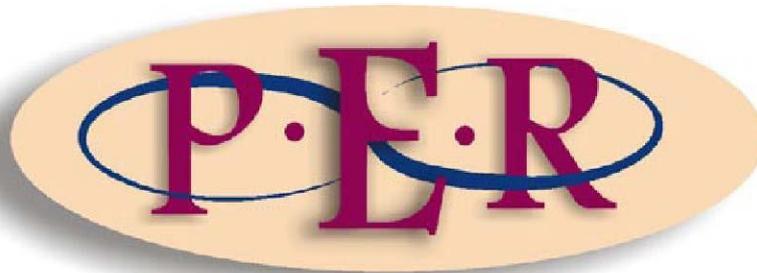


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**A CUSTOMARY RIGHT TO FISH WHEN FISH ARE SPARSE:  
MANAGING CONFLICTING CLAIMS BETWEEN CUSTOMARY  
RIGHTS AND ENVIRONMENTAL RIGHTS**



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## **A CUSTOMARY RIGHT TO FISH WHEN FISH ARE SPARSE: MANAGING CONFLICTING CLAIMS BETWEEN CUSTOMARY RIGHTS AND ENVIRONMENTAL RIGHTS**

**L Feris\***

### **1 Introduction**

Access to and the use of natural resources by indigenous communities has received considerable international attention. In the context of marine resources, indigenous claims to subsistence fishing rights have, in several countries,<sup>1</sup> given rise to the recognition of aboriginal rights, the establishment of aboriginal title, the conclusion of treaties, the creation of reserves and the carving out of fishing rights. These entitlements have enabled indigenous communities to access both freshwater and marine resources and maintain traditional subsistence economies.

This, however, is only one part of the story, as over-exploitation of fisheries (primarily as a result of commercial fishing) and the collapse or near collapse of key marine resources has also grabbed international attention. In the wake of pending disaster more and more governments are utilising measures such as the creation of marine protected areas to conserve and manage key marine species in order to ensure long-term sustainable utilisation. What happens, though, when an indigenous community attempts to exercise its customary right to fish and the nearest access to marine resources is located in a marine protected area?

This contribution addresses the potential conflict that may arise between customary rights and environmental rights in the face of dwindling natural resources and the need to find a balanced approach. The article starts out by reflecting on some of the common themes present in indigenous claims to natural resources, in particular

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<sup>1</sup> This includes countries such as the United States of America, Canada, Australia, New Zealand and Norway.

marine resource claims by communities who were subjected to colonisation. In doing so it analyses a South African judgment *State v David Gongqoze*,<sup>2</sup> which alluded to the existence of a customary right to fishing, a concept that until now has remained unexplored in South African law. This discussion is followed by a brief overview of the rapidly declining state of marine resources worldwide and in South Africa. Consideration is subsequently given to some of the challenges in meeting customary claims in the context of the need for conservation. It concludes by offering possibilities for reconciliation.

## **2. Claiming the fish - common themes in the narrative?**

### ***2.1 Customary rights to fishing - international perspectives***

In researching indigenous claims<sup>3</sup> to fishing rights, one cannot but note the common themes present in the history of countries marked with colonisation. In countries such as the United States of America, Canada, Australia, New Zealand and South Africa these common themes relate to natural resources and speak of a struggle between indigenous communities and colonisers over access to natural resources, including land, wildlife and marine resources.<sup>4</sup> On the one hand colonisers laid claim to the riches that attracted them to these new destinations while indigenous people strove to maintain food security, traditional subsistence economies and lifestyles. Over and above subsistence fishing, indigenous communities were also engaged in commercial fishing, trading fish with other groups and with new settlers for food,

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<sup>2</sup> *S v Gongqose* Case No. E382/10 (unreported) (*Gongqoze*).

<sup>3</sup> At the outset it should be made clear that the concept of "indigenous communities" is a complex one in the South African context. While the term "indigenous" is often used in a broad sense to refer to the languages and legal customs of the black African population, the term is perhaps more accurate in relation to the San and Khoi people who self-identify as such in line with the criteria proposed by the African Commission's Working Group of Experts on Indigenous Populations/Communities, whose emphasis is on self-identification. See Wachira Mukundi *Constitutional and Legislative Protection* 1; *ACHPR Report* 15-17; 89. See also Wicomb and Smith 2011 *AHRLJ* 422-446. In this note the broader sense of the concept "indigenous" will be intended.

