Africa. Subsistence Fisheries Task Group Final Report" *Unpublished Report, Marine and Coastal Management, Department of Environment Affairs and Tourism Cape Town* 88.

or sold, the resources are used as food security, fishers should operate near shore, they should use low tech gear, a community must exist with long standing traditions in gathering marine living resources, the types of resources will be of low value.

2. A separate small-scale commercial fishing sector should be established for those fishers on the continuum who have the financial ability, skills and knowledge to operate in this sector or are able to move from the subsistence sector to the small-scale commercial sector.
3. High value resources should be used for the commercial sector and not the subsistence sector because high value resources are for commercial gain and not for food security, the commercial sector are allocated rights individually and the subsistence sector collectively by way of “baskets” of species as this will create management confusion and conflict between sectors if the same species is allocated to both.
4. If a fisher can prove through stipulated ways that he is unemployed for a certain period he may be able to gain a collective subsistence right however, no fisher may operate as a commercial and a subsistence fisher.
5. Terms used in definitions must be unambiguous and there will be a strong need to define terms such as poor and low tech. To achieve this there needs to be a qualification as to who will be regarded as a subsistence fisher.

The SFTG consequently decided on the following definition for subsistence fishers:<sup>28</sup>

“Subsistence fishers are poor people who personally harvest marine resources as a source of food or to sell them to meet the basic needs of food security; they operate on or near to the shore or in estuaries, live in close proximity to the resource, consume or sell the resources locally, use low technology gear (often as part of a long-standing community-based or cultural practice), and the kinds of resources they harvest generate only sufficient returns to meet the basic needs of food security.”

The SFTG also recommended creating a small-scale commercial sector that would have been a separate sector to the subsistence category and the large scale

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<sup>28</sup>SFTG (2000).

commercial category. However, according to Sunde et al, the distinction would predominantly be based on the classification of the species of fish caught by the fishers and the availability of markets with a higher value species.<sup>29</sup> The basket of resources is defined by a whole variety of high and low value resources. Therefore a separation between the small-scale commercial sector and the subsistence sector should be avoided.

It is recommended that the definition adopted should be a broad term such as “small-scale fisheries” which is broad enough to cover the entire small-scale continuum including those who harvest on a subsistence basis to feed their families all the way to those who are operating a small commercial enterprise who sustain their traditional livelihoods. Most importantly, the umbrella term grants fishers their rights to livelihoods and does not place them in separate categories that allows for marginalisation.

## **2.2 Nature of the Rights, Types of Rights and resources attached thereto**

In the last 3 decades there has been a large shift in the way that fisheries are managed. The shift has come in various aspects of fisheries management. Firstly in the way that fish stocks are managed, from a production and stock and species based management approach, it has shifted towards a conservation and ecosystem based management approach. Open access and centralised government management systems have shifted towards privatisation, rights-based management as well as community-based management and co-management. It is becoming increasingly clear that when fishermen and other stakeholders are involved in the management of the fishing resources and the use rights are allocated individually or collectively then resources are better managed.<sup>30</sup>

Marine resources are usually under the jurisdiction of a particular nation and are the property of the nation’s citizens until they are landed. As we will see from the next chapter, co-management provides that at a community level there is collective governance of a common pool resource. Common pool resources by their nature imply that they belong to everyone so there is difficulty in excluding users. It further implies

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<sup>29</sup>Sunde J and Pederson C (2007) “Defining the Traditional Small-Scale Fisheries Sector in South Africa” *Masifundise Development Trust Discussion Series 17*.

<sup>30</sup>Pomeroy RS (2001) “Devolution and fisheries co-management. Collective Action, Property Rights and Devolution of Natural Resource Management—Exchange of Knowledge and Implications for Policy” *Zentralstelle für Ernährung und Landwirtschaft Feldafing Germany 110*

that should a user extract resources from the pool this limits availability to other users which causes overexploitation of the resource when other users attempt to take their share as well. In an attempt to avoid this scenario it is possible to establish a system of access control or institutional design to regulate the resource.<sup>31</sup> This is achieved through co-management to create a common property regime where property rights will be vested in a specific community on a collective basis.<sup>32</sup> Irrespective of who the owners are, these owners have property rights and therefore decide who is able to land the fish and under what conditions. This is done through what we call rights based fisheries management, where fishers obtain fishery rights such as access rights, use rights and management rights.<sup>33</sup> Management rights are regarded as the rights to be involved in the management of the fishery's overall objectives and policy or management of the fishing process directly, this will be the focus of the next element on co-management.

### 2.2.1 Types of fishery rights

Access rights are defined either spatially with regards to a specific fishing area or as having access to the fishery as a whole. Territorial use fishing rights (TURFs) is when access is granted to an individual or group of fishers to a specific fishing ground or demarcated area. This term was coined by Christy,<sup>34</sup> to describe this traditional form of fishery management which originated in Japan. This has evolved over time and is now described as a package of community based property rights which take into account the physical conditions of the area, the fish stocks and species diversity, the fishing gear to be used as well as the nature of the community.<sup>35</sup> TURFs are, however, in some circumstances not suited for all small-scale fisheries due to the fact that a common feature among artisanal fishers is to trek to where fish are and this may cause conflict between communities who have vested territorial rights.<sup>36</sup>

When fishers require access to the fishery as a whole it is usually achieved by obtaining a fishing licence from an authority. This is known as limited entry access and

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<sup>31</sup>Pomeroy (2001) 117.

<sup>32</sup>Dolsak N and Ostrom E (2003) "The challenges of the commons" In Dolsak N and Ostrom E (2003) "The commons in the new millennium: challenges and adaptation" Mit Press.

<sup>33</sup>Charles A (2011) "Human rights and fishery rights in small-scale fisheries management" *Small Scale Fisheries Management: Frameworks and Approaches for the Developing World* 67.

<sup>34</sup>Christy FT (1982) "Territorial use rights in fisheries" *FAO Fisheries Technical Paper* 227 Rome 1.

<sup>35</sup>Pomeroy (2001) 123.

<sup>36</sup>Allison EH and Ellis F (2001) "The livelihoods approach and management of small-scale fisheries" *Marine Policy* 2 385.

has been shown to work extremely well in small-scale fisheries, however the way in which this approach is implemented will have to be determined very subjectively.<sup>37</sup> Charles,<sup>38</sup> demonstrates that if these types of rights are given to a community and not to outsiders it could build on community livelihoods and reduce poverty. If the rights are however given to some members of the same community and not to others it could create conflict among members and in such circumstances it is important to broadly define who is deemed to be part of the community. Limiting access to the entire fishery should only be seen as part of the management of the fishery and managers should also ensure fishers limit their own fishing activity.

To ensure sustainable use of a resource by a small scale fishery, access rights should be accompanied by other mechanisms.<sup>39</sup> A way to achieve this is by using quantitative rights evidenced by high quality information gathered through science and monitoring. These rights should then assigned to fishers individually or collectively in the form of total allowable effort (TAE) and total allowable catch (TAC) or simply effort and harvest rights. TAE restrict the amount of effort used to catch fish. In a small scale fishery this may be done by limiting the amount of vessels allowed to fish, limiting the amount of traps to be set, the type of gear to be used or the amount of time the vessels are allowed to fish for. For effort rights to be effective and to serve conservation needs within a fishery, a broad spectrum of inputs are needed. Take for example, if one only limits the amount of boats allowed to fish, it leaves the amount of time allowed to fish without a limit.<sup>40</sup> TAC is when a limit is set on the amount of fish that may be removed from the sea in one season across all fishing sectors for the fishery to be sustainable. This limit is divided into fishing quotas spread across the different sectors. When an individual, company or community receives this quota it is known as a harvest right. When it is invested in an individual it is known as individual quota system. This system is highly praised by its ability to avoid mass fleets of vessels stripping a fishery by increasing product value due to limited TAC and lowering running because less fishers

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<sup>37</sup>Berkes *et al* (2001) "Managing small-scale fisheries: alternative directions and methods" *Ottawa: International Development Research Centre* (IDRC).

<sup>38</sup>Charles A (2011) 65.

<sup>39</sup>Pope J (2002) "Input and output controls: the practice of fishing effort and catch management in responsible fisheries" In Cochrane KL "A fishery manager's guidebook" *FAO Fisheries Technical Paper NO. 424 FAO Rome* 82.

<sup>40</sup>Charles A (2011) 66.

and equipment are needed to achieve the TAC.<sup>41</sup> However the high cost of monitoring catches has shown that individual quota systems are rarely found in small-scale fisheries. If harvest quotas are to be implemented in small-scale fisheries, community quotas or collective quotas allow for a community itself to manage this quota to suit the specific community and has the added benefit of empowerment and resource sustainability.<sup>42</sup> Note that this involves use rights at both the community level and the individual level.

### 2.2.2 Allocating Rights

There is no one way that is generally the best way to allocate rights to small scale fisheries as each fishery is unique. Countries like South Africa have a vast expanse of coastline and is home to hundreds of different coastal communities each with their own unique characteristics. It would be unwise for authorities to apply the same set of rights to each of them. In such a situation the best way to go about allocating rights would be for the use rights to be assigned to a community collectively and allowing the community itself to then allocate those rights to individuals within the community. In that way the use rights can be tailor made to suit each community specifically.<sup>43</sup> Collectively assigned rights are more likely to be effective if:<sup>44</sup>

1. The community is tightly knit;
2. There is competent local management;
3. The boundaries of the community are clearly established;
4. The size of the community is modest; and
5. An institutional structure is clearly established.

Additionally the objectives the community wishes to accomplish, the history and traditions of the communities, the key features of the resource itself such as level of

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<sup>41</sup>Shotton R (2000) "Use of property rights in fisheries management" *FAO Fisheries Technical Paper NO 404/1* FAO Rome Italy.

<sup>42</sup>Charles A (2001) "Sustainable Fishery Systems" *Blackwell Science Oxford UK*.

<sup>43</sup>Charles, A. (2011) 70.

<sup>44</sup>Charles A (2011) 68.

fish stocks, diversity of species and the ecosystem to which they belong and the personal capacity and education of community members are of great importance.<sup>45</sup>

### 2.3 Management approach

Traditionally, when it comes to fisheries management, government has the responsibility and power to make and enforce rules, allocate rights, determine what institutions are responsible to fulfil certain functions, procedures to be followed, address inadequacies and to ensure that the well-being and livelihoods of those effected are maintained and enhanced.<sup>46</sup> However, over the past few decades there has been an increasing realisation that this top down approach has been inadequate in properly managing small-scale fisheries in that there are a host of other non-government related actors that play a critical role in fisheries management.<sup>47</sup> This is of great relevance to a small-scale fishing sector as there are many role players and stake holders whose direct involvement in the management of the fishery is of extreme importance. If applied properly it can have many positive outcomes such as improved fishery compliance, individual and collective empowerment of fishing communities and sustainable utilisation of marine living resources. Co-management should however not be viewed as a panacea to solve all fishery problems but as an ongoing process that adapts and matures over time as the level of success, capacity and legitimacy of all partners increase.<sup>48</sup>

History has shown that when fishers take part in the management of their fisheries this builds on traditional systems of resource management and proves to be less expensive than modern top-down fisheries management.<sup>49</sup> Co-management can be defined as a partnership arrangement in which the community of local resource users (fishers), government, other stakeholders (boat owners, fish traders, boat builders, business people, etc.) and external agents (non-governmental organizations (NGOs), academic and research institutions) share the responsibility and authority for the management of the fishery.<sup>50</sup> Nielsen further adds to this by stating that co-

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<sup>45</sup>Charles A (2002) "Use rights and responsible fisheries" In Cochrane KL "A fishery manager's guidebook" *FAO Fisheries Technical Paper NO. 424 FAO Rome 144*.

<sup>46</sup>Kooiman J *et al* (2005).

<sup>47</sup>Bavinck M *et al* (2005) "Interactive fisheries governance: a guide to better practice" Delft Eburon.

<sup>48</sup>Pomeroy RS and Rivera-Guieb R (2005) 29.

<sup>49</sup>Alpizar, M.A.Q. (2006) Participation and fisheries management in Costa Rica: From theory to practice. *Marine Policy*, 30 645.

<sup>50</sup>Pomeroy RS and Rivera-Guieb R (2005) "Fishery co-management: a practical handbook" CABI Publishing Oxfordshire 26.

management can be viewed as a set of institutional and organisational arrangements, which define the co-operation among the fisheries administration and relevant fishing communities.<sup>51</sup> It is however important to note that the concept of co-management does not mean that a community has to be involved. The main requirement however is that government is involved in some way or another with participation by any stakeholders.<sup>52</sup>

Participation by resource users and stakeholders in fisheries management can take many forms. It ranges from very minimal influence from stakeholders other than government all the way to the other end of the scale where fishers have full responsibility for a fishery or management area.<sup>53</sup> According to various commentators co-management can be classified into five broad types according to the roles government and fishers play:<sup>54</sup>

- *Instructive*: Government sets the objectives and knowledge base for the management system, and differs from top down management only in the sense that there is a small degree of information exchange between communities and government.
- *Consultative*: Government sets the objectives and the knowledge base for the management system, however certain mechanisms are put in place to formally consult with the communities.
- *Cooperative*: Government and communities work together equally to make decisions regarding the management of the fishery. They are seen as equals with regards to setting objectives and forming a knowledge base. When consensus is reached government endorses the decision.

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<sup>51</sup>Nielsen JR *et al* (2004) "Fisheries co-management—an institutional innovation? Lessons from South East Asia and Southern Africa" *Marine Policy* 28(2) 154.

