

FISHING FOR SUSTAINABLE SOLUTIONS: TOWARDS A COMMUNAL SYSTEM OF RIGHTS ALLOCATION

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1. Introduction

'When my belly is crying, I must fill it. I can sit on the side of the road and beg for bread, but there is bread right there', says Hahn Goliath, a fisherman in the small village of Doring Bay on South Africa's West Coast.¹ This is a common frustration that is shared among an estimated 30,000 subsistence fishers in 148 fishing communities along 3,200 kilometres of South African coast.² In a developing country such as South Africa, the equilibrium between economic maximisation, social equity, and environmental concerns is complex, and a fine balance must be struck to promote all three needs while trying to reduce the impact on the others.³ South Africa has a compounded problem, as fishing does not just need to be sustainable, but also equitable.⁴ This paper will critically analyse current issues in the allocation of rights to subsistence fishers, and suggest some alternatives to these issues.

Indigenous South Africans have fished our waters for a considerable period of time. The first fishing regulations were passed between 1657 and 1658.⁵ These regulations allowed South African inhabitants to fish only for recreational or subsistence purposes and prohibited the use of commercial fishing, allowing 'freemen to fish, but not for the sake of selling'.⁶

Under the Apartheid regime, commercial fishing rights were principally held by large white-owned corporate entities.⁷ This excluded the majority of the South Africans, those

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¹ P Burnett, 'Fighting for the Right to Fish' *West Cape News* (Cape Town, 9 September 2009) <<http://westcapenews.com/?p=638>> accessed September 2012.

² Burnett (n 1).

³ L Sittert, and others, Benchmarking the first decade of post-apartheid fisheries reform in South Africa (2006) 30 *Marine Policy* 96, 98.

⁴ E Witbooi, Law and Fisheries Reform: Legislative and policy developments in South African fisheries over the decade 1994 -2004' (2006) 30 *Marine Policy* 30, 30.

⁵ G Branch & B Clark, Fish stocks and their management: The changing face of fisheries in South Africa (2006) 30 *Marine Policy* 3, 3.

⁶ Ibid.

⁷ Ibid.

classified as 'black' or 'coloured', from legal access to fishing resources.⁸ Subsistence fishers were one such group. This group of fishers are dependent on fishing for their livelihood.⁹ Subsistence fishers use their catch to feed themselves and their families, and often sustain a modest income by selling their catch to other locals. Although they were excluded, they continued to harvest resources either illegally or through recreational licenses.¹⁰

With the change in government and ideology, access to fishing rights came under increasing pressure.¹¹ On the one hand large corporations that were vital to development needed to be sustained, and on the other those who were previously disadvantaged needed to be given access to commercial, medium and small scale fishing ventures.¹²

These competing interests placed a great strain on government departments that were facing a period of rapid change and that were under-resourced.¹³ Kleinschmidt et al highlights the administrative issues that the new government faced:

In 1999, the Department processed a total of 11,989 applications for the annual allocation of rights. Prior to 1999, it had allocated no more than 300 applicants annually, so it was not surprising that the administration of the Department was plunged into a state of crisis management.¹⁴

The Department of Agriculture, Forestry and Fisheries (hereinafter the '**Department**') approach to sustainable development seems to provide unequal access to commercial fishermen, at the expense of subsistence fishers. With the commercial sector dominating the fishing allocations, and taking into account that fish stocks are already a stressed resource, the Department has to provide sustainable solutions to subsistence fishermen.¹⁵ With 65% of subsistence fishers not educated beyond primary school, 40% are unemployed (only 10% have regular employment) and income in households (of between five to eight members) is very low, the Department has recognised that this group is effectively, 'trapped in poverty'.¹⁶

⁸ M Sowman, Subsistence and small-scale fisheries in South Africa: A ten-year review (2006) 30 *Marine Policy* 60, 61.

⁹ Burnett (n 1).

¹⁰ *Ibid.*

¹¹ Sowman (n 8) 60.

¹² H Kleinschmidt and others, Commercial Fishing Rights Allocation in Post-Apartheid South Africa: Reconciling Equity and Stability (2003) 25 *African Journal of Marine Science* 25, 25.

¹³ Kleinschmidt and others (n 12) 26.

¹⁴ *Ibid.*

¹⁵ Draft Policy for the Allocation and Management of Medium-term Subsistence Fishing Rights GN 1358 GG 31707 of December 2008 15.

The plight of subsistence fishers is made more complex when one considers the many legal changes and different approaches that the Department has taken to managing this issue.¹⁷ Numerous draft policies have been implemented since a Subsistence Fisheries Task Group (SFTG)¹⁸ was appointed in 1999, and the approach in the current policy, the Draft Policy for the Small-Scale Fisheries Sector in South Africa (2010 Draft Policy)¹⁹ is radically different to its predecessor, the Draft Policy for the Allocation and Management of Medium-term Subsistence Fishing Rights (2008 Draft Policy).²⁰

The 2010 Draft Policy advocates a communal system of right allocations.²¹ This paradigm shift will need the support of the community and be appropriately regulated by the Department to ensure its success.²² This shift in focus is unexpected, considering that communal right allocations have failed in the past.²³ Furthermore, the entire system is based on the notion of a small, tight-knit fishing community, an ideal that no longer exists.²⁴ The 2010 Draft Policy, however, does make some important advancements. For example, women are specifically recognised under the 2010 Draft Policy as a group that needs support and development in the small scale fishing industry.²⁵

The creation of the term 'small scale fishing' is also a vital development as there have been definitional issues in the past.²⁶ Initially, the Marine Living Resources Act (hereinafter '**MLRA**')²⁷ recognised subsistence fishers as right holders, but this definition did not recognise that subsistence fishers use their catch for a variety of purposes depending on their circumstances and context. Subsistence fishermen catch for their daily household needs, but they also sell to locals if the opportunity arises, or run a small business.²⁸ The

¹⁶ 2008 Draft Policy (n 15) 13.