<sup>4</sup> See for instance Cornell "Indigenous Peoples". See also Fabricius and Koch "Fundamentals of Community-Based Natural Resource Management"; Palmer, Timmermans and Fay *From Conflict to Negotiation*; Sowman 2006 *Marine Policy* 60-73.

raw materials and manufactured goods,<sup>5</sup> and had their own economic interests to protect. In the end, however, the narrative details systematic dispossession of these resources from indigenous communities and the ultimate elimination of possessory interests and any legally protected uses of almost all natural resources, including marine resources.<sup>6</sup>

There is also evidence of common themes related to customary practices of indigenous communities that go beyond the imperatives of subsistence and food security. It shows that indigenous communities have had longstanding and deeply rooted traditional ties not only to land, but also to the ocean and the resources it offers. In other words, the evidence points to the more transcendent realm of identity and animation. Research shows that some indigenous communities believe that fishing is integral to the cultural continuity of their communities and that, beyond economic self-sufficiency, the act of fishing is itself fundamentally linked to the spiritual identities of indigenous people.<sup>7</sup> It thus speaks of a deeply rooted cultural link to marine resources and the dispossession of the fishing interests of indigenous people was, therefore, not only a dispossession of commercial interest, but also of cultural interest.

The narrative diverges to some extent when one witnesses the outcome of these struggles. In some of these countries, eventual legal protection of possessory interests resulted from protracted legal disputes where rights to access and harvest fish were eventually addressed through the recognition of aboriginal title by way of negotiated treaties,<sup>8</sup> legislation<sup>9</sup> and/or court rulings.<sup>10</sup> In South Africa, however, until very recently there has not been formal recognition of indigenous communities' rights over marine resources. In fact, legislation addressing access rights to fishing<sup>11</sup>

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<sup>5</sup> Blumm 1989-1990 *Wis Int'l L J* 4.

<sup>6</sup> Charlton *Constitutional Conflicts* 20.

<sup>7</sup> See for example Wilkinson *Messages from Frank's Landing*.

<sup>8</sup> As has been the case in the US, Canada, New Zealand and Australia.

<sup>9</sup> In Australia, for example, the *Torres Strait Fisheries Act*, 1984 implements the *Torres Strait Treaty* (1978), which provides for traditional fishing.

<sup>10</sup> See for instance *Te Weehi v Regional Fisheries Officer* 1986 1 NZLR 680; *Mabo v Queensland* (No 2) 1992 175 CLR 1; *United States v Washington* 384 F Supp 312 (WD Wash 1974).

<sup>11</sup> *Marine Living Resources Act* 18 of 1998 (MLRA).

has remained remarkably silent on customary rights related to fishing. Section 19 of the *Marine Living Resources Act* provides for subsistence fishing and gives the Minister the power to establish zones where subsistence fishers may fish and declare a specified community to be a fishing community with the concomitant rights.<sup>12</sup> Until now the recognition of subsistence fishers has been slow and has happened on an *ad hoc* basis.<sup>13</sup> It has also occurred in the absence of a policy that situates subsistence fisheries in a customary law context.<sup>14</sup>

## **2.2 Customary rights to fishing - S v Gongqose**

*S v Gongqose*, a case on illegal fishing in the magistrate's court for the district of Willowvale in the Eastern Cape, provided an unexpected opportunity to reflect on customary practices related to fishing and the extent to which such practices carve out a legal basis for constitutionally protected customary rights to fishing. David Gongqose and two others were jointly charged, *inter alia*, with "entering a national wildlife reserve area (Dwesa-Cwebe Nature Reserve) without authorization" and "fishing or attempting to fish in a marine protected area in contravention of section 43(2)(a) of the Marine Living Resources Act (MLRA)", which prohibits fishing in a marine protected area (MPA). In their defence the accused relied on their customary right to fish and provided evidence thereto. The defence also made the case that the establishment of an MPA has impacted negatively on the capacity of the Dwesa and Cwebe communities and other such communities to practise their system of customary law rules in respect of marine resources.

Much like the indigenous fishing communities of the USA, Canada, Australia and New Zealand, the Dwesa and Cwebe communities were systematically stripped of access to natural resources and the ability to exercise related customary rights. The Xhosa communities of which Gongqose is a member were forcibly removed from Dwesa-Cwebe not once, but twice. The first removal occurred after Dwesa and Cwebe were

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<sup>12</sup> Up until the promulgation of the MLRA the only categories of fishers that received legal recognition were commercial and recreational fishers.

<sup>13</sup> Sowman 2006 *Marine Policy* 60-73.

