Since time immemorial, communities up and down the South African coastline have depended on the sea for their lives and livelihoods. Some fishers will even tell you that “the sea is in our blood.” Not only has the sea been used as a source of food but it has also played an important role in the development of coastal communities’ cultures, their knowledge systems, beliefs and their customary systems of law.

Many communities living along the coast depending on marine and coastal resources for their livelihoods have, over time, developed local systems of rules to guide their use of Coastal lands, forests and waters. These local rules are part of their systems of customary law.

Customary law refers to the local rules and practices that people themselves create and live by. It is the systems of law developed by groups of people themselves to manage the way that they interact with each other and with nature. It is also called ‘living customary law’ as it changes and develops over time.

Policy for Small-scale Fisheries recognises customary rights

In many coastal communities in South Africa, rights to access, use, and own different natural resources arise from local customary systems of law. Access to and use of marine resources is linked to the access to and use of coastal lands and forests in the customary systems of law of several millions of South Africans. These systems of law are passed down from generation to generation. They are not written down like Western law, but children and young adults are taught these laws by their parents and elders in their communities orally and through practice.

Continued on page 3
IN 1996 our new democracy took an important step in redressing the discrimination suffered by millions of South Africans when the new Constitution was adopted. The recognition of customary law as equal to state and common law paves the way for the recognition, protection and promotion of customary rights to natural resources. This includes marine resources. In 2016 the Marine Living Resources Act of 1998 (MLRA) was amended in order to explicitly include small-scale fishing communities.

The MLRA states that the Minister must consider the objectives of the Constitution in Section 9 (2) and 39(3) when developing regulations for small-scale fishing communities. This means that the Minister must take steps to promote equality and the enjoyment of all freedoms for small-scale fishing communities and remove any unfair discrimination and must respect a communities’ customary fishing rights as long as these comply with the Bill of Rights.

Despite this clear legal guidance from the Constitution on the importance of redress of unfair discrimination, the Department of Agriculture, Fisheries and Forestry (DAFF) and the Department of Environmental Affairs (DEA) have failed to take decisive steps to address the discrimination suffered by many small-scale fishing communities and to recognise their customary rights. The Gongqose judgement in the Mthatha High Court is a victory for all small-scale fishing communities with customary fishing rights.

However, this judgement is meaningless when the fishers themselves are not aware of their rights and the DAFF and DEA officials and other conservation agencies continue to violate these rights.

The Policy on SSF is committed to a human-rights based approach. The right to practice one’s culture and to freedom from discrimination against one’s customary law and tenure system in addition to the right to redress and restitution are thus important rights that are central to the implementation of the Constitution as well as to international instruments such as the Voluntary Guidelines on Tenure and the Small-scale Fisheries Guidelines. Social movements, NGOs and other organisations can play a key role in supporting communities to understand what customary law systems mean, how to identify and describe their own systems and to demand recognition of their customary rights.

Small-scale fishers in South Africa need to be urged to request DAFF to engage with them on their customary rights in the coming months as the SSF Policy is rolled out.

**Voices from the Coast:**

**Thembu Mkhonto:**
In my community of Mvuthane in Kosi Bay, our Thonga clans residing around the edges of the lakes believe that the lakes are communally owned, however the fish traps that our ancestors used and constructed in the lakes are owned by our families. Our community has a local system of customary law that prescribes that only clan members may own fish traps however, outsiders may be given permission to use the traps if the local customary committee of trap owners agrees to this.

**Lulamile Ponono:**
The amaTshawe settled along the Eastern Cape coast between the Nxaxo river and the Gqunge river and established customary rules regarding which trees in their communal coastal forests can be used for building and which trees may be used for fencing their gardens. They even have a customary rule that during a ritual the leaves of unthatho must be used to line the plates upon which meat is served.

**Nocawe Maskote:**
Traditional healer from Mathokozeni in Coffee Bay uses a range of natural resources from the sea and coastal forest in her traditional healing practice. In the system of customary law of her community, a traditional healer fulfils an important role in the culture and well-being of that community. Her access to the sea and coastline for amayeza (medicines) and to perform amasiko (customary rituals) communicating with the ancestors is a customary right that is recognised by the community.
Q: Why is the Gongqose case significant for small-scale fishing communities in South Africa?

Wilmien: The case of David Gongqose and others is very significant, as it is the first time that a High Court has confirmed the existence and status of the customary rights of a fishing community in South Africa. This means that where a community has a customary system of law, and rights to fish are recognised in terms of the customary law of that community, then the Minister must recognise these pre-existing rights. This judgement can therefore be used by other fishing communities who also have a customary system of law that recognises their right to use marine resources.

Q: What advice can you give to communities who feel that their customary systems of law and customary rights are not being respected by DAFF in the draft Constitution that DAFF is using in the training for Cooperatives?