¹⁷ Sittert and others (n 3) 98.

¹⁸ Witbooi (n 4) 38.

¹⁹ Draft Policy for the Small-Scale Fisheries Sector in South Africa GN 786 GG 33530 of September 2010.

²⁰ 2008 Draft Policy (n 15); 2010 Draft Policy (n 19) 16.

²¹ 2010 Draft Policy (n 19) 16

²² 2010 Draft Policy (n 19) 16.

²³ S Moolla, *The Draft Small Scale Fisheries Policy –A recipe for failure, Feike: Natural Resource Management Advisors* 2010.

²⁴ Moolla (n 23).

²⁵ 2010 Draft Policy (n 19) 28.

²⁶ Sowman (n 8) 61.

²⁷ Act 18 of 1998.

²⁸ Branch & Clark (n 5) 5.

term small scale fishing allows subsistence fishermen to catch for variety of purposes, subsistence or commercial.²⁹

However, the positive and negative developments of the 2010 Draft Policy overlook the major issue. Fish stocks are dwindling, and in order to protect this important environmental resource, fishing quotas are limited. Since commercial fishing is an important part of our economic climate, it needs to be protected to sustain our economy.³⁰ If South Africa is committed to sustainable development, there must be recognition that in order to fulfil these economic and environmental needs, inevitably society will have to make changes. The Department must find solutions to provide food security to communities that traditionally relied on subsistence fishing. There are a number of legal and non-legal solutions that can be implemented by legislation, for example, alternative food schemes or taxing big business.

This paper will first examine the general regulatory framework governing fishing, and specifically subsistence fishing in Part 2. In Part 3, it will examine the definitional issues that have faced policy makers, and Part 4 will give a general outline of the nature of the rights under the 2010 Draft Policy, as opposed to the 2008 Draft Policy. Part 5 will describe the institutional arrangements of the new community right allocations, and Part 6 will discuss co-management. Finally, Part 7 will suggest short and long term complementary initiatives to fishing right allocations.

2. An Overview Of The General Regulatory Framework Governing Fishing 1994 - 2011

In 1994 the Minister of Environmental Affairs and Tourism created a committee to develop a national marine fisheries policy, as it was clear that the new constitutional dispensation required a transformation of the system. The result was the White Paper: Marine Fisheries Policy for South Africa (hereinafter the '**White Paper**').³¹

When formulating the rights afforded to subsistence fishermen, section 9(2) of the Constitution was taken into account.³² This section recognised the need to address inequality to those who had been previously disadvantaged. In order to give effect to this section, groups who had previously been denied access to fishing rights would need fair and equitable access to marine resources.³³ It acknowledged that marine resources should be considered 'a national asset and the heritage of all citizens'.³⁴ In order to reflect this

²⁹ 2010 Draft Policy (n 19) (iv).

³⁰ 2008 Draft Policy (n 15) 15.

³¹ Department of Environmental Affairs and Tourism, *White Paper on Marine Fisheries Policy for South Africa* (1997).

³² Constitution of the Republic of South Africa 1996.

³³ Witbooi (n 4) 30.

³⁴ White Paper (n 13) 14.

national asset, the distribution of marine resources would have to be broadened and therefore three groups of right holders were recognised: commercial, recreational, and subsistence.³⁵

2.1. How Fishing Rights Are Accessed Under The MLRA

The White Paper propounded the development of the MLRA, which regulates access to fishing in s 18.³⁶ In order to undertake any type of fishing- commercial, subsistence or recreational, a person must obtain a right to do so.³⁷ The Minister may determine how this application procedure is undertaken, and the Minister may require the applicant to undertake an Environmental Impact Assessment (hereinafter 'EIA').³⁸ All rights granted in terms of s 18 will be valid for a certain time period that is determined by the Minister.³⁹ This time period may not exceed fifteen years, and rights conferred are described as either medium or long term.⁴⁰

In order to control access to resources and protect fish stocks, South Africa has a system that calculates Total Allowable Catches (hereinafter 'TACs') and Total Allowable Effort (hereinafter 'TAEs').⁴¹ These respectively limit the tonnage of fish that can be caught annually and the number of people, boats or traps that can be utilised. The Minister is empowered through s 14(1) of the MLRA to decide on the allocations for TACs and TAEs.⁴² Encouragingly, the Department has not tampered with these amounts too much in the past years, and scientific advice on the protection of fish stocks has generally been taken into account when deciding on the guidelines for right allocations.⁴³ Recent newspaper reports, however, suggest that scientific advice has recently not been consulted and as a result TACs and TAEs are outdated.⁴⁴

2.2. The Allocation Of Subsistence Fishing Rights

³⁵ White Paper (n 13) 16.

³⁶ MLRA (n 27).

³⁷ *Ibid.*, s 18(1).

³⁸ *Ibid.*, s 18(2) and (3).

³⁹ *Ibid.*, s 18(6).

⁴⁰ *Ibid.*, s 18(6).

⁴¹ MLRA (n 27) s 14(1).

⁴² *Ibid.*

⁴³ Kleinschmidt and others (n 11) 29.

⁴⁴ S Planting, 'State of the fishing industry: Slippery Business' *Financial Mail* (17 June 2010) <<http://www.fm.co.za/fm/2010/06/17/state-of-the-fishing-industry>> accessed September 2012.