<sup>14</sup> This may now be remedied through the small-scale fisheries sector policy referred to later in this contribution.

declared state forests and during the period 1900 to 1950 the Dwesa and Cwebe communities were removed from the state forest and relocated to land adjacent to reserves.<sup>15</sup> The people, however, continued to use the land and its resources as before. The *Transkei Nature Conservation Act* came into force in 1971 and restricted fishing except in tidal waters, and the Dwesa-Cwebe nature reserve was established in 1975 under the same Act, at which point community rights were rescinded and access was restricted.<sup>16</sup>

The second forced removal took place from 1970 to 1989 as part of what was called "betterment planning"<sup>17</sup> and was carried out in line with apartheid policies and without consultation, due process or compensation.<sup>18</sup> In 1981 the area was proclaimed a State Protected Nature Reserve with authorities halting all access by local communities.<sup>19</sup> In 2000 the marine reserve was declared a marine protected area in terms of section 43 of the *Marine Living Resources Act* (MLRA),<sup>20</sup> and 'no take' regulations were imposed, which had the effect of completely banning fishing. In 2000 and as part of a land claim settlement the communities engaged in negotiations with the state, culminating in their retention of the Dwesa-Cwebe Reserve in perpetuity as a conservation area in the national interest, in partnership with the State, subject to the terms of a settlement agreement.<sup>21</sup> Despite substantial benefits<sup>22</sup> from the land claim, the communities at Dwesa-Cwebe are now

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<sup>15</sup> *Settlement Agreement in terms of Section 42D of the Restitution of Land Rights Act 22 of 1994: The Dwesa-Cwebe Community Land Restitution Claim* (on file with the author), (hereafter *Dwesa-Cwebe-Settlement Agreement*) 6.

<sup>16</sup> *Gongqoze* 4.

<sup>17</sup> For more information on the policy of "betterment planning", see Fay 2009 *World Development* 1424-1433.

<sup>18</sup> *Dwesa-Cwebe Settlement Agreement* 6.

<sup>19</sup> *Gongqoze* 4.

<sup>20</sup> GN R1429 in GG 21948 of 29 December 2000.

<sup>21</sup> *Dwesa-Cwebe Settlement Agreement* 6. In terms of the agreement 5,283 hectares was restored in full ownership to the claimants, consisting of the Dwesa and Cwebe Nature Reserves, the Haven Hotel and a number of holiday cottages. Clause 6.1 of the Agreement determined that the Dwesa-Cwebe reserves were to be protected as a national protected area in perpetuity. Clause 8.1 furthermore provided for a Community Agreement in terms of which the Reserve was to be co-managed with the Trust representing the claimant communities for an initial period of 21 years. This was not, however, given effect to.

<sup>22</sup> In terms of clause 9 of the *Dwesa-Cwebe Settlement Agreement* an amount of R2.1 million was to be paid to the community in exchange for leasing the land in perpetuity as a protected area and R1.6 million as compensation under the *Restitution of Land Rights Act* 22 of 1994 for

statistically some of the poorest in the country and the socio-economic and substantive quality of life of these residents demand that they be given access to natural resources such as marine resources.<sup>23</sup>

In an unusual magistrate's court ruling, the court assessed the case against its historic background and, in view of the expert evidence related to the customary practices of the community, considered whether the customary right to fish negated the unlawfulness of the conduct required for a conviction. The defence in *Gongqose* furthermore made the argument that the Hobeni community enjoys a constitutionally protected customary right of access to marine resources in the reserve as protected by section 31(1) of the *Constitution*, which protects the rights of communities to enjoy their culture. The defence argued that the absolute ban on fishing and the harvesting of marine resources in the Reserve amounted to a complete extinguishment of the customary rights of the communities of Hobeni to practice their customs in that specific geographical area.

The court acknowledged the existence of customary marine practices with respect to the Dwesa Cwebe MPA and acknowledged that these practices are in conflict with the *Marine Living Resources Act*.<sup>24</sup> In doing so it took cognisance of the argument by the defence that customary law may be regulated by way of statute but that such a statute cannot by implication negate customary rights, unless it clearly states its intention to this effect. The court thus concluded that "the absolute ban on fishing and/or harvesting of marine resources in the Reserve amounts to a complete extinguishment of the customary rights of the communities of Dwesa and Cwebe to practice these customs in that specific geographical area" and "the fact that such extinguishment occurred without consultation is also irrefutable."<sup>25</sup> In reference to the customary rights argument the court stated that "whether the provisions of the *Marine Living Resources Act* 18 of 1998 in so far as section 43 is concerned would

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choosing not to take physical occupation of the land. The 2,382 households involved in the claim would also receive in excess of R10 million in the form of grants.

<sup>23</sup> See Ntshona 2010 *Development Southern Africa* 353-361 for a narrative on the inability of successful land claimants to enjoy livelihood benefits from their newly acquired land rights.

<sup>24</sup> *Gongqose* 23.