<sup>52</sup>Alpizar MAQ (2006) 643.

<sup>53</sup>Berkes F *et al* (2001) "Managing small-scale fisheries: alternative directions and methods" *International Development Research Centre (IDRC) Ottawa*.

<sup>54</sup>Sen S *et al* (1996) "Fisheries co-management: a comparative analysis" *Marine Policy* 20, 405–418; Berkes F (2007) "Community-based conservation in a globalized world" *PNAS* 104 15188–15193; Castilla JC and Defeo O (2001) "Latin America benthic shellfisheries: emphasis on co-management and experimental practices" *Rev Fish Biol Fish* 11, 1–30.

- *Advisory*: Government is still the authority with regard to decision making however will endorse decisions made by stakeholders regarding the management of the fishery.
- *Informative*: Government has delegated authority to make decisions to stakeholders and they are only responsible to inform government of the decisions made.

Determining what kind and how much responsibility and/or authority to allocate to the community level is ultimately a decision made by government and is driven by political will. However, the key to co-management is negotiated where the interaction of the state and non-state actors would be an important factor in defining a common and acceptable balance in sharing power and allocating responsibilities.<sup>55</sup>

In many cases governments have used co-management as an instrument to reach its own management objectives more efficiently by only involving fishing communities in the implementation of these objectives. This this is known as instrumental co-management and falls more towards the instructive or consultative side of the scale. Fishermen's local knowledge should be used as the basis for making the decisions in the first place.<sup>56</sup> Certain case studies conducted in some developing countries have shown that instrumental co-management fails due to a lack of support from governments to local co-management initiatives and that the organisational structures within government have an inability to adapt to the new management concepts.<sup>57</sup> Instrumental co-management essentially does not differ much from modern top down management approaches and could in fact be even more detrimental to fishing communities as frustration will become evident due to lack of empowerment which is ultimately the backbone of co-management.<sup>58</sup>

The areas of importance of fisheries management is determined when fishing communities set the objectives of the management system and determine the knowledge base together with government.<sup>59</sup> This is known as empowerment and can

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<sup>55</sup>Pomeroy RS and Rivera-Guieb R (2005) 27.

<sup>56</sup>Nielson (2004) 154.

<sup>57</sup>Normann AK *et al* (1997) "Fisheries co-management in Africa. Proceedings from a Regional Workshop on Fisheries Co-Management Research" Mangochi Malawi; Viswanathan KK *et al* (1999) "Fisheries co-management" *Proceedings of the International Workshop on Fisheries Co-management* Penang, Malaysia.

<sup>58</sup>Jentoft S (2005) "Fisheries co-management as empowerment" *Marine Policy* 29(1) 1

<sup>59</sup>Nielson (2004) 155.

be defined as “a process where people become strong enough to participate within, share in the control of and influence, events and institutions effecting their lives”.<sup>60</sup> This is actual co-management and can serve as a mechanism for fisheries management and to develop a community socially and economically by promoting participation in actively solving the community’s problems.<sup>61</sup> Actual co-management requires a major restructuring of institutional arrangements that supports the co-management regime, which will be dealt with in more depth under paragraph 2.4. It also requires a large amount of capacity building which may take several years at several levels including government and community level before they can settle into the new role as co-managers of a resource whose opinions are heard and respected.<sup>62</sup> Capacity building will be dealt with in more depth under paragraph 2.5.

When one thinks of co-management, its complexity and ever changing and adaptive nature begs one to ask the question, how does it find its legal nature. At its heart is a legal, negotiated agreement between the various partners and stakeholders that sets out the objectives, rights and responsibilities of those involved and usually includes the following:<sup>63</sup>

- A territory (or set of resources) and its boundaries;
- The range of functions and sustainable uses it can provide;
- The recognized stakeholders;
- The functions, rights, and responsibilities of each stakeholder;
- An agreed set of management priorities and a management plan;
- Procedures for dealing with conflicts and negotiating collective decisions about all of the above Procedures for enforcing such decisions;

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<sup>60</sup>Jentoft S. (2004) “The community in fisheries management: experiences, opportunities and risks” In Hersoug B *et al* “Fisheries development: the institutional challenge” Eburon, Delft.

<sup>61</sup>Pomeroy RS (2001) “Devolution and fisheries co-management. Collective Action, Property Rights and Devolution of Natural Resource Management—Exchange of Knowledge and Implications for Policy” *Zentralstelle fur Ernährung und Landwirtschaft* Feldafing Germany 118.

<sup>62</sup>Berkes F (2001) 35.

<sup>63</sup>Pomeroy RS *et al* (1998) “Fisheries co-management: Key conditions and principles drawn from Asian experiences” in Gerard Persoon *et al* “Co-management of Natural Resources in Asia: A Comparative Perspective” 275; Borrini-Feyerabend G (1997) “Beyond fences: seeking social sustainability in conservation” *IUCN (The World Conservation Union)*, Gland, Switzerland.

- Rules for monitoring, evaluating, and reviewing the agreement and management plan.

The agreement should be dynamic and adaptive. As the co-management process matures over time, the agreement should be adjusted to reflect partners' changing roles, rights, and responsibilities. A management body with joint authority usually represents the partners. Each partner has clearly defined functions in decision-making. Though the agreement is an essential element of co-management it can be overwhelming to the partners, especially the government, because it holds them accountable to meet the specified conditions.

## **2.4 Institutions**

Institutions are identified as “a structural frame that gives substance to governance transactions as well as provides stability and continuity to people’s underlying notions”.<sup>64</sup> In other words institutions are the roadmap and the enabling channels that allow for a management regime such as co-management to operate. One should divide institutions into two aspects. Firstly into a broad understanding as described above, these are known as institutional arrangements and are rules and arrangements that allow for the flow of information between stakeholders. Secondly it is the actual structures and stakeholders themselves and how they are organised so that they behave in ways conducive to the co-management partnership. Even though these two ways of understanding institutions seem to mean two different things they are in fact inherently connected. As Hayami points out: “while the distinction between institution and organization is theoretically meaningful, the two are inseparable in practice. Organizations use rules in order to function, and rule systems act by organizing people into functioning bodies. Thus, it makes sense to view them as expressions of one and the same phenomenon”.<sup>65</sup>

### **2.4.1 Stakeholders and Institutional Structures**

At a general level, stakeholders are made up of individuals, groups, organisations and government who have a vested interest in the marine resources or are interested in the management of same. In small-scale fisheries, this may consist of the fishers

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<sup>64</sup>Song AM (2015) “Towards a Governable Co-management in South Korean Small-Scale Fisheries: Interactions of Institutions and Stakeholders Mind-set” In *Interactive Governance for Small-Scale Fisheries* Springer International Publishing 689.

<sup>65</sup>Hayami Y (2001) “Development economics from the poverty to the wealth of nations” *Oxford: Oxford University Press* 221.

themselves or resource users, individually and collectively such as community based organisations (CBOs), government at local, provincial and national level, Non-government organisations (NGOs), research institutions and others. Depending on the degree of reliance and interest in the resources will determine the degree of involvement in the management of the fishery. Primary stakeholders are those who will assume a more active role in management such as the fishing communities, CBO's and government bodies whereas secondary stakeholders such as NGOs, research institutions will assume a more advisory role in the management.<sup>66</sup> The different stakeholders and their respective roles in a co-management regime will be explained in the next section.

#### 2.4.2 Resource users

Resource users are the main reason why any small-scale fishery co-management project exists. It exists to empower fishers to be more involved and have a direct influence on the management of the resource that sustains their livelihoods. Fishers are the everyday users and managers of what happens on ground level. On a vertical scale of management authority they are right at the bottom, closest to the resources and the main beneficiaries thereof. Fishing communities are often made up of fishing families that consist not only of men but also of women. When fisheries are managed, the equally important role that women play is in most cases left out. Recent reviews have showed how important it is to include gender as one of the main characteristics when defining and understanding fishing communities as women participate and often dominate many aspects of the fisheries production chain.<sup>67</sup> From this it is clear that women are major stakeholders and their involvement in the management of the fishery should be specifically included.

In most instances it is necessary for fishing communities to develop management strategies in order to manage the actions of its members, to ensure resources are used sustainably, and that any conflict is avoided within the territory that the community operates. This is why local management of fishing activities is so important because it ensures peaceful co-existence and an equitable share of resources within the

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<sup>66</sup>Borrini-Feyerabend G (ed.) (1997) "Beyond Fences: Seeking Social Sustainability in Conservation" 2 Volumes IUCN Gland Switzerland.

<sup>67</sup>Bennett E (2005) "Gender, fisheries and development" *Marine Policy* 29 455; Williams MJ (2010) "Gender dimensions in fisheries management" In: RQ Grafton "Handbook of Marine Fisheries Conservation and Management" *Oxford University Press*, Oxford 72–86.

community.<sup>68</sup> The most effective way that this can be achieved is through community based organisations (CBOs). These organisations are established to bring the community together so that the social, cultural, economic and ecological concerns of the community can be addressed. The role of a CBO in a co-management system includes but is not limited to:<sup>69</sup> Identify possible concerns within the community; Identifying leadership roles; Research and data gathering at community level; Partake in the creation, and implementation of a co-management regime; Compliance and Enforcement at a community level; Set up and implement monitoring systems; Lobby government for policy changes needed by the community; Mobilize the community to have a collective voice.

### 2.4.3 Government

The government can and should operate at all three levels when it comes to fisheries management, each operating with their own mandate. However government cannot assume complete control of fisheries management responsibility. Increasingly we have seen that government policy has stressed the need for greater fisher involvement in the management process and that government must through enabling legislation commensurate legal rights and authorities and devolve some of their powers.<sup>70</sup> It is very important that government not only devolves some of its powers but continues to provide support to sustain the arrangement. According to Pomeroy and Berkes,<sup>71</sup> this can be done broadly in three steps:

Firstly, Government should encourage and if possible facilitate opportunities for fishers to hold meetings, mobilise and organise institutional arrangements that are tailor made to suit their needs and address their concerns. Secondly government must allow and facilitate access to government officials in order for fishers to express their concerns and respect their arrangements. Thirdly government must give fishers the right to form their own organisations and allow for co-operation with government. This can be done formally through local legislation or informally by enforcing rules established by fishers

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<sup>68</sup>Pascual-Fernández JJ(2005) "Local institutions" *Fish for life: interactive governance for fisheries* 160

<sup>69</sup>Pomeroy RS and Rivera-Guieb R (2005) "Fishery co-management: a practical handbook" CABI Publishing Oxfordshire 36.

<sup>70</sup>Bensted-Smith R & Kirkman H (2010) "Comparison of Approaches to Management of Large Marine Areas" *Fauna & Flora International*, Cambridge, UK, and *Conservation International* Washington DC 144.

<sup>71</sup>Pomeroy RS and Berkes F (1997) "Two to tango: the role of government in fisheries co-management." *Marine policy* 21 (5) 469.

using police. To summarise, the role of National government is to create legitimacy and accountability for local organisation and institutional arrangements.<sup>72</sup>

Local government also plays an extremely important role in a co-management arrangement in that if national government decentralizes its role, local government will play a middleman role between the two. Local government will therefore support the community and the co-management arrangement by approving local regulations that will assist community decisions regarding the management of the fishery, provide technical and financial assistance and most importantly facilitate and engage in efforts to collaborate with fishers and national government to ensure channels of communication and co-operation remain open.

#### 2.4.4 Other stakeholders

Other than government and resource users there are a number of other stakeholders that exist within a small-scale fishing sector. These different actors have varying degrees of importance, however each should be identified and brought up to speed with the management approach adopted so as to create accountability if they were to impede the overall objectives of the regime. An example of this situation may be in the case of part time resource users who may not form part of the community as they are from inland, however need to access the resources to sustain their livelihood when inland resources are unavailable. Local businesses are also very important stakeholders as they may be in the business of boat building, fish trade and processing that directly affects the fishery, these businesses may also assist communities financially.

The two most important other stakeholders in the author's opinion are resource management organisations and NGOs. Resource management organisations operate in collaboration with communities and the government. They are usually set up or encouraged by law and policy and are made up of community representatives and government officials. Their role is advisory in nature and provides the higher and lower levels of authority with necessary advice as to the management of the resources and the communities. NGOs are also of extreme importance as they provide a variety of

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<sup>72</sup>Pomeroy RS and Rivera-Guieb R (2005) "Fishery co-management: a practical handbook" *CABI Publishing Oxfordshire* 36.

services and may be involved at various times during co-management. NGOs may help the community to organise itself, supply advice and expertise. The NGO may supply training and capacity building as well as provide financial assistance. However, NGOs must always keep in mind that they are there to assist and enable participation by communities and must ultimately remove themselves from the process as the community becomes more competent.<sup>73</sup>

#### 2.4.5 Institutional arrangements

Because co-management is initiated at the highest level and requires that government devolves its powers and becomes de centralised, what powers and management functions are best handled at a local and community level? The straight answer is that there is no answer. The variables that influence co-management are infinite and are country specific, so there is no way to determine whether what works in one country will work in the next. It is an extremely costly and time consuming exercise.<sup>74</sup> There are certain core management functions Identified based on capacity and trust that may be devolved to a local and community level:<sup>75</sup>

(i) data gathering; (ii) logistical decisions such as who can harvest and when; (iii) allocation decisions; (iv) protection of resources from environmental damage; (v) enforcement of regulations; (vi) enhancement of long-term planning; and (vii) more inclusive decision-making.

Decentralisation does not mean the state must remove itself from the management process, but rather as a situation where the state, communities and other stakeholders identifies each other's strengths and weaknesses and create a win-win situation for all involved.