The first legal acknowledgement of subsistence fishers was in s 19 of the MLRA. This recognised this distinctive group as a category of legal right holders.⁴⁵ This term accommodated individuals who fished along the coast and who did not fall into the recreational or commercial categories of right holders.⁴⁶ The Department created a task group in 1999 to advise it on how to adequately deal with the recognition of this new group.⁴⁷

The application process to acquire subsistence rights has been plagued with problems. The fee that the Department charged for application; the forms and verification of the identity of the applicant have all been issues in the past.⁴⁸ The forms were initially complex and difficult to complete for those with a limited education.⁴⁹ The identity of the applicant was an issue as the system was initially so badly constructed that multiple rights could be awarded to the same candidate. For example, when subsistence fishing rights were first recognised and available in 1999, the application fee was R100 and this led to the Department: [...] being inundated with applications; in certain instances people applied up to [fifteen] times for the same rights, each time under a different name. Many viewed the application as a sort of lottery, and applied with the sole intention of selling their rights. [...] In some instances, it was later discovered that fishing rights were allocated to sham entities, and when the complex shareholding and convoluted company structures were analysed, white companies and individuals turned out to be the actual owners and managers of the new companies.⁵⁰

This 'administrative crisis' resulted in a 'loss of confidence' by the fishing industry, which led to poaching and other illegal activities.⁵¹ Many of these initial problems have been ironed out with application fee amounts being raised, as well as an appropriate verification process being set in place.⁵² After the initial administrative hurdle, the Department has faced many ideological difficulties in deciding on the most efficient and comprehensive legislative approach to managing subsistence fishing rights.

⁴⁵ MLRA (n 27).

⁴⁶ White Paper (n 31) 25.

⁴⁷ Sowman (n 8) 61.

⁴⁸ Kleinschmidt and others (n 11) 26 -28.

⁴⁹ Ibid.

⁵⁰ Kleinschmidt and others (n 11) 29.

⁵¹ Ibid., 26.

⁵² Ibid., 29.

2.3. The History Of Draft Policies To Address This Issue

Between 2005 and 2006, two draft policies were released; these were met with opposition from various stakeholders.⁵³ This resulted in the drawing up of the 2008 Draft Policy which was gazetted in November of that year.⁵⁴ Comments were submitted and public meetings were held up until August 2009, after which it became obvious that it needed to be reworked once more.⁵⁵

This resulted in the 2010 Draft Policy which was gazetted in September of that year.⁵⁶ Public consultations on the policy were held in October and November 2010, resulting in roughly one hundred meetings around the coast.⁵⁷ The 2010 Draft Policy is more detailed in terms of its aims and objectives and it does seem to give more recognition to women. But it is still vague, time frames seem unrealistic, and some of its new proposals (such as community-based allocation of rights) have previously been unsuccessful.⁵⁸ It signals a significant step in the process of granting more comprehensive rights to subsistence fishers, but it still has many issues that need to be resolved before implementation.

According to the Department '[a] substantial amount of comments were received' during the public consultations.⁵⁹ This resulted in the need to form a National Economic and Development Labour Council (hereinafter 'NEDLAC') task team. They held their first meeting in February 2011.⁶⁰ The Department is currently in the process of amending the legislation, while in consultation with NEDLAC.⁶¹

The implementation date of the 2010 Draft Policy is uncertain. It will depend on the duration of the 'NEDLAC process'. According to the Department this was to be completed by the end of May 2011. They had hoped to submit the implementation plan and final policy to Cabinet by that time, and hold concurrent negotiations with the commercial

⁵³ Draft General Policy on the Allocation and Management of Long-term Fishing Rights GN 396 GG 27357 of 4 March 2005; Draft Policy for the Allocation and Management of Medium-term Small-scale Commercial Fishing Rights GN 1679 GG 29391 of 17 November 2006.

⁵⁴ 2008 Draft Policy (n 15).

⁵⁵ Department of Agriculture, Forestry and Fisheries, Chairperson: Ms N. Twala (African National Congress). 'Briefing by Department of Agriculture, Forestry & Fisheries on Fisheries Sector Progress', 10 November 2010.

⁵⁶ 2010 Draft Policy (n 19).

⁵⁷ Department of Agriculture, Forestry and Fisheries, Chairperson: Mr M. Johnson (African National Congress). 'Progress Report: Implementation of Small-Scale Fisheries Policy', 8 February 2011.

⁵⁸ Briefing (n 55).

⁵⁹ Progress report (n 58).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

sector to gain their support for the implementation process. If this was successful, the policy was to be introduced in certain target areas by June 2011.⁶² According to a recent progress report given by the Department, they are still gathering comments from the public and have now extended the implementation date to December 2011.⁶³

3. Defining the Fishers

The MLRA established that fishing rights could be awarded to three different groups; commercial entities, recreational fishers, and subsistence fishers.⁶⁴ However, there have been definitional problems as to what constituted a 'subsistence fisher'. This is largely due to the fact that it was difficult for policy to reflect the many purposes for which subsistence fishermen harvest.⁶⁵

There is a range of purposes for which subsistence fishing occurs. At the one end of the spectrum is harvesting for the sole purpose of providing food for the family. A middle ground is the sale of the catch to others, such as community members, holiday-makers, and hotels, demonstrating that if a subsistence fisher is presented with an opportunity to sell he will do so. At the far end of the spectrum is the purpose to sell to buyers. Informal fishermen move along the continuum fluidly, depending on where they live, the availability of a market at the time and which resources they are able to harvest.⁶⁶

3.1. The Definitional Approaches Under Each Policy

Because of the great variety of communities and the different ways in which they harvest and utilise their catch, it was difficult to fit each individual into a specific category. Initially, policy documents recognised subsistence and small scale commercial fishers as distinct entities.⁶⁷ However, this distinction served no apparent purpose, and largely created confusion as to who was included or excluded by each draft policy, as subsistence fisherman fished for both commercial and subsistence purposes.⁶⁸

This issue has been resolved by the use of the wider and more inclusive term, 'small scale fisheries sector' in the 2010 Draft Policy.⁶⁹ It recognises that subsistence fishing can include

⁶² Ibid.