<sup>25</sup> *Gongqose* 23.

survive a test of constitutional validity is debatable to say the least."<sup>26</sup> The court could not however, pronounce on the constitutional validity of the *Marine Living Resources Act*, as magistrates' courts lack the jurisdictional capacity to do so. It thus convicted all three accused. In making the pronouncement that the ban on fishing extinguished the customary rights of the accused the court did not allude to the conservation considerations underlying the establishment of the MPA and the ban on fishing. These considerations require some attention.

### **3 When fish are scarce**

Centuries-long divergent claims to access to marine resources have now had an impact on the very resource that is at the heart of these struggles. According to the United Nations Food and Agriculture Organisation (FAO), global fish food supply has grown dramatically in the last five decades, with an average growth rate of 3.2 per cent per year in the period 1961-2009, outpacing the increase of 1.7 per cent per year in the world's population.<sup>27</sup> In essence the FAO report surmises that the declining global marine catch over the last few years together with the increased percentage of overexploited fish stocks and the decreased proportion of non-fully exploited species around the world means that the state of the world's marine fisheries is worsening, and that this has had a negative impact on fishery production. Scientists now believe that "global limits to exploitation have been reached and that recovery of depleted stocks must become a cornerstone of fisheries management".<sup>28</sup>

South African fisheries are in a similarly dire situation and many of South Africa's inshore marine resources are already overexploited or have collapsed, with a few being fully exploited.<sup>29</sup> This is mainly due to the accessibility of the resources to a wide range of marine user groups including commercial fishers and recreational fishers, as well as all types of illegal harvesting or poaching.<sup>30</sup> We are thus faced with competing claims to access fisheries in the context of a fast dwindling resource.

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<sup>26</sup> *Gongqose* 23.

<sup>27</sup> FAO *State of World Fisheries* 3.

<sup>28</sup> Worm and Branch 2012 *Trends in Ecology and Evolution* 599.

<sup>29</sup> WWF 2011 [www.wwf.org.za](http://www.wwf.org.za).

<sup>30</sup> Traffic 2010 [www.traffic.org](http://www.traffic.org).

In response, a range of fisheries management practices are relied upon in an attempt to halt the rapid decline of fish stocks. This includes the establishment of MPAs, in essence a tool to conserve biodiversity and to help rebuild the productivity of the oceans.

The Dwesa-Cwebe MPA,<sup>31</sup> adjacent to the Dwesa-Cwebe Nature Reserve, represents one of 21 MPAs in South Africa and is deemed to be of vital importance for a number of reasons, including its role as an important habitat for various fish species. This includes its role as a spawning area of the white steenbras; its role as one of only two breeding sites for the white steenbras and a breeding site for the equally threatened red steenbras; and its role as a nursery area for a number of other fish species.<sup>32</sup> During testimony in *Gongqose* an expert witness strongly cautioned against the opening of MPAs and advised that the opening of protected areas has historically proven disastrous as the large breeding fish get taken first, leading to an inevitable decline in spawning and the hatching of new stock.

In some respects *Gongqose* reflects the ultimate conundrum. On the one hand, the history of the area reflects the colonial tale of dispossession of access to natural resources. On the other hand, it presents the need to adopt and implement stringent measures aimed at protecting a threatened natural resource. This gives rise to a clash of rights: on the one hand there is a group's right to exercise customary practices, and on the other hand broader public interest rights to environmental sustainability.<sup>33</sup> These clashes are not uncommon in jurisdictions subject to indigenous claims to fishing rights.

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<sup>31</sup> It is 14 km long and extends 6 km out to sea from the high-water mark.

<sup>32</sup> WWF Date Unknown [www.wwf.org.za](http://www.wwf.org.za).

<sup>33</sup> *United States v Washington* (Phase I) 506 F Supp 187 (WD Wash 1980).

## **Marrying resource constraints and custom**

### ***4.1 The nature of customary rights to marine resources***

Neither our legislation nor our courts have until now addressed the exercise of customary rights related to marine resources. It is thus unclear what the nature and scope of such rights would be, how they might relate to access to resources, and ultimately when in conflict with conservation aims, how those conservation aims must be delineated and how the opposing interests must be balanced.

In the leading Canadian case on aboriginal rights to fishing *R v Van der Peet*,<sup>34</sup> the court had to assess whether salmon lawfully caught under a so-called native food fish licence, which excluded commercial sale, fell outside of the constitutionally protected aboriginal right.<sup>35</sup> In denying the right to commercial sale the court held that "[T]o be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."<sup>36</sup> It argued that aboriginal rights related only to those activities which were of central significance to the aboriginal community before colonial contact and stated that the claimant must "demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was".<sup>37</sup>

An earlier dissenting opinion in *Van der Peet* at the British Columbia Court of Appeal level embraced a more flexible view of custom and stated that the description of aboriginal rights should "relate the custom to the significance of the custom in the lives of the aboriginal people in question. If the fishing for salmon was what defined the culture of the society and made possible the cycle of the lives of its members, then it would be possible to describe the aboriginal right as a right to live from the salmon resource and continue to make salmon a focus of the sustainment of the

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<sup>34</sup> *R v Van der Peet* 1996 2 SCR 507.