Wilmien: Fishing communities should write to DAFF and inform DAFF they have a customary system of fishing rights and they should explain to DAFF why they feel that the Constitution is not respecting their rights. Recognition of customary rights is relatively new in South Africa and many government officials do not understand the recognition of customary law in the Constitution. Fishers should specifically ask DAFF to engage with them on these matters. Small-scale fishing communities living along our coast should demand to be allowed to give their free, prior, informed consent. They should insist that they be given time to understand the Constitution and to effective consultation about its implications and possible impacts before they are required to sign and give their consent to any development that will affect their rights to their lands, their forests and marine resources.

Policy for Small-scale Fisheries recognises customary rights

IN 1994 the new democratic government was determined to make sure that African systems of customary law would be respected in future. South Africa’s Constitution now recognises customary law together with common law and state law. Section 39 (3) makes provision for a community that has a system of customary rights arising from customary law to be recognised as long as these rights comply with the Bill of Rights. In line with this, the Policy on Small-scale Fisheries also recognises rights arising in terms of customary law. Despite this legal protection of customary law, many communities do not know their rights and their systems of customary law continue to be ignored and violated.
Does DAFF understand customary fishing rights?

DAFF’s letter dated 27 October 2017 to Eastern Cape Coastal Links

DAFF’s letter dated 27 October 2017

To: Eastern Cape Coastal Links

Re: Response to your letter dated 14 September 2017 titled Recognition of customary small-scale fishing communities in the Eastern Cape and implementation of an equitable interim measure in the Eastern Cape pending the implementation of the SBF policy.

This letter serves as a response to your letter dated 14 September 2017, which was addressed to The Honourable Minister of the Department of Agriculture, Forestry and Fisheries, Mr. Thulas Nxesi (MP) with reference to the recognition of customary small-scale fishing communities in the Eastern Cape and implementation of an equitable interim measure in the Eastern Cape pending the implementation of the SBF Policy.

This Department has considered your letter of correspondence with its content and would like to draw your attention to the following responses:

1. The Department has been having annual exemptions to over 1000 Eastern Cape small-scale fishers for over 15 years. These have been granted to ensure that people are able to fish. Eastern Cape fishers are allocated specific areas that are suitable to their catch and that are classified into categories, namely, Residents, non-residents, and non-compliant vessels. An example of this is the Eastern Cape Bait Lobster network, where large fishing limits have been reviewed over the years.

2. The Court judgment in Fishers’ Net acknowledges and respects the rights of existing customary rights, all communities were engaged in the process of the Small-Scale Fisheries Policy and have been registered with the Department.

3. Acceding to our departmental records, only a complaint from Dwingeloo was received about fishers who were left out in being consulted for permits during the registration of Small-Scale Fishers. All those requests were processed and the permits were issued to the applicants.

4. The Department decided to issue a letter of exemption to all fishers who have expressed interest in the permit to continue fishing without being subjected to questioning by law enforcement officials as the Department is finalizing the establishment of an integrated fisheries sector. The letter was issued by the delegated authority in terms of Marine Living Resources Act No. 10 of 1998.

5. The Department is committed to rolling out the small-scale fisheries sector to all four coastal provinces. It is in the Department’s interest that the small-scale fishers will be consulted for consultations for another year. The Department is currently rolling out small-scale fisheries and rights will be allocated around the second quarter of 2018. However, it should be noted that these rights will be allocated to those who have been identified in the initial consultation process.

Yours Faithfully

[Signature]

Date: 27/10/2017

Department: Cape Province

Minister: Mdantsane M. Netshitenza

Designation: Minister of Agriculture, Forestry and Fisheries

Signed by: [Name]

Employer Director-General, Fisheries Management
IN many parts of the country, the cultures and customary systems of law of local communities have been undermined by the colonial and apartheid governments imposing new state laws on communities. For example, in Langebaan Lagoon in the Western Cape the traditional net fishers had a system of local rules amongst themselves about how to work together when they were fishing. Families held rights to fish and if a fisherman died his family appointed another person to fish on their behalf. However, the government fisheries department introduced new regulations about fishing that took away family rights and introduced individual permits. So in some communities, whilst aspects of their culture and customs remain, these are no longer firmly rooted in a system of local law shared by the majority of the group or community that used to practice this law.

THUS whilst these customary practices might still be an important part of the culture and identity of these communities, they may no longer have customary rights arising in terms of the recognition and protection of customary law.