⁶³ Department of Agriculture, Forestry and Fisheries, Branch: Fisheries Management. 'Progress on Draft Small Scale Fisheries Policy: Presentation to the Select Committee on Land and Environment', 14 June 2011.

⁶⁴ MLRA (n 27) ss 18-21.

⁶⁵ Sowman (n 8) 61.

⁶⁶ Ibid.

⁶⁷ Ibid., 67.

⁶⁸R Arnason and M Kashorte, Commercialisation of South Africa's Subsistence Fisheries? Considerations, Criteria and Approach (2006) 45 International Journal of Oceans and Oceanography 1, 1.

⁶⁹ 2010 Draft Policy (n 19) (v).

those engaged in fishing for the purposes of food security and those who use fishing as a source of income. The definition of small scale fishers in the 2010 Draft Policy includes all those on the continuum discussed above.⁷⁰ It does so by defining the term as those who 'subsist from their catch, are engaged in the sale or barter or are involved in commercial activity'.⁷¹ While this definition is more inclusive, it is simultaneously problematic as the MLRA only recognises commercial, subsistence and recreational groups as holders of fishing rights, and not a group that would straddle both commercial and subsistence rights holders.⁷²

3.2. Unpacking The Term 'Small Scale' Fisher

This could mean that subsistence fishers, those who catch solely for the purpose of feeding those they are responsible for, could be excluded. However, the definition of a small scale fisher, does imply that subsistence fishers are subsumed under this group.

Secondly, it could imply, as the definition suggests, that they are not excluded but rather that the intent of the Department was to uplift those who catch either for the sole purpose of food security or those who are running small businesses (and all others on the continuum) as a holistic group, if they need or want the support. This seems the most logical response, in which case, the MLRA would need to be amended, so that the term 'small scale fishers' used in the 2010 Draft Policy could qualify as right holders. This would either entail that the term 'subsistence fishers' be removed and replaced with the term 'small scale fishers' or, that the definition of subsistence fishers be widened. In order to do so, the definition under the MLRA would have to be widened so that it would include the activities of the small scale fishers as set out in the 2010 Draft Policy, that is, this group would be able to engage in commercial activity.

This seems the most logical response as the South African government has committed itself to uplifting the small scale commercial fishing industry in the General Fisheries Policy on the Allocation and Management of Long Term Commercial Fishing Rights.⁷³ This policy made three major changes to the small scale commercial fishing sector by:

Clustering all inshore, small scale commercial fisheries into a cluster of [eight] high value fisheries including hake handline, lobster inshore, net fish, traditional line fish and oysters; reserving access to these sectors to individual small scale fishers who were vetted as small scale fishers by their very own communities through a public process of provisional rights lists overseen Deloitte; and allocating a total of more than 2,200 long term fishing rights to small-scale commercial fishers. This comprised 73% of all the fishing rights allocated.⁷⁴

⁷⁰ 2010 Draft Policy (n 19) (v).

⁷¹ 2010 Draft Policy (n 19) (v).

⁷² MLRA (n 27) ss18–21.

⁷³ G68 E.ENVI.05.GENE, May 2005.

The commitment to the development of the small scale sector has allowed subsistence fishers to apply for commercial rights and develop their small businesses. The 2010 Draft Policy commits itself to similar ideals, providing 'appropriate infrastructure support', such as marketing, business skills, human resource management and subsidiary schemes for the establishment of companies.⁷⁵ This could suggest that the Draft Policy is aimed towards developing those subsistence fishers who catch for the purpose of selling and to encourage subsistence fishermen to sell and market their produce.

If the MLRA is amended, then small scale fishermen could access rights that would allow them to fish for the purposes of food security and/or a source of income. This would reflect the current reality of many subsistence fishers who fish for a variety of reasons depending on the circumstance.⁷⁶ This would allow the Department to look at the community's unique situation and allow each fisherman to fish for a variety of needs, under the umbrella term of small scale fisher.

4. The Nature Of The Rights: A Paradigm Shift

The 2008 Draft Policy was an important step towards the protection of South African subsistence fishers. However, a newer and more comprehensive plan was needed to properly regulate subsistence fishers, while creating equality and fairness for all stakeholders.⁷⁷ It signals a significant step in the process of granting more comprehensive rights to subsistence fishers, but it still has many issues that need to be resolved before implementation.

4.1. From An Individual To A Collective Approach

The allocation of rights in terms of the 2008 Draft Policy was awarded on criteria that either excluded or included the applicant.⁷⁸ Exclusionary criteria deal with the application process. A candidate for example, will be excluded if his/her form was incorrectly completed, submitted late or did not furnish payment. Inclusionary criteria are compromised of seven sub-criteria, these are; citizenship, age, dependence on the resource, proximity, traditional attachment, historical disadvantage and personal involvement in harvesting the resource. These rights would be managed by the Department and may have included Local Co-Management Committees (hereinafter 'LCCs'), local community based groups.⁷⁹

⁷⁴ Moolla (n 23).