For co-management arrangements to work at the local level they must be nested within the community and its public and civic institutions; they must also be nested in co-management institutions at regional and national levels.<sup>76</sup>

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<sup>73</sup>Rivera R (1997) "Re-inventing Power and Politics in Coastal Communities: Community based and Coastal Resource Management in the Philippines" *Marine Affairs Program Dalhousie University Nova Scotia Canada*.

<sup>74</sup>Rivera R (1997); Pomeroy RS *et al* (1999) "Fisheries co-management in Asia: Lessons from experience" *ICLARM Manila*.

<sup>75</sup>Pinkerton E (ed.) "Co-operative Management of Local Fisheries: New Directions for Improved Management and Community Development" *University of British Columbia Press Vancouver 1989*.

<sup>76</sup>Jentoft S (1989) "Fisheries co-management: Delegating government responsibility to fishermen's organizations" *Marine Policy 13 (2) 141*.

## 2.5 Capacity Building

If one looks at the above paragraph on co-management we have identified that small-scale fishers individually, as a community as well as other stake holders have a large role to play in the management of the fishery. It is therefore imperative that their capabilities match the expectations. Co-management requires vertical and horizontal integration across scales and sectors; it requires a broad implementation by the management system to address social, economic, ecological and political concerns. For this to be achieved all partners and stakeholders including government will require new skills, knowledge and a shift in consciousness to ensure that the co-management system is implemented properly. Without this capacity the entire proposed management system regardless of how soundly it is designed will fail. Capacity can be defined as ‘the ability of individuals and organizations or organizational units to perform functions effectively, efficiently and sustainably’.<sup>77</sup>

A few factors that need to be taken into account when establishing a new management system is, firstly the rate of change in its implementation. This can often be rushed which leads to confusion within communities and fisheries management. The extent of the community’s ability to organize itself to work within a co-management arrangement is a significant issue affecting the potential impact of such arrangements. It was found that it can take 3–5 years to develop effective institutions.<sup>78</sup> Another important factor to take into account which is present in South Africa is the increased use of integrated coastal management (ICM) that requires the adoption of a wider more holistic multi-sectoral and eco-system based approach.<sup>79</sup> When taking these complexities into account it is clear that building skills across all departments and ministries at national, provincial, local and community level are of utmost importance to ensure that a common goal and purpose is achieved. This process is difficult and shouldn’t be underestimated.<sup>80</sup>

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<sup>77</sup>UNDP (1998) “Capacity Assessment and Development in a Systems and Strategic Management Context” *Management Development and Governance Division, Technical Advisory Paper No. 3*. United Nations Development Program, New York.

<sup>78</sup>Abdullah NMR & Pomeroy RS (1998) “Transaction Costs and Fisheries Co-Management” *Marine Resource Economics* 13 110.

<sup>79</sup>White A *et al* (2006) “Integrated Coastal Management in Philippine Local Governance: Evolution and Benefits” *Coastal Management*, 34 292.

<sup>80</sup>Campbell J *et al* (2013) “Key Factors Supporting Small-Scale Coastal Fisheries Management - Synthesis Review” *Rockefeller Foundation USA* 54

An important concern when implementing a co-management regime as well as decentralizing is leadership, skills, resources and capabilities of local organizations and institutions. When government and resource users work together they reinforce each other and this leads to improved management. However if there is insufficient capacity and power is prematurely shifted to a community level it can lead to political, social and economic fragmentation which in turn leads to a failure to successfully implement a co-management regime.<sup>81</sup>

When looking at the stakeholders involved in fisheries management from a capacity building lens it is important to realise that the fishery is not made up of a sum of individual parts but as a social community that is constantly communicating and forming relationships that seek to achieve a common goal through access to information.<sup>82</sup> This is known as social capital and facilitates learning and capacity building through interaction.<sup>83</sup> In the Eastern Caribbean fisheries governance is heavily constrained by the lack of capacity in communities and community organisations due to inadequate information exchange and positive interactions among stakeholders.<sup>84</sup>

### 2.5.1 Capacity Building Levels

Capacity building is generally focussed around three levels but can include others. The three levels are: Enabling level; Organisational level; Individual level.

It is necessary for these levels to always interact and communicate with each other. The enabling level consists of creating the basis for the entire co-management regime to function. It requires firstly, that capacity is built to prepare for negotiations, create a common goal and purpose, deciding on representation, dealing with conflict and create a platform to evaluate and monitor progress. Secondly it requires capacity development at national and regional level to create the enabling framework for co-management to function through policy and regulation, it creates a legal voice through

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<sup>81</sup>Pomeroy RS (2001) "Devolution and fisheries co-management. Collective Action, Property Rights and Devolution of Natural Resource Management—Exchange of Knowledge and Implications for Policy" *Zentralstelle für Ernährung und Landwirtschaft* Feldafing Germany 123.

<sup>82</sup>Borrini-Feyerabend *et al* (2000) "Co-management of Natural Resources: Organizing, Negotiating and Learning-by-doing" *GTZ and IUCN, Kasperek Verlag*, Heidelberg, Germany.

<sup>83</sup>Pomeroy RS and Rivera-Guieb R (2005) "Fishery co-management: a practical handbook" *CABI Publishing Oxfordshire* 144.

<sup>84</sup>Chakalall B *et al* (2007) "Governance of fisheries and other living marine resources in the wider Caribbean" *Fisheries Research* 87 94.

which user groups and communities can be heard and considered when any decisions are made.<sup>85</sup>

The organisational level is capacity that needs to be developed within the CBO. This includes developing a strategy and organisational structure. It also involves learning how to communicate with other organisations and performing necessary processes like writing reports, policy development, performance and office management. It requires that human resources are properly managed. From a financial aspect capacity needs to be developed to ensure that capital is correctly spent and that there is an income for operational requirements. Lastly infrastructure such as computer systems, telecommunication and a work environment that promotes productivity is pivotal at organisational level.<sup>86</sup>

Finally the individual level, which is most critical in that it encompasses the individual's ability to function within the co-management programme. This includes every individual stakeholder, whether at government level or part of a community based organisation and capacity building is specific to the individual's role and relationship to the resource and co-management regime.<sup>87</sup> It is often thought that if you solely build individual capacity, it will automatically strengthen the other levels, this is however not the case, as a strong capacity to conduct research for example has no impact if there is no organisational procedure for its implementation.<sup>88</sup>

### 2.5.2 How capacity is built

Capacity is developed by trying to achieve goals that are set by individuals and organisations by using new skills and knowledge that have been learned. It was found that many co-management initiatives give the role of building capacity to NGOs operating in the areas<sup>89</sup>. Role building capacity must not be confused with capacity building. Role building is extremely important and consists of stimulating capacity building by providing expertise and information, training and support, mentoring and facilitating. Capacity building however consists of individuals and community based organisations setting goals and making decisions. Leaders must come from the

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<sup>85</sup>Pomeroy RS and Rivera-Guieb R (2005) 145.

<sup>86</sup>Pomeroy RS and Rivera-Guieb R (2005) 145.

<sup>87</sup>Pomeroy RS and Rivera-Guieb R (2005) 145.

<sup>88</sup>Horton D (2002) "Planning, Implementing, and Evaluating Capacity Development" *Briefing Paper No. 50. International Service for National Agricultural Research* The Hague, Netherlands.

<sup>89</sup>Wilson DC *et al* (2006) "Cross-scale linkages and adaptive management: Fisheries co-management in Asia" *Marine Policy* 30 528.

organisations and members from within must be responsible for all the work done.<sup>90</sup> Individuals and organisations must network and share information as well as experiences.

For capacity building to be successful there are certain factors that need to be present:<sup>91</sup> An environment open to change; strong leadership; a clear plan; members who understand and are devoted to the initiative; transparency in all aspects of the management and decision making process and Adequate resources to enable capacity building.

When deciding the best strategies to implement capacity building it is important to determine the strengths and weaknesses of the organisations and stakeholders involved. This is achieved through strategic management by first undertaking a capacity assessment to determine what needs to be done and then carried out at various stages of the co-management regime to continually asses where work needs to be done. The capacity development efforts should be tested periodically in order to provide a basis for improving future capacity development efforts.<sup>92</sup> For example, when embarking in the implementation of a co-management regime, firstly planning and negotiating capacities will have to be developed, however only at a later stage will the capacity to allocate resources within the community be required.

## **2.6 Customary Rights and Marine Protected Areas (MPA's)**

As alluded to in the introductory chapter of this dissertation when the political dispensation changed in South Africa and the ANC government took over, expectations amongst small-scale fishers were high that rights to resources would be restored or re-allocated. The new dispensation had created a progressive constitution, a new legal framework for marine living resources that included comprehensive policies and regulations embodying principles of human rights and equitable access to resources. However fishing communities living adjacent to “no-take” marine protected areas (MPA's) were still not allowed to access marine resources situated in their traditional fishing locations.<sup>93</sup> South Africa's democracy is more than 20 years old

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<sup>90</sup>Horton (2002).

<sup>91</sup>Pomeroy RS and Rivera-Guieb R (2005) 146.

<sup>92</sup>Horton (2002).

<sup>93</sup>Sowman M (2015) “Governability Challenges Facing Small-Scale Fisheries Living Adjacent to Marine Protected Areas in Southern Africa” in “Interactive Governance for Small-Scale Fisheries *Springer International Publishing* 362.

however governability of small-scale fisheries in the context of MPAs appears to be filled with difficulties.

### 2.6.1 Conservation and MPAs

MPA's are regarded as an incredibly successful means of marine resource conservation and have been implemented in various fisheries management regimes around the world as well as in South Africa.<sup>94</sup> Recently South Africa has implemented a programme with which it seeks to expand its MPA network from 23% of which 9% are no-take zones to 25% of which 15% will be no-take zones.<sup>95</sup>

For the past 100 years coastal communities have been detrimentally impacted due to the lack of access to the resources contained in MPAs that they desperately depend on for their food and livelihoods.<sup>96</sup> So much so that that that in recent years communities have approached the courts to demand that their cultural and customary rights to the resources be restored.<sup>97</sup>

The reason why "no-take" MPAs are regarded as the most credible tool for marine conservation in South Africa is because of the predominant natural science view of resource conservation that exists, however there is a strong move to include social sciences when planning and implementing MPA management.<sup>98</sup> Despite this, the dominance of natural sciences throughout fisheries management in South Africa has continued to fuel the unequal relationship between fishing communities and fisheries scientists and for this reason the management of small-scale fisheries in South Africa in the context of MPA's will always be limited unless interactions between small-scale fishers and MPA management authorities improve.<sup>99</sup>

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<sup>94</sup>Helvey M (2004) "Seeking consensus on designing marine protected areas: Keeping the fishing community engaged" *Coastal Management* 32 179; DEA (2012) "South African environmental outlook: A report on the state of environment", *Chapter 5: Oceans and coast Draft 1* Pretoria: DEA.

<sup>95</sup>Sink K *et al* (2012) "National biodiversity assessment 2011: Technical report Volume 4" *Marine and Coastal component* Pretoria: South African National Biodiversity Institute.

<sup>96</sup>Sowman M *et al* (2011) "Marine protected area management in South Africa: New policies – Old paradigms" *Environmental Management* 47 (4) 579; Masifundise Development Trust (2013) "FishersNet" *Pan African Issue Vol 1* Mowbray: Masifundise Development Trust.

<sup>97</sup>State versus Gongqose and two others. (2012)(E382.10). Unreported; Kenneth George and others v The Minister of Environment and Tourism (EC 1/2005 and 2010).

<sup>98</sup>Sowman *et al* (2014) "Guidelines for integrating human dimensions into marine protected area (MPA) planning and management" *Prepared by the Environmental Evaluation Unit, University of Cape Town for WWF-SA*.

<sup>99</sup>Sowman M (2015) 372.

According to Sowman the following principles are paramount in order to ensure successful management of MPA's: <sup>100</sup>Participation and deliberation in decision making; free and informed consent; access to information; accountability; transparency; recognition of local and indigenous knowledge and respect for customary systems of governance and law.

Research has showed that when fishing communities are excluded from their traditional fishing grounds there is a significant increase in the amount of illegal fishing and harvesting within these “no-take” MPAs as these communities are dependent on the resources to feed their families.<sup>101</sup> Coastal communities believe that people and nature are inextricably linked and that environmental degradation is as detrimental to their livelihoods as the lack of access to the resources. <sup>102</sup> They believe that through traditional fishing practices within MPAs the resources will replenish themselves naturally and that fish stocks will not collapse because of the community's responsibility to care for nature. However participation in the management of the MPA must be a basic social norm.<sup>103</sup>

## 2.6.2 Customary Rights

In South Africa, not until very recently has there been any formal recognition of traditional, customary rights over marine resources. This is surprising, due to the fact that over 50 % of Africans in South Africa live according to some form of African customary law,<sup>104</sup> and that the South African Constitution explicitly recognises customary law in so far as it is consistent with the Bill of Rights. South Africa has also made a whole host of international commitments that enshrine the recognition of indigenous rights, participatory governance and to benefit sharing from resources held in protected areas.<sup>105</sup> To some extent the delayed recognition is understandable due to the relationship between customary rights and MPA's, which reflect the ultimate conundrum. On the one hand communities have the customary right to exercise

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<sup>100</sup>Sowman M (2015) 373.

<sup>101</sup>Hauck, M. (2009) “Rethinking small-scale fisheries compliance: From criminal justice to social justice” *Doctoral thesis*, University of Cape Town, South Africa.