<sup>35</sup> Section 35(1) of the *Canadian Constitution Act*, 1982 states that: "[T]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

<sup>36</sup> *R v Van der Peet* 1996 2 SCR 507 549.

<sup>37</sup> *R v Van der Peet* 1996 2 SCR 507 553.

lives of the people."<sup>38</sup> Thus, custom is what the members of the community believe and define it to be. However, one may also argue that the need to adequately and accurately validate the existence of custom weighs especially heavy when the custom relates to the use of natural resources.

In terms of South African law, customary law can be divided into statutory and non-statutory law. Statutory customary law refers to those customary traditions and practices that have been embodied in legislation such as the *Recognition of Customary Marriages Act*.<sup>39</sup> Non-statutory customary law, on the other hand, refers to uncodified traditions and practices that do not originate from legislation but can be accessed through written or oral sources.<sup>40</sup> It is this latter form of customary law that applies to the fishing practices of the Hobeni, as there are no statutory sources related to these practices. It must be said, however, that the nature of custom or customary practice is such that it makes the task of ascertaining customary law challenging. It is common cause that customary practices may differ from place to place and may change constantly over time. Customary practices are also somewhat ambiguous in that they are "uneasily poised on the boundary between law and fact".<sup>41</sup> This makes it difficult for courts to ascertain customary law and in the absence of precedent or written texts, courts rely on witness testimony.<sup>42</sup>

In *Gongqose* the fishing practices of the Hobeni community were accepted as customary law as ascertained by the oral testimony of two expert witnesses, both of whom had worked extensively with the Hobeni community. The accused testified that they were raised as fishermen and were taught the skills and traditions of fishing by their fathers, who in turn had been taught these skills and traditions by their fathers. The accused also testified to customs and traditions relating to the allocation of fishing spots over the generations and the reliance on the sea for many

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<sup>38</sup> *R v Van der Peet* 1993 80 BCLR (2d) 75.

<sup>39</sup> *Recognition of Customary Marriages Act* 120 of 1998.

<sup>40</sup> For an overview of customary law in South Africa, see Bennett *Customary Law*.

<sup>41</sup> Bennett *Customary Law* 144.

<sup>42</sup> The courts have not indicated how many witnesses are required or whether they should have certain types of qualifications. However, the testimony of traditional rulers is preferred as they are actively engaged in applying customary law in traditional court structures. Bennett *Customary Law* 49.

traditional customs practised by the men and woman of his community. A medical healer testified to the customary rituals relating to the sea and the intrinsic value of that specific piece of the coast to ancestral rituals. Additional evidence of the customary link to the sea was provided by expert witnesses who reiterated that harvesting marine resources went beyond subsistence and material need and constituted part of the culture and custom of many communities.

Ultimately, the court has the power (and discretion) to declare a traditional practice as law. In doing so it needs to make a judgement call with respect to the authenticity and persuasiveness of the evidence presented in support of the existence of such a custom. In *Gongqose*, as was stated in the dissenting opinion in the Canadian case of *Van der Peet*, the evidence spoke of the significance of the custom in the lives of the community in question and the significance of the resource to the sustainment of the lives of the people.

#### **4.2 *The relationship between customary law and natural resources***

A further question is the role of customary law in respect of access to natural resources. This issue was first addressed in *Alexkor Ltd and Another v Richtersveld Community*.<sup>43</sup> A community of indigenous people, the Richtersveld community successfully instituted a claim for the restoration of land. The court found that the content of the land rights held by the community must be determined by reference to the history and the usages of the community of the Richtersveld. Evidence presented in the case showed a history of prospecting in minerals by the community and conduct that was consistent with ownership of the minerals being vested in the community.

In the light of the evidence and of the findings by the lower courts, the Constitutional Court took the view that the real character of the title that the Richtersveld community possessed in the subject land prior to annexation was a right of communal ownership under indigenous law. The content of that right

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<sup>43</sup> *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC).

included the right to exclusive occupation and use of the subject land by members of the community. The community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. The court thus awarded the land claim inclusive of mineral resources and the right to claim compensation for past use in terms of a settlement agreement.<sup>44</sup>

*Alexkor* thus confirms that customary law may serve as the basis for claims to natural resources and reiterates the importance of customary law as an integral part of our law. The case is furthermore evident of the need to bring about some sense of restitution in the face of historic deprivations of ownership, the use of and access to natural resources. It is also clear that access to natural resources must be properly placed in a historical context that speaks to traditions and the usage of natural resources. The history of the Dwesa-Cwebe communities, as in the case of the Richtersveld community, clearly indicates the existence of long-term utilisation of marine resources for food security as well as for other cultural practices linked to the ocean. Most importantly, *Alexkor* demonstrates the legal validity of customary claims to natural resources and that customary law, like any other source of law such as common law, provides the legal basis for claims to access and use.