⁷⁵ 2010 Draft Policy (n 19) 31.

⁷⁶ 2010 Draft Policy (n 19) 36; Sowman (n 8) 61.

⁷⁷ Sittert and others (n 3) 96.

⁷⁸ 2008 Draft Policy (n 15) 17.

⁷⁹ Ibid.

The Department's approach in 2008 was individualistic, and LCCs were merely a vehicle to complement the allocation of personal rights to individuals.⁸⁰

However, there has been a paradigm shift in the 2010 Draft Policy. Instead of awarding rights based on individual merit, the Department will award rights to a 'community based entity'. These community based entities will be organised into zones, and they will award rights to individuals who belong to the community co-operative.

While some would see this as a positive development, Sowman (for example) called individual rights unworkable where fishers worked co-operatively.⁸¹ It is important to note that historically community based allocation of rights have failed. A recent example is the South African Commercial Fishing Corporation (hereinafter 'SACFC'). The facts are explained as followed:

SACFC had 3000 members in [twenty-five] co-operatives along the West coast, Southern Cape coast and Eastern Cape coast. From the very start, the grandiose political promises about jobs for all co-operative members and wealth creation through quotas began to fade as less than 500 members saw any income from SACFC. And when they did see any income it was exploitative. For example, lobster fishers would earn about R20 for a kilogram of lobster with the balance of between R80 and R100 going to the "co-operative" - or as we now know into the pockets of board members. By the time the 3000 members forced Parliament's portfolio committee on environmental affairs to hear their plight in 2004, the SACFC board had made off with million's of rand earned from the "paper quota" sale of their valuable quotas.⁸²

This example from the fishing industry just over ten years ago shows that communal right allocations have traditionally proven unsuccessful.

4.2. Competition With Commercial Rights Holders

The 2010 Draft Policy also makes note that the new approach, 'seeks to address the ecological sustainability of the resource'.⁸³ The Department seems to have maintained the TACs and TAEs so that the total amount of fish caught does not impact fish stocks negatively. However, the majority of the proportions of fish stocks that are calculated to be safe for harvesting seem to be possessed not by the subsistence fishers, but by big businesses. Commercial fishing companies seem to have the monopoly on fishing rights in general.

⁸⁰ Sowman (n 8) 60.

⁸¹ Sowman (n 8) 70.

⁸² Moolla (n 23).

⁸³ 2010 Draft Policy (n 19) 34.

This was acknowledged by the Department in the 2008 Draft Policy where it was stated that the, 'Allocation of fishing rights to subsistence fishers in general presents a challenge in that, most living marine resources have already been allocated to commercial fisheries'.⁸⁴ This means that subsistence fishers who rely on the business of small scale fishing to provide food and income for their families are facing abject poverty. The inability of fishermen to earn a living results in 'households breaking up, children dropping out of school and teenage pregnancies'.⁸⁵

The 2010 Draft Policy acknowledges that the availability of marine resources will not be adequate to fully meet the livelihood needs of the fishing community.⁸⁶ In order to adequately provide for subsistence fishers, the amount of TACs and TAEs allocated to this group needs to be increased. It is important, however, to recognise that commercial fishing is a significant contributor to the economy, which is a form of job creation and therefore contributes to community improvement. The Department will have to find a way to balance both these objectives. It only acknowledges and restates these issues in the introduction under the heading, 'Problem Statement', but the 2010 Draft Policy does not address this issue directly.

4.3. The Recognition Of Women

The 2008 Draft Policy does not recognise the role of women in the fishing sector. However, the 2010 Draft Policy puts considerable focus on transformation and gender, recognising that women have been historically disadvantaged, and that many are the primary care givers of their households, who operate without support.⁸⁷ The 2010 Draft Policy also gives preference to those who are 'dependent' on the resource.⁸⁸ This includes those who are unemployed, and those with no other regular source of income.⁸⁹

This is a positive development, especially considering that 2010 Draft Policy makes provision for skills training and subsidiary schemes for these vulnerable groups.⁹⁰ This could assist female subsistence fishers in creating their own jobs, and even growing a small business to support themselves and their families.

⁸⁴ 2008 Draft Policy (n 15) 18.

⁸⁵ Burnett (n 1).

⁸⁶ Draft Policy 2008 (n 11) 7.

⁸⁷ Draft Policy 2010 (n 12) 28.

⁸⁸ *Ibid.*, 21.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

4.4. The Notion Of The Community

The 2008 Draft Policy identified a list of subsistence fishing communities or areas where subsistence fishing was frequent, and it also recognised the concept of a 'basket of species'. This term allowed fishermen to fish for a variety of resources within a particular area. The 2010 Draft Policy has recognised the same idea when it comes to what resources are to be harvested, but uses the term, 'multiple species approach'. However the policy does not identify the communities or areas as the 2008 Draft Policy did. One can assume that regulations will identify the geographical areas or communities that will have access to these rights.

While these zones are yet to be determined, it has been raised in departmental meetings that demarcating zones could lead to conflict between communities, and problems could arise if communities cut across zones.⁹¹ The Inkatha Freedom Party (hereinafter '**IFP**') has raised the issue that taxi violence was triggered by the creation of zones in which they could operate, and that this kind of demarcation could lead to similar hostility between neighbouring communities.⁹²

Furthermore, this system is based upon the idea of the community. But 'the notion of the 'fishing community' is a fallacy today'.⁹³ Although small, tight knit communities might have existed between the sixteenth and mid twentieth centuries, today populations are increasingly fluid and residents migrate in and out of coastal towns, cities and villages undertaking various forms of economic activities.⁹⁴ In modern society the community is not a single, unified structure. If the system of community rights allocation is based on a participatory, people centred approach then surely the community must be a definable, cohesive group so that decisions can be made collectively and in the interests of all.