<sup>102</sup>Wicomb W & Smith H (2011) “Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What to do with the Endorois decision” *African Journal of Human Rights Law* 11 346.

<sup>103</sup>Sunde J (2014) “Customary governance and expressions of living customary law at Dwesa-Cwebe: Contributions to small-scale fisheries governance in South Africa” *Doctoral thesis* University of Cape Town South Africa.

<sup>104</sup>Sunde J *et al* (2013) “Emerging proposals for governance of tenure in small-scale fisheries in South Africa” *Land Tenure Journal* 1 (13) 117–146 FAO Rome.

<sup>105</sup>Sowman M (2015) 373.

customary practices and on the other hand there are broader public interest rights for environmental protection.<sup>106</sup> This conundrum is presented to us in the following case.

### 2.6.3 S v Gongqose

David Gongqose and two others were charged with entering a national wildlife area without authorisation and fishing, or attempting to fish in a “no-take” MPA which is in contravention of the MLRA. The accused raised the defence that they have a customary right to fish and that the establishment of an MPA impacted negatively on the community to practise their system of customary law. The magistrate criticised the authorities for their failure to recognise the customary rights of the community and not respecting their system of customary law, however he did not have the power to declare a national law unconstitutional. He stated “South Africa’s new constitutional dispensation began not only a political but also a legal revolution. With the inclusion of a justiciable Bill of Rights in the Constitution, the validity of a wide range of laws, whether public or private, could now be tested against the standards of fundamental human rights”.<sup>107</sup> Section 43 of the MLRA was the National Law in question which gives the Minister the power for an area to be declared a marine protected area for certain purposes including: (b) “...to facilitate fishery management by protecting spawning stock, allowing stock recovery, enhancing stock abundance in adjacent areas, and providing pristine communities for research...”. This would be the most important factor to consider when balancing custom and conservation. When the matter was taken to the High Court, the judges found that the community did in fact have customary rights to the resources but the communities could have been accommodated by Section 81 of the MLRA which allows for the granting of an exemption to fish in an MPA.<sup>108</sup> The community has still not gained access to the resources despite multiple applications for exemption under Section 81. The matter has subsequently been appealed to the Supreme Court of Appeal.

The SSF Guidelines released by the FAO state that: “*States and all other parties, should, in line with national legislation, recognize, respect and protect all forms of legitimate tenure rights, taking into account, where appropriate, customary rights, to*

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<sup>106</sup>Ferris, L. (2013) “A customary right to fish when fish is sparse. Managing conflicting claims between customary rights and environmental rights” *Potchefstroom Law Journal* 16 (5) 562.

<sup>107</sup>*State versus Gongqose and others* 2012 E 382/10.

<sup>108</sup>*Gongqose and others versus the Minister and others* CA&R 26/13

*aquatic resources and land and small-scale fishing areas enjoyed by small-scale fishing communities*".<sup>109</sup> The SSF Guidelines thus place an obligation on the State to take proactive measures to protect customary tenure rights, not merely to assume that they are implicitly protected in general legislation. The SFTG in South Africa suggests that as a general rule no subsistence harvesting should take place within MPAs, and the only possible exceptions should be if the area has been historically used for small scale fishing and when there is a cultural basis.<sup>110</sup>

It would be unwise for policy makers to exclude customary rights when developing a small-scale fishing policy in that customary rights and fishing communities are inexplicably linked and the management of MPA's cannot be done with the view that humans and nature are separate. It is therefore imperative that customary rights are recognised within a policy framework and that principles of stewardship utilising traditional knowledge and cultural practices be used to enhance fisheries and MPA management.<sup>111</sup>

## **2.7 Compliance and Enforcement**

Coastal fishing communities are usually found dispersed along vast lengths of coast line. Due to a lack of capacity in traditional top down enforcement, forcing fishers to comply with regulations is an almost impossible task.<sup>112</sup> In many developing countries the enforcement of regulations in small-scale fishing communities has become extremely onerous as there are many vessels operating from various landing sites along the coast.<sup>113</sup> Enforcement is also very often linked with other issues such as rural development and high unemployment rates.

It is thus imperative that a radical new approach is developed for compliance and enforcement in small-scale fisheries.<sup>114</sup> This new approach is consistent with the themes so far discussed in this paper and runs to the heart of co-management in that

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<sup>109</sup>FAO (Food and Agriculture Organization) (2015) "Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries" Rome 5.

<sup>110</sup>Harris JM *et al* (2002) "Recommendations for the management of subsistence fisheries in South Africa" *South African Journal of Marine Science* 24 1 509.

<sup>111</sup>Pinkerton and Weinstein (1995) "Fisheries that Work: Sustainability through Community-Based Management" *David Suzuki Foundation*.

<sup>112</sup>Arthur RI (2005) "Co-management: a synthesis of the lessons learned from the DFID Fisheries Management Science Programme" *MRAG Ltd* London 36.

<sup>113</sup>Jentoft S (2000) "The Community: a missing link in fisheries management" *Marine Policy* 24 54.

<sup>114</sup>Berkes *et al* (2001) "Managing small-scale fisheries: alternative directions and methods" *International Development Research Centre (IDRC)* Ottawa 162

communities need to be involved in the management of the fishery and that they must consent to decisions that affect them. When this happens fishers are no longer forced to comply with regulations but they feel they have a commitment to comply with the regulations.<sup>115</sup> Moving from compliance to commitment is a pivotal step to ensure that rules are followed and fish stocks remain at sustainable levels.<sup>116</sup> This assumption is built upon the idea that when communities are educated to understand what the problems are within the fishery and what the benefits are of taking action and being involved in the actions to be taken, the communities will comply and be more involved with enforcement.

In many fisheries around the world the most costly element of fisheries management is enforcement. This seriously jeopardises the entire management regime. There are ways of ensuring compliance within a fishery without relying too heavily on costly enforcement.<sup>117</sup> To identify what these are it is important to first identify which factors determine compliance within small-scale fisheries. Kuperman *et al* identifies the following factors:<sup>118</sup> Potential illegal gain; severity and certainty of sanctions; an individual's moral development and his or her standard of personal morality; an individual's perception of how just and moral the rules being enforced are and the social environment.

The return of illegal fishing compared to legal fishing is far greater and therefore the penalties that authorities impose will also have to be harsher as they will need to create the offset in the mind of the fishers that the proposed gain does not outweigh getting caught. As alluded to before the cost of enforcement is extremely high and in developing countries the chances of being caught are extremely slim.<sup>119</sup> Judicial bodies are also very reluctant to impose sanctions that outweigh the illegal gain. Therefore when enforcement capacity is low due to its high cost and the sanctions imposed are not severe and certain enough, fishery managers have to rely on the moral obligation of the communities themselves.

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<sup>115</sup>Kuperan VK & Jahan KM (2010) "Noncompliance a major threat in fisheries management – Experiences from the artisanal coastal fisheries of Bangladesh" *Journal of International Studies* 6 103.

<sup>116</sup>Campbell J *et al* (2013) "Key Factors Supporting Small-Scale Coastal Fisheries Management - Synthesis Review" *Rockefeller Foundation USA* 73

<sup>117</sup>Sutinen JG (1993) "Recreational and commercial fisheries allocation with costly enforcement" *Amer J Agricultural Econ* 75(5) 1185.

<sup>118</sup>Kuperan K *et al* (1997) "Enforcement and compliance with fisheries regulations in Malaysia, Indonesia and the Philippines" *ICLARM Co-management Project Research Report No. 5* ICLARM Makati Philippines.

<sup>119</sup>Furlong WJ (1991) "The deterrent effect of regulatory enforcement in the fishery" *Land Economics*. 67(1) 125.

When a co-management regime exists fishing communities feel that they have a much larger moral obligation to comply with fisheries regulation. This moral obligation is created through the involvement in the entire process of managing the fishery. Communities thus feel that they are responsible for their livelihoods and they are not merely subject to having laws created in a national office imposed on them. This together with strict sanctions will greatly improve compliance.

Despite complying with the rules, communities can be involved in the actual enforcement of the rules directly by either acting as the eyes and ears for enforcement officers by monitoring and reporting. This will require that the authorities are willing and able to respond immediately. Secondly community members can be designated by law as enforcement officers. This approach is however not recommended by the SFTG because of the fear of violent retribution.<sup>120</sup> Both of these approaches however require a large degree of training and that the institutional arrangements are properly developed. It will require that all stakeholders responsible for enforcement will have to be constantly communicating and consulting with each other.<sup>121</sup>

### 2.7.1 Compliance and Enforcement in Marine Protected Areas

In South Africa there are numerous examples where small-scale fishing communities do not understand the rules imposed on them by government with regard to the establishment of MPA's in areas that they regard as their traditional fishing and harvesting grounds. The enforcement measures used within these MPAs are regarded as a violation of their human rights as they are treated terribly.<sup>122</sup> The idea that a "No-take" MPAs are created for reasons such as conservation and to replenishing fish stocks is a hard pill to swallow when they are forced to sit back and observe how the commercial industry are allocated rights to fish adjacent to their traditional territories and they are prosecuted.<sup>123</sup>

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<sup>120</sup>Harris JM et al (2002) "Recommendations for the management of subsistence fisheries in South Africa" *South African Journal of Marine Science* 24 1 518.

<sup>121</sup>Pomeroy RS and Rivera-Guieb R (2005) "Fishery co-management: a practical handbook" *CABI Publishing* Oxfordshire 226.

<sup>122</sup>Sowman M *et al.* (2014) "Making space for small-scale fishing communities: The use of spatial management measures in fisheries management and marine conservation" In SM Garcia *et al* (Eds.) "Governance for fisheries and marine conservation: Interactions and co-evolution" *Chichester/Hoboken: Wiley-Blackwell*.

<sup>123</sup>Sowman M (2015) "Governability Challenges Facing Small-Scale Fisheries Living Adjacent to Marine Protected Areas in Southern Africa" in "Interactive Governance for Small-Scale Fisheries *Springer International Publishing* 362.

The underlying mentality to enforcement that exists in South Africa's MPA management is that small-scale fisheries are regarded as a huge threat to MPAs because of the illegal fishing that occurs. So far instead of finding the root cause of this problem, the government has persisted to increase direct enforcement measures by trying to increase arrests and convictions.

### 2.7.2 A South African Context

Up until now, no formal compliance programme existed for subsistence fishers in South Africa because they have never been regarded as a legal fishing sector.<sup>124</sup> In addition to what has been discussed earlier in this chapter, for compliance to be effective, there needs to be independent regulations for the small-scale sector. These regulations need to be developed together with the users and communities themselves and compliance staff must be specifically trained to deal with the specific requirements of the regulations.<sup>125</sup>

The design elements discussed above are not the only elements that are to be considered, but may be regarded as the most important. These design elements do not function in a vacuum and are interconnected. The choice of designing a certain element in a certain way will directly affect the potential design options available regarding the other elements.

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<sup>124</sup>Hauck M *et al* (2002) "Perceptions of subsistence and informal fishers in South Africa about management of living marine resources" *South African Journal of Marine Science* 24 465.

<sup>125</sup>Harris JM *et al* (2002) "Recommendations for the management of subsistence fisheries in South Africa" *South African Journal of Marine Science* 24 1 518.

## Chapter 3

### Policy Review

The Small-Scale Policy is South Africa's attempt to formalise a sector that has suffered at the hands of inequality. In this chapter the paper seeks to determine whether the design elements discussed under chapter 2 have been successfully transposed into the Small-Scale Policy. The chapter therefore uses the same elements to critically analyse the Policy and determine whether the lessons learned have indeed lead to a Policy that will lead to the successful management of the Small-Scale fishing sector.

#### 3.1 Defining the Sector – Policy Review

The usefulness of a definition depends on the purpose and objectives of the definition. In this context the definition gives guidance as to the parameters of a new national policy and legislative framework.<sup>126</sup> What the Small Scale Policy seeks to achieve when looking at the “small-scale” terminology used as well as looking at a summary document issued by the Department of Agriculture forestry and fisheries,<sup>127</sup> is that it seeks to encompass all informal fishers, from subsistence all the way to an artisanal and even small-scale commercial.

Within the Small-Scale Policy we see three definitions relating to the sector, “Small-Scale fishing”, “Small-Scale fishers”, “Small-Scale fisheries Sector” and “Small-Scale fishing community”. These terms all have varying degrees of importance when interpreting the scope of the policy. When one looks at the first three definitions above, there is a common thread that runs through them all, in that the purpose of fishing activities undertaken are to ensure food security.<sup>128</sup> The definition of Small-Scale fishing means “the use of marine living resources...in order to ensure food and livelihood security”, the definition of Small-Scale fishers means “persons who fish to meet food and basic livelihood means”, and the definition of Small-Scale fisheries Sector means “that sector of fishers who...harvest marine living resources...to ensure

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<sup>126</sup> Sunde J and Pederson C (2007) “Defining the Traditional Small-Scale Fisheries Sector in South Africa” Masifundise Development Trust Discussion Series 1 6.

<sup>127</sup> DAFF Date Unknown [www.nda.agric.za](http://www.nda.agric.za) (the Summary Document).

<sup>128</sup> Young M (2013) “Achieving equity in the fishing industry: the fate of informal fishers in the context of the Policy for the Small-Scale Fisheries Sector in South Africa” Potchefstroom se Elektroniese Regsblad 16(5) 298.

food security”.<sup>129</sup> This entails that the policy is predominantly aimed at ensuring that fishers at least experience a standard of living that meets the very basic livelihoods.