#### ***4.3 Customary law in the light of resource constraints: the quest for balance***

Unlike mineral resources, marine resources are not viewed as resources that are available for exclusive or optimal use. In fact, they are resources that require prudent management to ensure long-term sustainability and availability to a variety of different users including the present and future traditional users. Applying *Alexkor* to cases involving customary access to natural resources thus requires a more

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<sup>44</sup> The settlement included 194 600 ha being given to the community, including an 84 000 ha coastal strip of diamond-bearing land mined by Alexkor; an 'extraordinary reparation payment' of R190-million to a community-owned investment company; a R50-million development grant and also transfer of Alexkor's farming operations to the community. Alexkor and the community are to enter into a joint mining venture, in which Alexkor will hold a 51 per cent interest, to which the state will contribute up to R200-million in capitalisation. The mine-owned town of Alexander Bay will be transferred to the community, and Alexkor will pay R45-million to continue housing its staff there for a period of ten years.

nuanced understanding of the type of resource and the requirements for sustainable management of such resource and ultimately how sustainable management can take account of access claims grounded in customary law. In assessing customary rights claims to access marine resources one will thus have to balance such claims against the counter-demand of resource conservation.

As stated above, the defence in *Gonggose* primarily relied on a rights-based argument, that the Hobeni community enjoys a constitutionally protected customary right of access to marine resources in the reserve as protected by section 31(1) of the Constitution and that the absolute ban on fishing and the harvesting of marine resources in the Reserve amounted to a complete extinguishment of those customary rights. In accepting this argument the court expressed its doubts as to whether the provision that established the MPA, section 43 of the MLRA, would survive a test of constitutional validity. The issue of constitutional validity requires, however, a bit more reflection.

In this respect, as with all rights-based claims, one needs to consider when and under what circumstances rights in the Bill of Rights may be circumscribed. Section 36 of the Bill of Rights sets out specific criteria for justifiable restrictions on these rights;<sup>45</sup> the primary requirements being that the limitation must be limited only in terms of law of general application and that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The latter requirement is instructive. In essence, it lays down a proportionality requirement, in terms of which it must be shown that the law in question (the *Marine Living Resources Act*) serves a constitutionally acceptable

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<sup>45</sup> S 36 of the *Constitution* states that: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

purpose and that there is sufficient proportionality between the infringement and the purpose that the law is designed to achieve.<sup>46</sup>

Section 43 of the *Marine Living Resources Act* was enacted to promote the goal of marine conservation, a purpose that is explicitly mandated by section 24 of the *Constitution*.<sup>47</sup> The court in *Gonggose* made only one reference to section 24 and refrained from considering its applicability in the matter. Section 24 places a mandate on the state to take certain measures in order to secure the ecologically sustainable development and use of natural resources. The environmental right places, therefore, a very clear constitutional duty on the government to ensure that natural resources such as marine resources are managed in a manner which acknowledges the economic interests in fisheries, but at the same time ensures that ecosystems and species are protected to ensure long-term viability. The enactment of the *Marine Living Resources Act* is in line with this obligation and serves a constitutional purpose. The Act was established to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources, and the orderly access to exploitation, utilisation and protection of certain marine living resources.<sup>48</sup>

In line with these stated objectives, the *Marine Living Resources Act* provides for an array of fisheries management tools such as the determination of allowable catches,<sup>49</sup> access to marine resources by way of quotas and permits,<sup>50</sup> harvesting methods<sup>51</sup> and marine protected areas. Section 43 gives the Minister the power to declare an area to be a marine protected area with the following aims:

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<sup>46</sup> Currie and De Waal *Bill of Rights Handbook*.

<sup>47</sup> Section 24 of the *Constitution* provides as follows: 'Everyone has the right - (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

<sup>48</sup> Preamble to the MLRA.

<sup>49</sup> S 14 of the MLRA.

<sup>50</sup> Ss 18, 19 and 20 of the MLRA.

<sup>51</sup> Chapter 5 of the MLRA.