Comments made during a departmental briefing by a committee member advised the Department to examine the policy thoroughly before enacting it, as well as urging government not to create 'expectations that they could not fulfil'.⁹⁵ While community based right allocations are, in theory, a good idea, in practice they could be difficult to manage and difficult to properly monitor.

5. Institutional Arrangements

The individualistic rights allocation in the 2008 Draft Policy when compared to the collective allocation of rights in the 2010 Draft Policy is a major paradigm shift.⁹⁶ The 2008

⁹¹ Briefing (n 55).

⁹² Ibid.

⁹³ Moolla (n 23).

⁹⁴ Ibid.

⁹⁵ Moolla (n 23).

⁹⁶ 2010 Draft Policy (n 19) 16.

Draft Policy was criticised for its focus on individual right allocations.⁹⁷ The principle behind this new holistic approach is to promote local socio-economic development through community co-operatives that would be managed by the community as a whole.⁹⁸

The 2010 Draft Policy specifically recognises the complementary value of indigenous and local knowledge. The idea behind the policy is to allow the community to manage the rights as a group which would, in principal, allow each community to manage their rights depending on their unique context.⁹⁹

While the community is the focus of the 2010 Draft Policy, a multi-tiered organisational model is proposed. The 2010 Draft Policy suggests the creation of management structures at a national level, this would be the Consultative Advisory Forum (hereinafter 'CAF'); below that a management working group and then local co-management committees and community based entities.¹⁰⁰ The following discussion will focus on the structures and devices employed in the community based entities, and co-management of the resource.

5.1. How Individuals Will Access Rights From Community Based Entities

The Department will award rights to community based entities, who will have to apply to be recognised as such by the Minister.¹⁰¹ These organisations will then award rights to individual fishermen who belong to their institution. These members will be drawn up in a list by the community, and will be approved by the Minister.¹⁰² The criteria for creating the list are unclear. The Draft Policy only states that the community must draw up the list by deciding, 'who in their view may be entitled to harvest or fish for marine living resources'.¹⁰³ This list is then submitted to the Minister, and the Minister will decide how the fishing rights are distributed among its members.¹⁰⁴ This decision will be made on 'pre-set criteria' that would have been decided upon in consultation with the community. The Department states that it will facilitate this process, providing resources, workshops and consultation with the community.¹⁰⁵

⁹⁷ Sowman (n 8) 70.

⁹⁸ 2010 Draft Policy (n 19) 12.

⁹⁹ *Ibid.*, 21.

¹⁰⁰ *Ibid.*, 33.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, 27.

¹⁰³ 2010 Draft Policy (n 19) 27.

¹⁰⁴ 201 Draft Policy (n 19) 27.

¹⁰⁵ *Ibid.*

5.2. What Form The Community Based Entities Will Take

These community based entities will be legal bodies, and the fishermen will have the right to decide what appropriate legal entity they will adopt. There is no other specific information as to the form and content of these 'legal bodies', with the 2010 Draft Policy suggesting that they could take the form of a section 21 or another type of company, trust or co-operative.¹⁰⁶ The Department will liaise with the community, to educate them as to which legal body would be most appropriate and to provide the requisite training and education to help the community to make the correct decision. The final decision as to the type of legal entity the community wishes to adopt will be decided at a community meeting chaired by the Department, another Government department or even representatives from NGOs, after which provisional committee members must be nominated.¹⁰⁷ They will be responsible for ensuring that the entity is established and registered in terms of the laws applicable to that entity.

5.3. Conflict Resolution

Conflict is a natural part of the way in which a community operates. It is natural that not all members of the community are fond of all the other members, and disagreements will arise between members. In 'conflict resolution mechanisms' the community entity is given a fair amount of power when resolving differences.¹⁰⁸ If conflict does arise, the internal conflict resolution mechanisms agreed upon by members at the time of establishment of the community based entity must be followed. If an individual is aggrieved by that process, he or she cannot appeal to the Minister and he or she does not have recourse to the appeal provisions under the MLRA. The only recourse offered is a mediator provided by the Director General, who the individual or the community must appeal to.¹⁰⁹ By preventing an individual from having access to appeal mechanisms and the help of local government, it could be argued that the rights of such individuals are unfairly limited, and that they are at the whim of the community's decision making process.

Government departments are allocated these kinds of responsibilities to safeguard against conflicts of interest and to ensure that rights are allocated equally and fairly among individuals. In a meeting where the 2010 Draft Policy was being discussed, the following comments were made,

The co-management approach was also debated, with members of the portfolio committee expressing their concern about the reduced role of DAFF [The Department of Agriculture Forestry and Fishery] in the administration of the sector. DAFF was reminded that the state remained ultimately responsible and

¹⁰⁶ *Ibid.*, 33.

¹⁰⁷ *Ibid.*, 28.

¹⁰⁸ *Ibid.*, 40.

¹⁰⁹ 2010 Draft Policy (n 19) 40.

that it fell on DAFF to ensure that all marine resources were sustainably utilised and that they were adequately protected.¹¹⁰

The power to allocate individual rights and to resolve conflict should rest at a government level, otherwise the system could be open to exploitation, and the policy does not create mechanisms to solve this potential conflict.