However, reference is made under the definition of Small-Scale fishers that seeks to encompass a broader scope of the policy to include fishers who are “...engaged in the sale or barter or are involved in commercial activity”. The Small-Scale Policy however makes no clear distinction where the border lies between a small-scale fisher who engages in commercial activities and the realm of the regulated commercial sector. According to Young,<sup>130</sup> the lack of objective criteria in this regard potentially perpetuates uncertainty as to which class of fishers the policy covers.

If the policy does however turn out to include the entire spectrum of small-scale fishers, another filter has been included in the policy for fishers to be allocated rights. In order to receive these rights, a fisher must be a member of a fishing community. A fisher must qualify as a small-scale fisher in terms of the criteria laid out by the Policy,<sup>131</sup> to qualify to be a member of a fishing community. Some of the criteria laid down can be regarded as an unnecessary limitation present in the Small-Scale Policy and Regulations.<sup>132</sup> The criteria specific to the policy will be discussed under this chapter and those present in both will be discussed when reviewing the Regulations. The Policy states that to be regarded as a Small-Scale fisher the individual must have no permanent other employment. This requirement conflicts with the definition of Small-Scale fishing that allows for “part time or seasonal” harvesting, creating confusion as to who may be regarded as a small-scale fisher. The Policy states that fishers must subsist from their catch or be engaged in the sale or barter or involved in semi-commercial activity. This aligns with the definition of Small-Scale fisher under the Policy however the use of the words “semi-commercial” is ambiguous in that it continues to perpetuate uncertainty as to where the barrier between small-scale commercial and commercial lies. If the “small-scale commercial” fishermen are again excluded from the scope of the Policy one would assume that a nuanced rights allocation approach will be adopted for these fishers by the commercial sector. The Draft Revised General Policy on the Allocation and Management of Fishing Rights

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<sup>129</sup> The Small-Scale Policy IV.

<sup>130</sup> Young M (2013) 299.

<sup>131</sup> The Small-Scale Policy 35.

<sup>132</sup> The Small-Scale Policy 38; Small-Scale Regulations 4.1 10.

which includes the small-scale sector shows no nuanced process, even though it makes provision for the fact that the small-scale sector may be assessed differently.<sup>133</sup>

Although the policy has cast a broad net to encompass a large continuum of fishers, its lack of objective criteria to draw a line between “small-scale commercial” and commercial enterprise will continue to hamper the attainment of equality in South African fisheries.

### **3.2 Nature of the Rights, Types of Rights and resources attached thereto – Policy Review**

The Small-Scale Policy envisions that rights will be allocated to a community based legal entity (CBLE) in a collective manner. The CBLE will allocate rights to individuals within the community and not to individuals.<sup>134</sup> This is in line with the paradigm shift and principles contained in the Policy.<sup>135</sup> The collective rights will be called ‘basket rights’ which is a multi-species approach with regard to the types of resources that will be made available to the community. The types of species allocated will be based on a variety of factors such as the availability and productivity of the species, whether the species is migratory or not, if the species can be sustainably exploited or if the species is already fully exploited by other sectors, but primarily on the TAC and TAE of particular species.<sup>136</sup> The policy allows for the demarcation of a specific area which will be exclusively reserved for a specific community after a community has been established in terms of the criteria stipulated by the Policy and a CBLE exists. This will allow exclusive access rights to the community over marine living resources which will be co-managed by the Department and the community.

A fisher must form part of a community in order to gain access to the collective rights. This community-orientated approach is extremely limited in that it assumes that all fishers in this sector share common interests and regard themselves as part of a community.<sup>137</sup> This common interest makes it possible that the Department and the community are able to co-manage the resource and its associated activities. If a fisher therefore seeks to gain access to the collective rights he must form part of the

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<sup>133</sup> Gen N 396 in GG 36383 of 17 April 2013 (Draft General Commercial Policy). Gen N 473 in GG 36460 of 14 May 2013 par 6.2.

<sup>134</sup>The Small-Scale Policy 33.

<sup>135</sup> The Small-Scale Policy 17, 14.

<sup>136</sup> The Small-Scale Policy 36.

<sup>137</sup> The Small-Scale Policy 6.

community. This fundamental principle is likely to exclude those who do not form part of this homogenous community.<sup>138</sup>

A greater amount of coastal communities will gain access to resources they would have never had through the individual rights based system. The amount of fish allocated to an individual will be considerably less for those who were lucky enough to gain access to the resources under the individual rights system, this is why existing holders are opposed to the paradigm shift envisioned by the Policy from individual quotas to collective quotas.<sup>139</sup> On the other side however, more fishers will gain access to resources which will increase economic opportunities over a broad spectrum.<sup>140</sup>

The shift to a collective community-based allocation of rights given to a CBLE may however not be suitable to every community, even if the community fulfils the requirements to be regarded as same. As Sowman points out the individual system will be ill-suited and unworkable if harvesting activities are conducted in a community orientated manner and similarly collective allocation is ill-suited and unworkable when communities do not harvest in a communal manner.<sup>141</sup> Areas will be declared for exclusive access to communities, will be identified and have set boundaries, they will be managed according to traditional fishing practices and sustainable harvest limits.<sup>142</sup> In many communities it will be easy to identify these TURFS, because they target sedentary or benthic species, however those that target migratory species will not be so easy to define. Similarly, communities that live in cities or close to urban areas where competition for the same resource is high across sectors will find it hard to have an area demarcated exclusively for use by the small-scale sector.<sup>143</sup>

In summary the community based rights allocation system does cast a broad net that includes a far greater number of fishers than in the past. However the broad net cast that specifically rules out an individual allocation system excludes certain fishers that require a nuanced allocation process. The need to look at different communities in a more nuanced fashion rather than decide on an objective approach regarding the

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<sup>138</sup> Young M (2013) 308.

<sup>139</sup> Isaacs M (2015) "Backing Small-Scale Fisheries: Opportunities and Challenges in Transforming the Fish Sector" Institute for Poverty, Land and Agrarian Studies 13.

<sup>140</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 38.

<sup>141</sup> Sowman M (2006) "Subsistence and small-scale fisheries in South Arica: a ten year review" *Marine Policy* 70.

<sup>142</sup> The Small-Scale Policy 28.

<sup>143</sup> Sowman M *et al* (2014) 39.

allocation of rights is an area where the Small-Scale policy falls short. The author must agree with Young,<sup>144</sup> in that there is no “one size fits all” solution regarding the allocation of rights.

### **3.3 Co-Management – Policy Review**

When looking at the wording of the Small-Scale Policy, it is clear that it adopts a co-management approach. Firstly, the Policy provides for a definition of co-management which provides that government and small-scale communities share the responsibility and authority for the management of a marine resource by that community.<sup>145</sup> This definition itself lays down the idea that the type of co-management the Policy envisions leans towards one of co-operation and not one that will only see minimal community involvement. This observation is further strengthened by multiple references to co-management and a community based approach. The Policy states that small-scale fisheries resources will be managed in terms of a community-based co-management approach.<sup>146</sup> The policy will establish an effective basis for determining which marine living resources are applicable to the small-scale fisheries sector. This will include a co-management approach to managing the small-scale fisheries sector.<sup>147</sup> The principles that will apply to decision-making, management and regulation of marine living resources in the sector should include; to adopt an approach of co-management empowerment; develop accountable and transparent structures and mechanisms, promote effective participation in policy development, management and decision-making; and incorporate a community-based rights approach to the allocation of the marine living resources.<sup>148</sup>

The Policy identifies that to achieve its overall purpose of providing access to all fishers that fall within the sector, it must provide the necessary support mechanisms such as participatory management practices.<sup>149</sup> The institutional arrangements are of vital importance to achieve co-management and therefore the creation of a co-management committee, which is formed once a CBLE is created. This committee will contain members of Local, Provincial and National Government.<sup>150</sup> Finally the Policy

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<sup>144</sup> Young M (2013) 309.

<sup>145</sup> The Small-Scale Policy (VI).

<sup>146</sup> The Small Scale Policy 4.

<sup>147</sup> The Small-Scale Policy 10.

<sup>148</sup> The Small-Scale Policy 14, 15.

<sup>149</sup> The Small –Scale Policy 12.

<sup>150</sup> The Small-Scale Policy 32

provides for the creation of a co-management agreement which as alluded to under chapter two is where the relationship between the community and government obtains its legal character. It stipulates the duties and responsibilities of all stakeholders,<sup>151</sup> and facilitates the implementation of co-management at local level.<sup>152</sup>

In order for fishers to properly co-manage the fishery, they need to be directly involved in all aspects of the fishery in some way or another. This is achieved through participation in decision making and through actively protecting, conserving and rehabilitating the resources.<sup>153</sup> Management of these duties are the responsibility of government in traditional fisheries, but in a co-management agreement these roles must be devolved from government to the communities.<sup>154</sup>

The only clarity that the Policy gives with regard to the types of community involvement is with regard to community based catch monitoring at landing sites within demarcated areas, compliance, monitoring and enforcement.<sup>155</sup> It stipulates that once some capacity building has taken place to ensure effective monitoring of TAC and TAE and effective identification of species coastal fishing communities are well placed to assist in protecting marine living resources, monitoring and reporting illegal activities. However the wording used in the policy under this section states that the Department is "...ultimately responsible for ensuring compliance..." which in the author's view places the community in a submissive position. This view is supported by the fact that the Policy gives no clarity on the degree of input communities will have regarding essential issues such as what species will be made available in the "basket of species", the quota that will be received and the extent of the fishing areas that will be demarcated exclusively for communities. The policy only speaks of some consultation and involvement of communities regarding the above.

The policy clearly states that "...the Department will be responsible for policy development, consultation with stakeholders, screening of fishing rights applicants, reviewing applications and issuing rights and permits. The Department will share the responsibility for managing the marine living resources with CBLE through a co-

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<sup>151</sup> The Small-Scale Policy 30

<sup>152</sup> The Small-Scale Policy 29

<sup>153</sup> Berkes F, Colding J and Folke C (2001) "Managing Small-Scale Fisheries: Alternative Directions and Methods" *International Development Research Centre Ottawa*.

<sup>154</sup> Young M (2013) "Achieving equity in the fishing industry: the fate of informal fishers in the context of the Policy for the Small-Scale Fisheries Sector in South Africa" *Potchefstroom se Elektroniese Regsblad* 16(5) 309.

<sup>155</sup> The Small-Scale Policy 29, 24.

management committee..."<sup>156</sup> There is no guidance with regards to the weight the community representative will carry in the committee made up of representatives from all spheres of government.

If communities feel that they are not properly represented in the management approach, the entire approach will lack credibility, and without credibility the rules established will be ineffective as it will be very unlikely that the communities will abide by the rules of the regime.<sup>157</sup> Many commentators have emphasised the importance of adequate participation and consultation especially when it comes to the determination of the types of resources made available to the communities and the declaration of MPA's.<sup>158</sup>

In summary, the Small-scale Policy broadly allows for participation and consultation of communities in the management process and provides no detailed clarity of the weight community involvement will have. The Policy sets out that "the policy is not a strategy, implementation plan or procedural guideline. The operational details of how the management system will work in practice... will be determined and may be spelt out in regulations ..."<sup>159</sup> The implementation of a co-management regime should be present in the MLRA and should not be catered for by way of regulation.<sup>160</sup> The review of the Small-Scale Fishing Regulations deals more intimately with this issue.

### **3.4 Institutions – Policy Review**

The Small-Scale Policy envisions that the institutional arrangements will consist of a multi-tiered model incorporating representatives from all three spheres of Government and the small-scale sector. It will comprise of a Consultative Advisory Forum at the national level, a dedicated small-scale fisheries management working group serving as a vehicle or middleman for interaction between the sector and the national department to address management issues.<sup>161</sup> At community level co-management

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<sup>156</sup> The Small-Scale Policy 32.

<sup>157</sup> Hauck M and Hector R (2003) "Towards Abalone and Rock Lobster Co-management in the Hangklip-Kleinmond Area" Hauck M and Sowman M (Eds) *Waves of Change: Coastal and Fisheries Co-management in South Africa* University of Cape Town Press Cape Town 248.

<sup>158</sup> Raemaekers S *et al* (2001) "Review of the causes of the rise of the illegal South African abalone fishery and consequent closure of the rights-based fishery" *Ocean and Coastal Management* 433-445; Sowman M *et al* (2011) "Marine Protected Area management in South Africa: New policies, old paradigms" *Environmental Management* 573-583.

<sup>159</sup> The Small-Scale Policy 18, fn 14.

<sup>160</sup> M Young (2013) 314.

<sup>161</sup> The Small-Scale Policy 31.

committees and community-based legal entities will deal with issues affecting local fishers and the local fishery.<sup>162</sup>

The CBLE is to be created for the purpose of formalising the co-management and community based approach the policy adopts, as well as co-ordinating all community activities associated with the harvesting and management of marine living resources.<sup>163</sup> The Policy envisions that the CBLE could be a Section 21 company or any other type of company, or a trust or co-operative.<sup>164</sup> The Policy's intention is to include a whole array of fishers into the system especially those who will add value to the fishery products. These local level institutions are complex and without the necessary means to run these entities by the fishers themselves may be taken over by the elite. This invariably leads to lack of transparency and accountability within these entities. There are also questions surrounding how government will be able to provide the necessary capacity building to help enable the model envisioned by the policy.<sup>165</sup>

The co-management committees are to be made up of representatives of all three spheres of Government and members of the CBLE, its purpose is to implement the co-management approach envisioned by the policy.<sup>166</sup> This implies representation of communities; however the degree of representation may not be sufficient.