- (a) for the protection of fauna and flora or a particular species of fauna or flora and the physical features on which they depend;
- (b) to facilitate fishery management by protecting spawning stock, allowing stock recovery, enhancing stock abundance in adjacent areas, and providing pristine communities for research; or
- (c) to diminish any conflict that may arise from competing uses in that area.

In terms of section 43 Dwesa-Cwebe was declared a marine protected area, and in accordance with section 43(b), with the specific function of safeguarding the spawning and breeding site of a threatened fish species. This objective must play a central role in any balancing of the competing interests of conservation and custom. Central to section 43 is the need to safeguard a species and its associated ecosystem beyond immediate needs to ensure viability for future generations. As such it safeguards national and perhaps even global interests in dynamic marine ecosystems. In *Christian Education South Africa v Minister of Education*,<sup>52</sup> which dealt with the right to practice religion and an independent school's right to use corporal punishment, the court suggested that when balancing conflicting rights more weight may be given to a right that aims to protect interests at a national level, an approach that suggests that the scales may weigh more heavily on the side of the sustainable management of fisheries in Dwesa-Cwebe.

One must bear in mind, however, that a proper balancing of competing interests requires a consideration of all such interests. It is not clear that at the time of the declaration of the MPA all competing interests had indeed been taken into account.<sup>53</sup> In particular, it is not evident that the customary interests of the Hobeni community was a factor taken into consideration. This makes an enquiry into the reasonableness and justifiability of the declaration of the MPA and the ban on fishing a challenging enterprise. When engaging in a section 36 proportionality enquiry the court would rely as per section 36 on a set of relevant factors including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;

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<sup>52</sup> *Christian Education South Africa v Minister of Education* 1998 12 BCLR 1449 (CC).

<sup>53</sup> As evidenced by oral testimony during the case.

- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The state may be hard-pressed to alleviate the burden of some of the factors set out in section 36. For example, with respect to (e) the state will need to show that there are no alternative and less restrictive measures to protect the marine species in the Dwesa-Cwebe MPA that would at the same time permit the Hobeni community to practice its customary rights. If the same purpose can be achieved by means that are less restrictive of the community's customary rights, the limiting law will not be considered unreasonable and unjustifiable.<sup>54</sup> This would require the state to show not only that its prioritisation of conservation at the time was based on scientific evidence, but also that its action was informed by all uses of the MPA, including the traditional use and the customary practices of the community. Whilst the latter may be difficult to show, scientific evidence may provide some rationale for the declaration of a no-take MPA. For instance it has been argued that once fishing is resumed in marine reserves, stocks of animals which have accumulated over time are very rapidly depleted and a WWF report estimated that the natural capital (fish stocks) accumulated over forty years in the Tsitsikamma MPA would be fished down in approximately 33 fishing days if a section of the MPA was opened to fishing.<sup>55</sup> On the other hand would the same result occur if the MPA was closed only during the breeding period of the White Steenbras, therefore providing access for the community, whilst preserving conservation aims? At the end of the day though, it is not the function of the Court to second-guess the wisdom of policy choices made by the legislature.<sup>56</sup> It would grant a margin of discretion to the state, but one would argue that such discretion would come into play only if the state could show that it had considered all the relevant circumstances that would influence its decision.

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54 Cheadle "Limitation of Rights".

55 WWF *Sanlam Living Waters Partnership Report* (on file with the author).

56 Currie and De Waal *Bill of Rights Handbook* 170.

## 5 Towards reconciliation

*Gongqose* in some ways represents an extreme example of the conflict between custom and conservation. Not all customary rights to fishing would involve no-take marine protected areas and extremely threatened marine resources. However, to simply accept that section 43 amounts to a 'complete extinguishment' of the customary rights of the community without considering the broader aims and purposes of section 43 is to take an approach that pits the community against nature in a way that suggests a separation between human beings and the environment and does not take into account the environmental interests of the community itself. The court states that:<sup>57</sup>

This court cannot be blind to the reality that the plain and simple truth is that while these marine resource extractions may not include long term benefits for communities or the environment itself they in reality only need to benefit the community from day to day to have an enormous immediate benefit to those utilizing them to survive. What in essence is the undeniable truth is that this impoverished community is starving today and the children of the area require education now and for them the future is of little consequence.

While one acknowledges the food security requirements of the community, attending to short-term needs only is not sustainable. Such a view supports the convention that fisheries can be managed only in a way that implies human 'apartness' from nature and superiority over other living things. This view is inconsistent with the interdependence of people and nature, and the principle that people live subject to the constraints of the natural world.<sup>58</sup>

In fact, one could argue that the goal of the sustainable management of threatened marine species in the Dwesa-Cwebe MPA not only preserves the national interest in marine conservation but also favours the communities of Dwesa and Cwebe by conserving the marine ecosystem for the use and benefit of future generations of the community. The Canadian case, *Kruger v The Queen*, is instructive in this regard. The court noted that "without some conservation measures the ability of

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<sup>57</sup> *Gongqose* 14.