Struggles for the recognition of customary fishing rights

THE ancestors of the seven communities that live adjacent to the Dwesa-Cwebe Nature Reserve and MPA in the Eastern Cape settled on this land next to the sea several hundred years ago. These communities have well established customary systems of law that guide their access to and use of natural resources from their lands, their forest and the sea. They were forcibly removed from the land next to the sea by the colonial forest department and later by the apartheid regime. However in 2001 they signed a Land Claim Settlement Agreement. Despite this, Dwesa-Cwebe Marine Protected Area (MPA) was declared a no-take MPA and many fishers were arrested and imprisoned for fishing. In 2010 David Gongqose, a traditional fisher and two others were arrested for fishing in the MPA. They were represented by the Legal Resources Centre in this criminal case that was first heard in the Elliotdale Magisterial Court in 2012. The fishers argued that they were fishing in accordance with their customary rights to fish based on their customary system of law. The magistrate stated that he believed that the fishers had a customary system that gave rise to customary rights to fish, but he did not have the power to declare the MLRA unconstitutional and thus the matter went on appeal to the High Court. In 2016 the High Court in Mthatha ruled that the communities of Dwesa-Cwebe had customary fishing rights.
THE #Right2sayNO Campaign is an international campaign being led by communities that demand the right to decide what development they want to see on their land and to say NO to mining and other developments that they do not want. In South Africa the Amadiba Crisis Committee from Xolobeni, on the Eastern Cape coast are spearheading this campaign. The Xolobeni community are saying NO to attempts to mine their land. They say that if mining goes ahead on their land it will interfere with their relationship with their land and their ancestors. It will result in the removal of many households, disrupting their livelihoods. It will also impact their water, their air quality and the grassland, marine and estuarine ecosystems upon which they depend. They argue that their customary system of law requires that they be consulted and give their consent and their traditional leaders do not have the right to decide on their behalf. On 23 April, 2018, the Amadiba Crisis Committee, represented by their lawyers Richard Spoor Inc. and the Legal Resources Centre will be in the High Court in Pretoria where they are taking the Department of Mineral Resources (DMR) to court on the grounds that they have not given their free, prior, informed consent and they have the right to say NO (Source: Amandla, Feb 2018).

Customary rights and
# Right2sayNO Campaign

Activists demanding consultation.
Hey guys, I have been reading the Policy for SSF. Did you know that the very first sentence in the policy says "this policy aims to provide redress and recognition to the rights of SSF previously marginalised and discriminated against"?

Yes! And in Section 3 it says it recognises customary rights that come from customary law. Guys, that’s us! DAFF is going to recognise our rights that our families have always had, to fish and harvest resources here in our village.

Yes, it looks good on paper but what does that actually mean in practice?

That’s like what has been discussed on the radio and TV this week about land. People who had their land taken away or who have customary rights to land must get redress and get access to land again. So it’s the same for us fishers.

And don’t forget the Constitution says in Section 25 that our tenure to our land and our resources must be recognised. Even if they are not written down and are only passed down orally from our grandparents. Government must still recognise these customary tenure rights.

Ja, but the problem is DAFF doesn’t see it like that. They don’t understand our customary fishing rights. They think rights come from the government only.

Don’t worry, I heard David Gonggose’s lawyer, Wilmien talking on the radio. She said the Constitutional Court will recognise and respect the living customary laws of communities if government, chiefs and elites don’t do so.

We as leaders must help SSF become aware of their rights. CLSA will continue to defend and support the recognition and respect of the customary fishing rights of SSF.
Customary rights and the right to food

EVERYONE has the right to be free from hunger. This fundamental human right requires that men, women and children have adequate food and nutrition. In South Africa it is estimated that 26% of households are food insecure and 28% are at risk of hunger. In South Africa 25% of children are deprived of basic nutritional requirements resulting in stunted development. In a submission to the United Nations Human Rights Office on the Right to Food the Legal Resources Centre (LRC) and the Department of Environmental and Geographical Science of the University of Cape Town (UCT) have emphasised the link between the recognition of customary rights and the right to food. Many communities have historically developed local systems of customary governance of their natural resources. These local systems are usually developed on the basis of the users’ local knowledge of their ecosystems and resources. Restricting their right to access these resources increased the vulnerability of communities. It not only impacts their food security directly, but also indirectly as it impacts their indigenous knowledge systems and their culture.

The LRC and UCT team noted that state-centred conservation policies have led to small-scale fishing communities being dispossessed of their access to and control over natural resources which has impacted their right to food and nutrition. In particular, the declaration of no-take Marine Protected Areas in isolated rural areas has undermined their customary systems of law, their local knowledge and food systems without any compensation or adequate alternatives.

This has also been observed by the United Nations Rapporteur on the Right to Food, De Schutte (2012). He said that it was now obvious that top down management strategies were problematic and the participation of fishing communities in management was critical as well as the integration of fishers’ local knowledge in the management of fish and marine species.

A large number of international conventions, laws and guidelines recognise the importance of customary systems of law and customary practices for the contribution that they can make to the protection of marine and coastal biodiversity and the enjoyment of indigenous peoples and local communities’ human rights.

**THIS includes amongst others:**
- THE Convention on Biological Diversity (CBD),
- THE United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),
- THE International Labour Organisation Convention 169,
- THE Voluntary Guidelines on the Responsible Governance of Tenure of Lands, Fisheries and Forests in the context of national food security (VG Tenure), and
- THE International Guidelines on Small-scale Fisheries.

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