In South Africa the lack of co-operative governance between different levels of government results in a situation where planning and development across sectors occurs in complete isolation.<sup>167</sup> This unfortunately in most cases leads to lost opportunities in addressing the overall objectives the policy envisions. South Africa's national fishery agency is characterised by low human capacity as well as high staff turnover.<sup>168</sup> There needs to be continuity and reliability in the government institutions to provide the necessary support and build relationships with small-scale communities.

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<sup>162</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 37.

<sup>163</sup> The Small-Scale Policy 32.

<sup>164</sup> The Small-Scale Policy 32

<sup>165</sup> Sowman M *et al* (2014) 39.

<sup>166</sup> The Small-Scale Policy 32.

<sup>167</sup> Cardoso MP Fielding P Sowman M (2005) "Overview and analysis of social, economic and fisheries information to promote artisanal fisheries management in the BCLME region – South Africa" Final report and recommendations. *Environmental Evaluation Unit, University of Cape Town Cape Town*.

<sup>168</sup> Cochrane KL *et al* (2009) "Benguela Current Large Marine Ecosystem — Governance and management for an ecosystem approach to fisheries in the region" *Coastal Management* 37: 235–254.

In summary the institutional arrangements included in the Policy shows that government intends to improve on its historical top-down approach to fisheries management by shifting to a holistic and synergistic approach. This calls for co-operation and co-ordination between different departments and sectors.<sup>169</sup> It calls for greater representation in decision making from communities and a clear line of communication across the entire multi-tiered institutional model prescribed by the Policy.

### **3.5 Capacity Building – Policy Review**

For co-management to be successful, it needs to be accompanied by strong institutions to ensure that the objectives of the regime are carried out successfully. In order for these institutions to behave in a competent manner, communities must be capacitated and empowered to take part in the management process, and this process needs to be an ongoing one that constantly improves.<sup>170</sup>

The Small-scale Policy recognises the need and critical importance of capacity building to ensure that communities are able to successfully manage and use the resources available to them in their area.<sup>171</sup> The different levels of capacity building are also recognised by the Policy as the Department is aware that capacity building needs to be provided to establish local community based entities; preparation and implementation of management plans; conflict resolution; monitoring and recording catches; value addition and marketing and; the effective and efficient functioning of the co-management committees.<sup>172</sup> The need for capacity building at the local user level is specifically highlighted by the Policy which makes provision for building capacity through education, training and skills development in all aspects of the fishery.<sup>173</sup> Some commentators believe that capacity building around only fishery related matters will not be enough and that basic numeracy and literacy skills are also required.<sup>174</sup> The recognition of the need for capacity building is a great first step in the process, however the Policy provides no indication on how government will implement the customised training programmes envisioned by the Department. It only provides

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<sup>169</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 38.

<sup>170</sup> Young M (2013) 311.

<sup>171</sup> The Small-scale Policy 25.

<sup>172</sup> The Small-Scale Policy 25-26.

<sup>173</sup> The Small-Scale Policy 15.

<sup>174</sup> Sowman, Hauck and Branch "Lessons Learned" 248.

that the programmes will be developed by the Department of Labour and SETA's and that provincial and local government as well as NGO's will play an important role in building capacity and training.<sup>175</sup>

In 2002 a survey of 448 households in Small-scale fishing communities showed that the majority of people had no schooling whatsoever or some primary school education.<sup>176</sup> The need for capacity building runs deep in communities such as these, and will be an area that requires adequate resources and ongoing attention. This vision seems very bleak when faced with the human and financial capital currently available at government level.<sup>177</sup> DAFF will have to expand and adapt its structure if it wishes to achieve the goals envisioned by the Policy. Communities will have to become more organised, not an easy task due to low levels of financial resources, formal education and business experience, and high levels of conflict. It is imperative that the correct training programmes are put in place.<sup>178</sup>

The Policy seeks to align itself with the Integrated Fisheries Development Plan and Programme of Action (IFDP). The IFDP seeks to promote fisheries as a whole, and include all sectors. It seeks to provide support to the small scale sector by adopting a developmental approach to management, it seeks to go beyond stagnant fisheries management and provide for ongoing development to move into a position where fishers are able to add value to their resources and increase their capacity.<sup>179</sup> The IFDP focuses government interventions on developing and transferring new skills that will boost local economic development and create decent jobs. Some of the interventions included in this Plan are to promote the development and support of the development of alternative livelihoods.

To summarise the Policy has recognised the need for capacity development and has aligned itself with the National framework regarding fisheries, however the lack of capacity in terms of finance and human resources at government level coupled with

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<sup>175</sup> The Small-Scale Policy 25-26.

<sup>176</sup> Branch G et al (2002) "Case studies on the socio-economic characteristics and lifestyles of subsistence and informal fishers in South Africa" *SAfrJ Mar* 445.

<sup>177</sup> Cochrane KL et al (2009) "Benguela Current Large Marine Ecosystem — Governance and management for an ecosystem approach to fisheries in the region" *Coastal Management* 37 235–254.

<sup>178</sup> Sowman M et al (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 40.

<sup>179</sup> Sunde J and Pedersen C (2007) "Defining the Traditional Small Scale Fisheries Sector in South Africa" A Discussion Paper prepared by Masifundise and presented by Marine and Coastal Management Affairs and Tourism Discussion Series 8

the level of capacity-building and training that will be required raises concerns on how this capacity development will be achieved.

### **3.6 Customary Rights and MPA's – Policy Review**

The Small-Scale Policy has taken a completely new approach to tenurial governance. The Policy has recognised the existence of common law, customary law and legislation in so far as it is consistent with the Bill of Rights.<sup>180</sup> It recognises 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.<sup>181</sup> It requires that preferential access be given to small-scale fishers who according to the definition have depended historically on harvested marine living resources.<sup>182</sup> It requires that where tenure to coastal land involves coastal communities and affects implementation of the Policy, government must resolve these issues.<sup>183</sup>

Customary law is an equal and independent body of law and deserves the recognition as such. Conservation -and fisheries management authorities have largely ignored customary systems of marine resource use. As mentioned above, the Policy recognises customary fishing rights however it seems that the Constitutional provision that protects customary rights in so far as they are consistent with the bill of rights is not yet fully understood when it comes to fisheries management.<sup>184</sup>

In terms of the Policy, small-scale communities will be able to have access to and harvest resources as they always have according to their customs and traditions, as long as they are consistent with the Bill of Rights. Case law confirms that customary systems of resource management can give access and use rights over resources to individuals or communities.<sup>185</sup> In the recent case of David Gongqose,<sup>186</sup> currently on appeal to the SCA it is clear that when communities have a customary right to marine living resources and that right is being limited due to a “no-take” MPA, there exist grounds to have the management of these MPA's reviewed to incorporate customary

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<sup>180</sup> The Small-Scale Policy 14.

<sup>181</sup> The Small-Scale Policy 14.

<sup>182</sup> The Small-Scale Policy 15.

<sup>183</sup> The Small-Scale Policy 15.

<sup>184</sup> Section 211 (3) of the Constitution of South Africa states that “the courts are obliged to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law”.

<sup>185</sup> Customary law has been recognised as a source of law in several cases by the Constitutional Court of South Africa for example *S V Makwanyane and Another* 1995 (3) SA 391 (CC) and *Alexkor Ltd v The Richtersveld Community*, 2004 (5) SA 460 (CC)

<sup>186</sup> *S V Gongqoze*, E 382/10,

systems of resource management into the management of the MPA. In circumstances such as the above, communities will have to be consulted and taken seriously as their customary rights may have implications for conservation if a sustainable solution cannot be achieved.<sup>187</sup>

The problem with MPA governance in South Africa is the fact that there are too many institutions involved and a whole host of laws and policies that govern these institutions. There are also statutes that contain provision for community management in protected areas.<sup>188</sup> This unorganized nature of the governance system and simply the practical day to day application of these mechanisms creates confusion amongst fishing communities regarding how the principles envisioned in the policy will be implemented.<sup>189</sup> Procedures and mechanisms are further not clarified in the Policy and this adduces to more uncertainty. Will we be left with the conundrum as alluded to earlier where we have the rights and needs of the community on the one hand and resource sustainability on the other?<sup>190</sup>

Customary systems of resource management provide an opportunity to give life to the principles enshrined in the Policy. For customary systems to be effective access and use of rights must be given to communities, however what is most important is that these communities must obtain certain key management rights over the same resources as this will create accountability. This will require devolution of powers from the top down as well as a devolution of trust.<sup>191</sup> Only then will we see a realisation of the Policy and the true realisation of customary rights to marine resources.

### **3.7 Compliance and Enforcement – Policy Review**

The Small-Scale Policy provides a whole host of provisions for compliance, monitoring and enforcement. It states that the Department recognises that fishing communities are well placed to assist in protecting marine living resources, monitoring and reporting illegal activities.<sup>192</sup> This creates the idea that the government is willing to shift away

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<sup>187</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 38.

<sup>188</sup> National Environmental Management: Protected Areas Act 57 of

<sup>189</sup> Sowman M (2015) "Governability Challenges Facing Small-Scale Fisheries Living Adjacent to Marine Protected Areas in Southern Africa" in "Interactive Governance for Small-Scale Fisheries *Springer International Publishing* 362.

<sup>190</sup> Ferris L (2013) "A customary right to fish when fish is sparse. Managing conflicting claims between customary rights and environmental rights" *Potchefstroom Law Journal* 16 (5) 562

<sup>191</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 40.

<sup>192</sup> The Small-Scale Policy 24.

from a top-down enforcement approach and allow communities to become more involved. In the same breath however, the Policy provides that the Department is ultimately responsible for ensuring compliance with regulations.<sup>193</sup> Organised crime is also regarded as something that will be dealt with exclusively by government according to the Policy.<sup>194</sup> This is understandable as organised crime falls squarely within the mandate of the national police force and is regulated by various laws, the key statute being the 1998 Prevention of Organised Crime Act.<sup>195</sup>

The Policy envisions creating a system where fishers will be trained to record and monitor fishing related activities and assist in preventing illegal activity. While this seems like an empowering provision, as mentioned under capacity building, the human and financial capacity to provide this training is heavily lacking within the Department. The Policy provides for demarcation of fishing areas for fishing communities and a co-management regime within these areas and it is presumed that communities will want to therefore protect those resources.<sup>196</sup> The effectiveness of this presumption will rely heavily on the rules that govern the behaviour of fishers within those areas.<sup>197</sup> If the rules lack credibility the fishers are unlikely to harvest only the species that are included in their basket of species, or the quantity allowed.<sup>198</sup> This was the case in the past regarding the Abalone fishery in which small-scale fishers who were unable to obtain the necessary fishing allocations, decided to continue harvesting abalone irrespective of the consequences because they were hard done by the rule makers.<sup>199</sup>

When one looks at compliance within MPAs a very similar scenario presents itself. 'No-take Marine protected areas where communities believe customary rights to fish exist or where no community participation or consultation has occurred regarding the declaration of the MPA has resulted in communities simply continuing to fish.<sup>200</sup> If fishers believe that they are truly represented in the management of the fishery and

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<sup>193</sup> The Small-Scale Policy 24.

<sup>194</sup> The Small-Scale Policy 24.

<sup>195</sup> Prevention of Organised Crime Act 121 of 1998

<sup>196</sup> The Small-Scale Policy 24.

<sup>197</sup> Hauck M and Hector R (2003) "Towards Abalone and Rock Lobster Co-management in the Hangklip Kleinmond Area" Hauck M and Sowman M (eds) *Waves of Change: Coastal and Fisheries Co-management in South Africa* University of Cape Town Press Cape Town 248.

<sup>198</sup> Young M (2013).

<sup>199</sup> Raemaekers S et al (2011) "Review of the causes of the rise of the illegal South African abalone fishery and consequent closure of the rights-based fishery" *Ocean and Coastal Management* 433-445

<sup>200</sup> Sowman M et al (2011) "Marine Protected Area management in South Africa: New policies, old paradigms" *Environmental Management* 573-583

that they are equitably being assigned the rights they deserve there will be something for them to protect and this will ultimately lead to compliance, however if the Small-Scale Policy and the co-management regime it proposes lacks credibility there simply won't be enough capacity at government level to force fishers to comply with Regulations.<sup>201</sup>

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<sup>201</sup> Arthur RI (2005) "Co-management: a synthesis of the lessons learned from the DFID Fisheries Management Science Programme" *MRAG Ltd* London 36.

## Chapter 4

### Regulations Review

As with the previous chapter, the dissertation in this chapter seeks to determine whether the design elements discussed under chapter 2 have been successfully transposed into the Small-Scale Regulations. The chapter therefore uses the same elements to critically analyse the Regulations and determine whether the lessons learned have indeed lead to a Regulations that provide the necessary mechanisms to enable the sector to operate successfully.

#### 4.1 Defining the Sector – Regulations Review

The Marine Living Resources Amendment Act was passed in May 2014. Section 1 defines a small-scale fisher as “a member of a small-scale fishing community engaged in fishing to meet food and basic livelihood needs, or directly involved in processing or marketing of fish, who traditionally operate in near-shore fishing grounds; mainly employ traditional low technology or passive fishing gear; undertake single-day fishing trips; and are engaged in consumption, barter or sale of fish or otherwise involved in commercial activity, all within the small-scale fisheries sector”. This definition is in line with the universally accepted FAO broad definition of Small-scale Fisheries and Artisanal Fisheries.<sup>202</sup> The use of the words “all within the small-scale fisheries sector” denotes the possibility that the Regulations explicitly wish to emphasise the fact that small-scale commercial fishers will fall under the scope of the sector as long as all the criteria to be regarded as a small scale fisher are met. This is supported by the fact that reference to “subsistence” have been removed from the MLRA in order to explicitly bring the continuum of fishers under the umbrella term “small scale”.