5.4. Management Of 'Community Based Entities'

There is no specific instruction as to how these bodies will be managed at local level. The language of the 2010 Draft Policy seems to imply that management plans must be developed through a participatory process, which would then be 'concreti[s]ed in law or adopted as policy instruments'.¹¹¹ However, how this process will be run so that it produces positive and constructive outcomes is vague. Furthermore, these community based structures will be responsible for compliance with the rights allocated to the community and ancillary fishing activities.¹¹²

While communal right allocations are important, they do have potential short comings. For example, the community based entities would manage the communal rights. This would entail community members supporting other individuals in the community as possible right holders, as well as having a duty to monitor compliance. Both the allocation of individual rights from the community allocation and the duty to police themselves may place an undue burden on the community.¹¹³ This is because community dynamics are complex and individuals can act towards each other on an irrational basis. They could be motivated by resentment, bitterness and other personal feelings which could influence their decision making, and could in turn influence the way in which they allocate rights, and monitor compliance.

This does not mean that the system cannot work at all, but policy would have to implement structures and procedures to counter these problems. For example, all decisions that the community wishes to take would have to be approved by a government department, or a government representative should run the community based entity to ensure that the procedures they choose to adopt and the decisions they made are fair and proper. However, the 2010 Draft Policy is vague when describing specific procedures. It specifically states that procedures will be determined by regulations, in guidelines or alternatively in manuals, so that they can be easily amended.¹¹⁴ The Democratic Alliance (hereinafter 'DA') has criticised the 2010 Draft Policy in this regard and has been quoted saying that 'the

¹¹⁰ Dawson, Edwards and Associates, *Small-Scale Fisheries a Balancing Act*, (31 March 2011) <<http://www.dawsons.co.za/2011/04/march-31-2011/>> accessed September 2012.

¹¹¹ 2010 Draft Policy (n 19) 30.

¹¹² 2010 Draft Policy (n 19) 33.

¹¹³ Dawson, Edwards and Associates (n 111).

¹¹⁴ Draft Policy 2010 (n 19) 30-31.

policy was high on rhetoric but light on factual issues regarding the actual practical application and implementation of the policy'.¹¹⁵

6. Co-management

While individuals will manage themselves within the community based entity, the 2010 Draft Policy also advocates a co-management approach.¹¹⁶ Co-management is where government authorities manage the resource in partnership with the local communities.¹¹⁷ Branch & Clark explain:

Its fundamental premise is that if people participate in decisions and gain ownership they are more likely to comply with controls... Following promulgation of the MLRA, co-management gained impetus, particularly when it became evident that the abortive initial rights allocation process could have benefited from greater participation by users.¹¹⁸

Co-management has been used in the past. The Sokhulu community 'served as a flagship of implementation' in Kwa-Zulu Natal.¹¹⁹ This group represented twenty-seven communities, was constituted by local and government representatives and was responsible for implementing legislation and monitoring compliance.¹²⁰ In order for co-management to be successful, there needs to be training, sufficient funding, commitment and time.¹²¹ Since this concept rests on participation, it is most important that the community feels that the process provides them with some benefit in order to incentivise them to contribute to the process.¹²² In order for co-management to be successful, there must be consultation with the community.¹²³

LCCs were merely a suggestion in the 2008 Draft Policy, however full support is given to a co-management approach in the 2010 Draft Policy.¹²⁴ The Department has adopted an 'adaptive management approach' to organising each co-management committee. According

¹¹⁵ Dawson, Edwards and Associates (n 111).

¹¹⁶ 2010 Draft Policy (n 19) 22.

¹¹⁷ Branch & Clark (n 5) 11.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, 12.

¹²¹ *Ibid.*

¹²² *Ibid.*; Kleinschmidt and others (n 11) 27.

¹²³ Kleinschmidt and others (n 11) 27; Christo Reeders 'Why Proper Consultation is an Imperative' (2008) 29 *Mining Law* 39, 39.

¹²⁴ 2010 Draft Policy (n 19) 22; 2008 Draft Policy (n 15) 17.

to the 2010 Draft Policy, this implies that each area will manage the resource according to their varying circumstances, contexts and environments.¹²⁵ These committees will be constituted by representatives from all three spheres of government, members of the relative community based entity as well as members from the relevant conservation authority if the area is adjacent to or near a marine protected area.¹²⁶ This co-management committee will share the responsibility of managing the resource, and community based entities will be expected to implement the decisions taken by the co-management committee.¹²⁷

However, there are no other descriptions in the 2010 Draft Policy as to how co-management will be translated into a workable management system. For example, there is no indication of whether this process will be voluntary or mandatory, although the language of the policy suggests that it will be compulsory. There are no comments made about how this body will be monitored, how regularly they will be required to meet and so on.

7. Complementary Initiatives

If South Africa is committed to sustainable development, it must be recognised that in order to fulfil these economic and environmental needs, inevitably society will have to make changes. The Department must find solutions to provide food security to communities that have traditionally relied on subsistence fishing. Sowman believes that government is obliged to 'facilitate the exploration of alternative livelihood opportunities... if the objectives of the MLRA are to be achieved'.¹²⁸

There are a number of legal and non-legal solutions that can be implemented by legislation, such as alternative food schemes or taxing big business. It is important to note that these are not the only solutions to this complex problem; these are just two examples to illustrate both short and long term solutions. Most importantly, community consultation will be needed to ensure the success of any improvement programme.¹²⁹

7.1. Long Term Solution: Employing Big Business As A Partner

While the fishing industry in South Africa only contributes 0.5% to the GDP, it does provide 43,000 jobs, and in an increasingly pressured job market, it is vital that this industry be protected.¹³⁰ The commercial sector is allocated the majority of fishing rights, but this sector itself is under increased pressure:

¹²⁵ *Ibid.*, 22 -23.