<sup>58</sup> *Notzke Aboriginal Peoples* 2.

Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource".<sup>59</sup> The communities of Hobeni have traditionally relied on the MPA for a myriad of uses, including food security. Sustainable management of the Dwesa-Cwebe MPA would in the long run ensure a more viable resource supply, but such management needs also to take cognisance of customary rights and practices.

The nature of the conflict between customary and environmental rights is such that it requires a different approach. Current fisheries management has been criticised, such criticism including the statement that "fishing rights have been construed narrowly to mean the right to harvest, a right that is seen as separate and distinct from management of the resource".<sup>60</sup> This is an approach that favours the economic exploitation of natural resources wherein exploitation and management are generally conceived as separate activities: users of the resource are expected to apply their legal rights to compete and prosper and, in so doing, to behave according to market pressures, while the responsibility for preventing overuse lies with public institutions and regulatory agencies.<sup>61</sup>

Arguments are thus now made for a community-based approach to fisheries management that actively involves indigenous communities. It is based on the principles of stewardship and utilising cultural practices and traditional knowledge related to fisheries management to enhance the management process.<sup>62</sup> Local communities thus become involved not only in stock assessment and monitoring but also in compliance and enforcement. In essence, it requires the involvement of the community in a way that instils not only a right to harvest, but also a duty to manage the resources for future generations. Thus, "when communities become stewards, a large percentage of the community residents as well as fishermen enforce the system as fundamental to the values of the society, or at least of the

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<sup>59</sup> *Kruger v The Queen* 1978 1 SCR 104 112.

<sup>60</sup> Walter, M'Gonigle and McKay 2000 *McGill L J* 267.

<sup>61</sup> Walter, M'Gonigle and McKay 2000 *McGill L J* 267.

<sup>62</sup> See for example Pinkerton and Weinstein *Fisheries That Work*.

local community".<sup>63</sup> This is certainly a compelling model, provided that one has accurately and comprehensively distilled the content and meaning of the cultural practices of a particular community in the context of fishing.

South Africa has recently adopted a small-scale fisheries sector policy<sup>64</sup> which, in its own words, 'recognises and draws on age-old local traditions and practices of catching, harvesting and managing marine living resources among Small-Scale fishers. At the same time, the new approach seeks to address the ecological sustainability of the resource, the progressive realisation of socio-economic human rights within affected communities, and current economic realities.'<sup>65</sup> The policy thus proposes a range of management instruments and tools that could be used in the small-scale fishing sector. These include the assessment of the status of marine living resources; management plans; demarcating areas that are prioritised for small-scale fishers; and agreements that would implement these management tools.

It is not clear, however, that the policy at this point envisages the inclusion of local communities or the utilisation of traditional knowledge in the actual management of marine resources such as the assessment of stock. It is also not clear how or whether existing no-take MPAs such as Dwesa-Cwebe will be considered in the demarcation of small-scale fishing community areas designed to provide for co-management. The policy is, however, a first step in actively involving indigenous communities in the actual management and conservation of marine resources.

## 6 Conclusion

It is evident that indigenous communities throughout the world share a common desire to maintain traditional and cultural practices related to marine resources. Often, as is the case in Dwesa and Cwebe, marine resources play an important role in food security and day-to-day subsistence. At the same time marine resources are

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<sup>63</sup> Pinkerton and Weinstein *Fisheries That Work* 16.

<sup>64</sup> GN 474 in GG 35455 of 20 June 2012 (*Policy for the Small Scale Fisheries Sector in South Africa* (2012)).

<sup>65</sup> *Policy for the Small Scale Fisheries Sector in South Africa* (2012) 27.

the subject of competing claims from other sectors and as a result are now under severe threat of depletion. Ironically, the scarcity of marine resources resulted not from those that engage in subsistence living, but rather as a result of large-scale commercial fishing.

*Gongqose* reminds us that these claims are real and that they are most likely, as in other parts of the world situated in historic dispossession and denial of rights, unequal treatment and as a result, dire poverty. In negotiating these conflicts one must, therefore, find a way of reconciling customary and environmental rights that would refrain from situating indigenous communities as separate from the environment and conservation, but would rather make them an integral part of marine resource management.

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**List of abbreviations**

ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
FAO	United Nations Food and Agriculture Organisation
McGill L J	McGill Law Journal

MLRA	Marine Living Resources Act
MPA	Marine protected area
Wis Int'l L J	Wisconsin International Law Journal
WWF	World Wide Fund for Nature