The criteria set out in the Regulations stem more or less directly from the definition above and resemble those expressed in the Small-scale Policy. Just like the Policy, the Regulations stipulate that the fisher must be a South African Citizen of at least 18 years of age and reside within the relevant fishing community.<sup>203</sup> The fact that a fisher must be part of a community may exclude small-scale commercial fishers as the

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<sup>202</sup> Béné C Macfaddyen G Allison E H (2007) “Increasing the contribution of small-scale fisheries to poverty alleviation and food security” Food and Agriculture Organization of the United Nations. *FAO Fisheries Technical Paper 481* Rome.

<sup>203</sup> Small-Scale Fishing Regulations 4(1) 9.

community-based rights allocation proposed by the MLRA,<sup>204</sup> is ill suited for this kind of fisherman.<sup>205</sup> The same could apply to fishers living in built up urban areas who live more individualistic lives. The regulations do however make a distinction between species that may be allocated for commercial use and those that may be allocated for own consumption but again as in the policy, The Regulations do not specify a more nuanced approach to allocating rights. Nevertheless, the Regulations do apply to the fishers at the commercial end of the spectrum as they are able to gain access to rights if they are able to form a community of at least 20 fishers.<sup>206</sup> The requirement that to be regarded as a small-scale fisher, a person must be able to show that they “...derive the major part of their livelihood from traditional fishing operations and be able to show historical dependence on fish...” is exclusionary in that there are some fishers that genuinely rely on the oceans for their only source of protein but cannot prove historical dependence. There are those that rely heavily on fishing to support their livelihoods, even though it does not form a major part of their income.<sup>207</sup>

Depending on how strictly the regulations relating to the identification of the fishers are applied, it seems that the marginalisation of fishers may continue, as the criteria is ambiguous. The criteria used may result in identifying *bona fide* small-scale fishers; it however excludes some that should fall under the Regulations.

#### **4.2 Nature of the Rights, Types of Rights and resources attached thereto – Regulations Review**

The Small-Scale Policy provides that the Department of Agriculture, Forestry’s and Fisheries (DAFF) must allocate a “basket of species” “community-based” fishing right to a community based legal entity established in each small scale fishing community.

The Small-Scale Regulations state that the list and quantity included in this basket shall be determined by DAFF in consultation with each community,<sup>208</sup> once the verification and co-operative formation processes have been concluded. The Regulations further state that each community (in consultation with the Department) will be required to select species from two lists attached as annexures to the Regulations. One list contains species that may be used for own consumption and the

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<sup>204</sup> MLRA (1998) 19(3).

<sup>205</sup> M Young (2013) 302.

<sup>206</sup> Small-Scale Fishing Regulations 4(2) 10.

<sup>207</sup> Young M (2013) 303; Clark B *et al* (2002) 434.

<sup>208</sup> Small-Scale Regulations 6(1).

other that can either be eaten or sold.<sup>209</sup> In November 2015 the DAFF held a meeting on this subject and invited stakeholders from not only the small-scale sector but also the commercial sector to provide input. Shortly after DAFF released a document with proposed apportionment figures.<sup>210</sup> The document shows a substantial future allocation of near shore resources to the small-scale sector, however nothing has been confirmed.

The rights allocation contained in the Regulations are fraught with concerns. The upcoming consultations that are set to take place between the Department and communities regarding allocations as stipulated in the Regulations are questionable given the corrupt and undemocratic nature of South African fishery governance. It is only understandable that the author questions whether the communities will be heard and treated equitably.<sup>211</sup>

Another complication arises in that the Department has conducted two rounds of long term fishing allocations in 2013 and in 2015.<sup>212</sup> Both of these rights allocation procedures have granted rights ranging from 8 to 10 years to the commercial sector which contains a wide range of species also included under the Small-Scale Regulations. A great number of these stocks, including those most relevant to the small-scale sector, are fully exploited or overexploited or have even collapsed.<sup>213</sup> This situation makes the equitable allocation of rights to the small-scale sector inconceivable. The uncertainty that exists with regards to the amount of resources that will be allocated collectively to communities is creating further instability amongst community groups who have endured a long wait for the enabling provisions to materialise.<sup>214</sup> It seems as though the only way in which the small-scale sector can be accommodated is by decreasing the quotas awarded to the other sectors and re-allocating them to the small-scale sector.<sup>215</sup> This means that objectives in the MLRA such as ensuring sustainable use of resources and promoting economic growth must

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<sup>209</sup> Small Scale Regulations 6(1)(c)

<sup>210</sup> DAFF (Department of Agriculture, Forestry and Fisheries) (2015) "Apportionment Document" DAFF Pretoria.

<sup>211</sup> Hauck M and Kroese M (2006) "Fisheries compliance in South Africa: a decade of challenges and reform 1994–2004" *Marine Policy* 30 74–83; Isaacs M et al (2005) "South African Fisheries Reform: Past, Present and Future?" Policy Brief 16 PLAAS

<sup>212</sup> DAFF (2013) Fishing Rights Allocation Process (FRAP) GN 473 GG No 36460 dated 14 May 2013; DAFF (2015) Fishing Rights Allocation Process (FRAP) GN 1127 GG No 39417 dated 16 November 2015.

<sup>213</sup> Sowman 2011 *Afr J Marine Sci* 298.

<sup>214</sup> Sunde J (2016) "Social relations and dynamics shaping the implementation of the Voluntary Guidelines on Small-scale Fisheries (SSF Guidelines) in South Africa" 35

<sup>215</sup> Branch G et al (2002) "Case studies on the socio-economic characteristics and lifestyles of subsistence and informal fishers in South Africa" 2002 *SAfrJ Mar Sci* 456

be realised.<sup>216</sup>The Regulations provide that if 20 small scale-fishers come together to form a community, they may register a co-operative and then may be allocated rights.<sup>217</sup> The Small-Scale Policy and the Amendment Act both in their definition of community envision a community as a group that have shared aspirations and historical interest. What this means is that in most cases one cannot choose to be part of a community, you simply are. The Regulations get this process wrong in the way it intends to allocate a community right. The regulations provide for an artificial creation of a community by twenty or more fishers coming together to form an enterprise. This cannot be regarded as a “small-scale fishing community” as defined by the Act. The system proposed by the Regulations is, in fact, nothing more as a version of the individualised permitting system that the Policy explicitly rejects.<sup>218</sup>

With regard to specific areas or zones the Regulations state that the Department must set up a procedure to engage and consult with communities regarding proposed demarcated areas, but it does not specifically state how this will happen.<sup>219</sup> The TURF model proposed by the Regulations will need to be adapted for a range of fisheries, and in some cases where there are migratory species, static demarcated areas may not be feasible irrespective of the size of the area.<sup>220</sup>

### **4.3 Co-Management – Regulations Review**

The Statutory Basis for Co-management is found under the National Environmental Management Act: Protected Areas (NEMPA).<sup>221</sup> This is only relevant however in the context of protected areas and coastal communities living within or adjacent to these areas. For there to be a statutory basis for co-management it needs to be included under the principle MLRA. The MLRA Amendment Act and the Small Scale Policy establishes certain principles regarding Co-management and a community based approach that needs to be reflected in the Regulations.

A community based approach does not simply mean that rights must be granted collectively to a community based legal entity, it also means that governance, decision-

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<sup>216</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) 508G-509H.

<sup>217</sup> Small-Scale Regulations Sec (3) and (4).

<sup>218</sup>Wicomb W (2015) “Submissions to the Minister of Agriculture, Forestry and Fisheries on the Proposed Regulations Relating to Small-Scale Fishing” Legal Resource Centre 10.

<sup>219</sup> The Small-Scale Regulations 5 (1).

<sup>220</sup> Sowman M *et al* (2014) “Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries” Marine Policy 46 39.

<sup>221</sup> National Environmental Management: Protected Areas Act 57 of 2003 Sec 42.

making and participation of the community is promoted.<sup>222</sup> The MLRA Amendment Act therefore creates the empowering provision in the following way:

*“The Minister and any organ of state shall have regard to the need to incorporate a community-based approach in the allocation of rights of access within the small-scale fisheries sector.”<sup>223</sup>*

The Small-Scale Regulations hardly refers to co-management or a community based approach other than allocating rights collectively. Only once reference is made that communities shall be represented at national, regional and local management structures as part of a co-management approach.<sup>224</sup> Still no reference as to how communities are to be represented is made, although the Regulations do make reference to consultation with communities on various occasions.<sup>225</sup> Most notably it makes provision for consultation when deciding on the quantum and fishing effort to be allocated to each small-scale fishing community.<sup>226</sup> It however then provides that if communities cannot agree on apportionment, the decision will be made based on certain requirements.<sup>227</sup> This final decision will no doubt be made by the Minister. Likewise with regards to the outcome of other decisions where consultation is required, the final say still lies with the Minister. This type of co-management reflects a very limited participatory version of co-management and does not accord with the definition of co-management expressed under the Small-Scale Policy.<sup>228</sup>

In summary the Regulations do not provide the necessary tools for the realisation of co-management, participatory decision making or co-governance. Reference to consultations with communities is stipulated however no indication is given with regards to the weight these communities will carry, or how these communities will be represented in these consultations. The Regulations ultimately leave the management of the sector in the hands of the government with very little input from communities.

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<sup>222</sup> The Small-Scale Policy 17-18.

<sup>223</sup> MLRA Amendment Act 5 of 2014 Sec 5(3).

<sup>224</sup> The Small-Scale Regulations 15.

<sup>225</sup> The Small Scale Regulations 12, 14.

<sup>226</sup> The Small-Scale Regulations 14.

<sup>227</sup> The Small-Scale Regulations 15.

<sup>228</sup> Wicomb W (2015) “Submissions to the Minister of Agriculture, Forestry and Fisheries on the Proposed Regulations Relating to Small-Scale Fishing” Legal Resource Centre 10.

#### 4.4 Institutions - Regulations Review

When investigating the Regulations one has to look long and hard for clarity on the institutional structures that the Regulations envision. It makes reference to the Department needing to provide assistance to communities to register a co-operative.<sup>229</sup> Reference is further made to co-operatives when talking about rights allocations,<sup>230</sup> and finally reference is made to secondary co-operatives that may be created through which the community can market and process wild captured marine resources by the third fishing season of the right being granted.<sup>231</sup> Unlike the Small-Scale Policy that clearly provides a purpose for the CBLE the Regulations do not. The purpose of the CBLE under the Small-Scale Policy is to:

“serve as local management structure and formalize co-management and the community-based approach. These structures will have to ensure that all activities associated with the harvesting and management of marine living resources are coordinated and properly controlled. This includes compliance with the conditions of the fishing rights and ancillary fishing activities. These structures will play a key role in ensuring that the interest of the local fishing community and sustainability of the ecosystems and marine living resources they depend upon, are not compromised. The community-based structures will further serve as a platform for Small Scale Fishers to express their aspirations, needs and the challenges that they face”.<sup>232</sup>

If one looks at the Draft Regulations,<sup>233</sup> under the definition of a co-operative and a secondary co-operative, their purpose is to “to provide for employment or services to its members and facilitate community development and to provide sectoral services such as processing and marketing to its members”.<sup>234</sup> This purpose in the Draft Regulations certainly does not coincide with the Policy. Secondly the Regulations insist that the CBLE be a co-operative, unlike the Policy which specifically provides that communities may choose, so as to suit their individual needs.

These regulations follow years of negotiations between many interested parties. The fact that the Regulations differ so fundamentally from the purpose envisioned by the

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<sup>229</sup> The Small-Scale Regulations 9.

<sup>230</sup> The Small Scale-Regulations 10.

<sup>231</sup> The Small-Scale Regulations 16.

<sup>232</sup> The Small-Scale Policy 31-32.

<sup>233</sup> GR 10378 GG No 38536 dated 6 March 2015 (Draft Small-Scale Regulations)

<sup>234</sup> Draft Small-Scale Regulations (2015) 5.

Policy regarding the legal entity is disingenuous. Therefore, the policy's commitment to the institutions must stand and the co-operative entity envisioned by the Regulations cannot be sufficient.<sup>235</sup> Unfortunately the Regulations stand until challenged and set aside. The co-operatives envisioned by the Regulations are firstly, to be registered in terms of the Co-operatives Act.<sup>236</sup> Secondly, in terms of the Co-operatives Act, co-operatives can become insolvent as they are commercial entities. Running a business is not something that will immediately come naturally to small-scale communities.<sup>237</sup> What would happen to the communal right, should they not succeed? Membership to a co-operative must be voluntary in terms of the Co-Operatives Act.<sup>238</sup> Members must be able to leave the co-operative should they be of the opinion that it is not operating in a democratic manner and therefore voluntary membership is vital. Yet, the Regulations insist that to gain access to rights one must be part of a community and to be part of a community one must be a member of a co-operative. This means that membership is not voluntary.<sup>239</sup>

What adds to the frustration regarding the co-operatives is that in 2009 the Department of Agriculture, Forestry and Fisheries entered into a partnership with the Department of Trade and Industry in which they established co-operatives in fishing villages to empower local fishers. They were given vessels and limited- infrastructure to enable them to improve the community's livelihoods. These co-operatives were set up as general co-operatives and not in terms of the context laid down by the Small-Scale Policy and members of these co-operatives would have to register new co-operatives. This shows the lack of communication and policy coherence.<sup>240</sup>

As it stands, The MLRA does not provide for the delegation of powers or assignment of duties to the provincial sphere of government. This provision was present in the original Bill published for comment in 2013, however the Amendment Act contains no such provision. The lack of power at a provincial level disrupts the entire institutional

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<sup>235</sup> Wicomb W (2015) "Submissions to the Minister of Agriculture, Forestry and Fisheries on the Proposed Regulations Relating to Small-Scale Fishing" Legal Resource Centre 11.