¹²⁶ 2010 Draft Policy (n 19) 34.

¹²⁷ 2010 Draft Policy (n 19) 34.

¹²⁸ Sowman (n 8) 70.

¹²⁹ Kleinschmidt and others (n 11) 27; Reeders (n 125) 39.

Since 2005 the total allowable catch has been reduced by 250000t. With declining catch rates and volatile revenue streams (but fixed overheads in the form of vessels, processing plants and employees) the commercial operators need to find ways to grow their businesses and ensure their assets are gainfully used. How to maintain growth in an industry with a limited resource is as much a dilemma for big, listed operators such as Oceana as it is for the likes of Imie Patel, who runs Le-Tap Fishing, a chokka (squid) business in the Eastern Cape.¹³¹

It is clear that the fishing industry as a whole is under strain. Taking this into account, there is a need for the government to approach the problem pragmatically, and provide practical support to those who rely on this trade to provide food and income to their families. This is dramatically different from supporting commercial profits.

While subsistence or small scale fishermen use their rights for a variety of needs, it is clear that their greatest concern is to ensure food security, whether directly derived from fishing or from other income. It seems fair that if the commercial sector is benefitting by receiving the majority of fishing rights, they need to be involved to ensure that those who are adversely affected by this allocation are protected.

Businesses could be involved in a number of ways. Namely, they could offer financial support, and the amount donated would be dependent on the amount of fishing rights they are allocated. This would essentially be a type of industrial tax. The funds could be used to set up education centres or to teach those who are fishermen by trade another skill that could provide them with alternative employment. The money could be used for social grants, or to provide food security programmes. Alternatively, the company could be responsible for the money itself, and set up its own improvement programmes or NGOs. Most importantly, in order for this to be successful there needs to be either the support of businesses or a legislative obligation on businesses to provide financially.

By allowing the companies to allocate the money individually, they would be managing their business to produce an overall positive impact for the environment and the subsistence fishers. Businesses want to find opportunities to market themselves as ethical entities. By compelling big businesses to be involved in these communities, their efforts could be used as marketing tools to incentivise consumers to buy their products. Corporate social responsibility could be used to create opportunities for subsistence fishing communities.

Historically, they benefitted at a time when the term subsistence fishers were not yet recognised, and they continue to be given the lion's share of the portion. With increasing poverty and scarcity of jobs, communities need to be supported, and it is clear that big

¹³⁰ Planting (n 44).

¹³¹ Ibid.

businesses can contribute to remedy these issues and simultaneously protect the environment.

7.2. Short Term Solution: The Food Security Programme In Saldahna Bay

The Department has recognised that providing all communities with fishing rights is no longer a viable option; as TACs are reduced, illegal fishing threatens the sustainability of marine resources and climate change impacts the habitats and lives of many species.¹³² Sittert et al, suggests that there should be 'imaginative new approaches' to this compounded problem.¹³³

One such solution can be found in the African National Congress (hereinafter 'ANC') run Saldana Bay municipality. The municipality has implemented a food security programme in Hopland, a small low cost housing area near Paternoster in the Western Cape. The municipality provided ten chickens to each family, with a three month supply of feed. They also provided training. Residents attended a ten day course at the community hall, which instructed them on how to care for their chickens and what they would need to feed the chickens. They were also taught that by selling their eggs, these animals could provide them with food and income.¹³⁴ From recent reports, the community is happy with the arrangement:

Ewa Pieterse lives a few doors away. She shows off her recently acquired chicken coop, "I have lived here all my life. These are difficult times. Rearing chickens is a good idea. I have been unemployed for a long time [...] Our community relied on our men who went out to sea, caught fish and kreef. But those days are gone. Now we have to find alternative ways to put food on the table."¹³⁵

This is an important step in uplifting these communities, and similar programmes could benefit others. Implementation is relatively simple, costs are similarly low, and the benefits are immediate. Furthermore, this kind of programme does not rely on long term education or excessive amounts of training, and it is also a good bridging exercise in running a small business, which could encourage those who are successful to expand their businesses to other commodities. While this might not always be an ideal solution, in the long term, it will satisfy those who are desperate with very necessary relief until concrete solutions are found.

¹³² Planting (n 44).

¹³³ Sittert and others (n 3) 104.

¹³⁴ Melanie Peters, 'Politics and fish don't mix'. Sunday Argus, 2011.

¹³⁵ Ibid.

8. Conclusion

A number of different draft policies over the past ten years have indicated that finding an adequate solution to providing rights to subsistence fishermen is complex. While the 2010 Draft Policy has provided an interesting solutions such as, for example, placing an undue burden on the community.

While the idea of communal right allocations show that the Department is thinking creatively and progressively, it seems that they are not thinking pragmatically. Many of the details of implementation have not been yet been published, and the Department is rushing to implement the 2010 Draft Policy, even under criticism from other party members and the public. In the past, communal right allocations have not been successful, recent examples from the fishing industry have shown that they are easily open to exploitation.

If the Department wishes to solve the problem quickly and effectively, it is clear that it must consider alternative solutions to support communities who cannot rely on fishing to adequately sustain their families. Corporate social responsibility and food security programmes are simple and effective alternatives that ensure that fish stocks are protected. The food security programme in Saldahna Bay is an example of quick, cheap and simple solution to provide families with food and income.

Whatever the answer, it is clear that a solution must be found that provides an alternative to subsistence fishing communities so that they do not have to rely on fishing to sustain their livelihoods.