<sup>236</sup> Co-operatives Act 14 of 2005.

<sup>237</sup> Co-Operatives Act (2005) Sec 73

<sup>238</sup> Co-operatives Act (2005) 1(i).

<sup>239</sup> Wicomb W (2015) 12.

<sup>240</sup> Sunde J (2016) "Social relations and dynamics shaping the implementation of the Voluntary Guidelines on Small-scale Fisheries (SSF Guidelines) in South Africa" 35

structure in order to fulfil the objects of the co-management regime proposed by the Small-Scale Policy.

#### **4.5 Capacity Building – Regulations Review**

The implementation of the Small-Scale Policy provides the opportunity to build capacity for self-governance and to deepen local democracy. It requires the development of local community based legal entities. Support and skills training are desperately needed. It also requires that fishers become aware of the power they have at a political level, especially women. It is critical that the methodology developed and adopted to implement the capacity building needs of the sector are clearly catered for in the Regulations.<sup>241</sup>

The Regulations make no direct reference to capacity building and do not provide a mechanism that allows for capacity building but rather seek to leave this onerous responsibility up to the fishing community to establish for themselves. The Small-Scale Regulations provide that a small-scale community must have a management plan that must specify:<sup>242</sup>

*(iii) training and development support needs;*

*(iv) measures to promote involvement of women and persons with disability;*

*(vi) social responsible measures for the youth to improve their levels of education and to provide opportunities for the youth to gain experience in the small-scale fishing sector;*

*(vii) those services that will be outsourced to the community.*

There is therefore no duty placed on government to provide for capacity building, neither do the regulations put a mechanism in place that ensures government will facilitate capacity building. To be regarded as a small-scale community, involves the joining together of 20 small-scale fishers.<sup>243</sup> This requirement is prior to the establishment of a co-operative which requires assistance from DAFF. That ultimately means that once a community is established it must develop a management plan. At this point communities are in no position to create a complex management plan,

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<sup>241</sup>Sunde J (2016) "Social relations and dynamics shaping the implementation of the Voluntary Guidelines on Small-scale Fisheries (SSF Guidelines) in South Africa" 35

<sup>242</sup> The Small-Scale Regulations 10-11.

<sup>243</sup> The Small-Scale Regulations 10.

without the necessary capacity there is no means for communities to determine what measures they wish to put in place as required by the management plan. This is where the Department and NGO's are required to assist. In cases where communities have been assisted by NGOs to help with this process, it has occurred through private agreement and not through a regulation which compels government to facilitate these agreements.

The Small-Scale policy implementation plan,<sup>244</sup> reflects that the Small-Scale fishing Directorate intends to provide some capacity building through service providers and ongoing field support. The Directorate only has 11 posts so capacity is definitely lacking. The WWF project in Kogelberg is a good example of co-management where there has been the necessary assistance from a civil society organisation to help service communities. It also indicates the high level of training needed, the time it takes and the large amount of involvement needed to successfully implement a co-management approach.<sup>245</sup>

As mentioned before the regulations require the management plan to include the measures to promote the involvement of woman. Again the Regulations provide no mechanisms for this involvement and neither does the Policy. However if one looks at other developing countries, women have been empowered in many ways. For this to occur there needs to be a paradigm shift. The value placed on people's lives must be regarded as a mix of social cultural and economic value rather than just economic. Another shift is required to enable poor women to enter the value chain. This can only be done if small-scale producers are able to increase their share of the market, either by the power of collective action or by creating niche markets<sup>246</sup>. State intervention will be required to provide infrastructure and subsidies to get the process started.

#### **4.6 Customary Rights and MPA's – Regulations Review**

If one looks at customary rights through the lens of small-scale fisheries and fishing communities, the first ones that come to mind are those communities from the Eastern Cape and KZN, who are currently involved in litigation and have proved that they as communities have historically in terms of their customary systems of resource

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<sup>244</sup> The Small-Scale Policy Implementation Plan available at <http://www.small-scalefisheries.co.za/useful-resources/>

<sup>245</sup> Sunde J (2016) 80.

<sup>246</sup> Sowman M *et al* (2014) "Fishing for equality: Policy for poverty alleviation for South Africa's small-scale fisheries" *Marine Policy* 46 40.

management accessed marine living resources sustainably and have a customary right to access these resources based on the constitution.<sup>247</sup> These rights can be regulated if they are recognised and the necessary mechanisms put in place. For the small-scale fishing sector these rights have been recognised in 3 different instances.<sup>248</sup> Firstly by the Constitution,<sup>249</sup> The most important being Section 39(3) which states:

*“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 of Rights.”*

Judge Langa in the case of *Bhe v Magistrate Khayelitsha & Others* said:<sup>250</sup>

*“Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.”*

Secondly customary rights are recognised in the MLRA Amendment Act, under Section 5(1) that governs the small-scale sector and states that the minister must “achieve the objectives contemplated in section 9(2) and 39(3) of the Constitution. In addition to this a small-scale fishing community is defined in the Act as a community who “...exercise their right in a communal manner in terms of an agreement, custom or law”.<sup>251</sup>

Thirdly the Small-scale Policy as alluded to in chapter 3.6 under its principles recognises the existence of any rights conferred by common law, customary law or legislation to the extent they are consistent with the bill of rights. It also recognises rights guaranteed by custom and law and access to and the use of natural resources on a communal basis, to the extent that they are consistent with the Bill of Rights.<sup>252</sup>

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<sup>247</sup> S V Gongqoze, E 382/10,

<sup>248</sup> Wicomb W (2015) “Submissions to the Minister of Agriculture, Forestry and Fisheries on the Proposed Regulations Relating to Small-Scale Fishing” *Legal Resource Centre* 11

<sup>249</sup> Constitution of the Republic of South Africa, Act 108 of 1996 Section 30, 31, 39(2) and 39(3).

<sup>250</sup> *Bhe v. Magistrate Khayelitsha & Others* 2005 (1) BCLR 1 (CC) 15 Oct 2004.

<sup>251</sup> MLRA Amendment Act Sec 1.

<sup>252</sup> The Small-Scale Policy 14.

The overwhelming recognition of customary rights in the small-scale fishing sector means that the Minister ought to have enacted regulations that provide the necessary mechanisms to ensure the promotion of these rights. No mention of customary rights are made in The Regulations, they have simply been omitted. Interesting to note is in 2015, the President sent the Minerals and Petroleum Resources Development Act,<sup>253</sup> back to Parliament because it was found that the Act did not take into account the implications the Act would have on the customary rights of communities.<sup>254</sup> The Regulations underwent no such presidential scrutiny.

What is needed from the Regulations that is clearly not present is a mechanism that allows for communities to apply for a customary right based on their customary systems of governance and should then be given access through this mechanism, and when a ‘no-take’ MPA is present, a system of co-management as promoted by the Small-Scale Policy should be entered into taking into account the fragile ecosystem.

The Judgement pending in the Eastern Cape at Dwesa-Cwebe MPA will have a substantial impact on the mind-set of the DAFF and the DEA neither of which have recognised the customary rights of communities living adjacent to MPA’s. Fishers there have no permits to fish, they have no access to information and receive no assistance from government.<sup>255</sup>

#### **4.7 Compliance and Enforcement – Regulations Review**

The Regulations simply make no mention of any mechanisms of any kind with regard to compliance and enforcement, besides the fact that the management plan each community must have, shall contain reporting mechanisms.<sup>256</sup> This implies that communities will provide honest and fair catch quantities all within the basket of species they are assigned. If one looks at the proposed Small-Scale fishing Regulations that were released for comment in 2015, a provision for compliance was present. It provided for community involvement by proposing: the constitution of a co-operative should contain the action that must be taken if a provision of the MLRA is

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<sup>253</sup> Mineral and Petroleum Resources Development Act No. 28 of 2002.

<sup>254</sup> Presidential statement 23 January 2015 available at <http://www.thepresidency.gov.za/content/referral-mineral-and-petroleum-resources-development-amendment-bill-national-assembly-1> accessed on 26 January 2017.

<sup>255</sup> Sunde J (2016) “Social relations and dynamics shaping the implementation of the Voluntary Guidelines on Small-scale Fisheries (SSF Guidelines) in South Africa” 60.

<sup>256</sup> The Small-Scale Regulations 10.

contravened.<sup>257</sup> This however would imply that the co-operative could decide a sanction for the contravention. Would this mean that the contravening fisher would escape prosecution under the MLRA? Surely not. This provision as pointed out earlier has subsequently not been included in the final Regulations.

Worth mentioning is the role corruption plays in small-scale fisheries. The cost of being honest has increased considerably. The amount of corruption present at a compliance and enforcement level between the Department and small-scale fishers is immense and well documented.<sup>258</sup> Sundström in his research points out that corruption is extremely widespread ranging from enforcement officials to the judiciary. The impact corruption has on good governance is so immense that regardless of the system in place, the one that suffers is resource sustainability.

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<sup>257</sup> Proposed Regulations relating to Small-Scale Fishing GR 10378 GG No 38536 dated 6 March 2015 Reg 13(2).

<sup>258</sup> Sundström A (2014) "Covenants with broken swords: Corruption and law enforcement in governance of the commons." *QoG Working Paper Series*. The Quality of Government Institute. Department of Political Science, University of Gothenburg, Sweden.

## **Chapter 5**

### **Conclusion**

By harnessing the social and environmental benefits of small-scale fisheries, the new small-scale fisheries policy holds enormous promise for fishers and the coastal ecosystems in which they operate. Yet there is a dramatic tension between the potential of the small-scale fisheries policy and the challenge of its implementation. This can be seen by the Small Scale Regulations that remain silent on many of the pivotal elements that are required for the successful implementation of the Sector.

This dissertation has discussed the most important elements that should be addressed in any small-scale fishing sector and offers suggestions where governance actors need to focus their attention when addressing the many needs that the sector imbues. In particular, it addresses the reasons why informal fishers were marginalised and issues that needed to be addressed in order for this flaw to be rectified. In this regard this dissertation considered the definition of the sector and the rights allocation. It was suggested that the definition of a small-scale fisher broadly defined so as to encompass all informal fishers, from those fishing on a subsistence scale to those fishing on a small-scale commercial basis. This dissertation discussed how rights could be allocated individually or collectively and learned that the collective approach that is followed by the policy and regulations may not necessarily suit all fishers.

The co-management approach was discussed and its promise to allow for equal participation in the management of the sector by the fishers themselves. Government needs to devolve its responsibilities and duties to communities. The Small-scale Policy only broadly allows for participation and consultation of communities in the management process and provides no detailed clarity of the weight community involvement will have. The Policy provided that the operational guidelines on how the management regime would work would be catered by way of Regulations. The Regulations however contained no such guidelines and the management of the sector remains in the hands of the government with very little input from communities.

A co-management regime cannot exist without the necessary institutional structures in place or the skills and expertise needed to execute the endless roles that need to be filled to enable successful implementation. The CBLE's that were suggested by the

Policy seemed to provide for the ideal vehicle to represent communities in the sector with the purpose to include a whole array of fishers into the system by giving not only those that catch an opportunity but to include those who will add value to the fishery products. The Policy envisioned a multi-tiered model where all levels of government and communities have decision making powers. The Regulations undermined this model and the regime in that neither the Regulations nor the MLRA provide for the delegation of powers or assignment of duties to the provincial sphere of government. The Policy has recognised the need for capacity however the lack of capacity in terms of finance and human resources at government level raises concerns how this capacity development will be achieved. The regulations remain silent on capacity building but requires each community to have a management plan in place that identifies the support and training needs of the community.

Case law confirms that customary systems of resource management can give access and use rights over resources to individuals or communities. The Policy adopts an entire new approach to tenurial governance. In terms of the Policy, small-scale communities will be able to have access to and harvest resources as they always have according to their customs and traditions, as long as they are consistent with the Bill of Rights. This will allow for access to marine living resources previously harvested by communities in terms of their customary right. The recognition of customary rights in the small-scale fishing sector by the Constitution, MLRA and the Small-Scale Policy means that the Minister must enact regulations that provide the necessary mechanisms to ensure the promotion of these rights. The regulations however do no such thing. The SCA judgment in the *Gonqose* may provide more clarity on the matter.

The Policy recognises the need for community involvement in compliance and enforcement and makes the assumption that communities will want to protect their resources if they are given access to specific areas and the resources within. This will depend on the credibility of the rules that govern the entire system. Fishers must feel that they are involved in every aspect of management of the fishery. Their rights must be recognised and their equitable access to resources must be realised.

In September 2016 DAFF gazetted that small-scale fishing rights will only be allocated for a period of 3 years and no indication of what will happen thereafter.<sup>259</sup> This decision was made without informing or consulting with any small-scale communities. The Small-Scale Policy was created for this very purpose, to ensure that communities are represented at all decisions that affect the fishery. The Equality Court Decision back in 2007 legally required government to recognise and restore small-scale fishing communities' rights to access and benefit from South Africa's marine environment. This decision to single handily allocate rights for only three years institutionalises a very volatile form of tenure for small-scale communities and again clearly shows that this industry is in dire need of a functioning regulatory framework that supports and protects it.

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<sup>259</sup> GN 1067 GG No 40286 dated 16 September 2016.

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