Gongqose v Minister of Agriculture, Forestry and Fisheries – A Tale of Customary Rituals and Practices in Marine Protected Areas

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Abstract

The correct application of customary law post constitutionalism continues to be the subject of much judicial and academic deliberation. This is especially true where the existence and/or scope of customary rights and cultural practices are not well defined in a specific case. *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 5 SA 104 (SCA) presents a perfect example of the dissonance between the recognition of customary law by the *Constitution of the Republic of South Africa*, 1996 and the regulation of rights and cultural practices emanating from customary law. The case grapples with the meeting point of customary rights and customs and the need to preserve the environment. This intersection is considered in view of earth jurisprudence as an emerging legal thought topic in environmental law. On the whole, the decision of the SCA demonstrates encouraging signs of an appreciation of customary law as deserving of an equal place on the legal podium.

Keywords

Marine Protected Areas; cultural practices; customary law; *Gongqose*.

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1 Introduction

Gongqose v Minister of Agriculture, Forestry and Fisheries[1] (hereinafter *Gongqose*) pits two interests on different scales of the law against each other. On the one hand, there are customary rights or cultural practices, which stem from customary law, while on the other hand there is a question of the preservation or sustainability of the ecosystem, which for the purposes of this case note falls to be considered under marine law. It is common cause that customary law has not always enjoyed the legal status and recognition that it is afforded under the Constitution.[2] Notwithstanding this, however, a constitutional framework and jurisprudence as new as that in South Africa will continuously seek clarification of rights and the establishment or understanding of cultural practices and autonomy. Sections 30[3] and 31[4] of the South Africa Constitution of 1996, read together, provide for the entrenchment of the rights to culture and cultural practices. Significantly, section 30 extends to everyone the right to "… participate in the cultural life of their choice" consistent with the provisions of the Bill of Rights, which must necessarily also include the right to a safe environment, as enshrined in section 24[5] of the Constitution.

The recognition and enjoyment of cultural life is negated to a considerable degree by the oral tradition of customary law. Thus, customary tales told and teachings conveyed through narration by elders, through songs or even through cultural games may be lost on future generations, or even worse,

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1 *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 5 SA 104 (SCA) (hereafter *Gongqose*).

2 *Constitution of the Republic of South Africa*, 1996 (the Constitution).

3 Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

4 "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community— (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

5 "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 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."

lost through translation by third parties. These tales are known to invoke some sort of emotion in their audience; from the jesting tales told around the fire in the dead of night to the horror tales about evil spirits marauding the streets in search of evil people. One of the documented examples of customary folklore that has a bearing on cultural practices is documented by Ratiba[6] in his reference to the tales on the famous Lake Fanduzi in Venda. He notes that:[7]

> By way of an example… [O]ne story (emanating from the villagers) holds that, at times, a white sheep mysteriously appears on the water and just as suddenly vanishes. Added to this is the tale that outsiders who have tried to do water sports on the lake have apparently all drowned – a tale that is coupled with many accounts of sightings of a white crocodile guarding the ancestral spirits who inhabit the lake.

The customary law rights or cultural practices are now acknowledged by the Constitution.[8] Notwithstanding this recognition by the text of the Constitution, their position on the legal podium is not always clear. In 2003 the Constitutional Court in *Alexkor Ltd v Ricktersveld Community,*[9] while at pains to express its views relating to the perverse treatment of customary law, used a rather generous description of the role of customary law in our jurisprudence post constitutionalism. The Court noted that "indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."[10] Notwithstanding this rather generous reference to the standing of customary law, the Supreme Court of Appeal in *Gongqose* opens its decision with a blunt take on the supposed fusion of customary law into our jurisprudence; *vis* "[t]his appeal brings customary law, which has not occupied its rightful place in this country, directly to the fore."[11] This take seems to echo the views of some academics whose contention is that customary law, norms and practices operate on the periphery of mainstream law. To sum up, Ratiba aptly states that "African cultural practices and any other cultural ethos for that matter have, since the time when Africa came to meet with the West, always been and still are the subject of ridicule, belittlement and largely eschewed by western civilization."[12]

It is against this backdrop that the section 30 rights may be easier to enjoy in theory than in practice. This is especially true, as *Gongqose* proves,

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6 Ratiba 2013 *Indilinga* 143.
7 Ratiba 2013 *Indilinga* 143.
8 *Gongqose* para 22.
9 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) (hereafter *Alexkor*) paras 51-53.
10 *Alexkor* para 51.
11 *Gongqose* para 1.
12 Ratiba 2015 *Indilinga* 210.

where the customary law rights or cultural practices falls into a Marine Protected Area (MPA). This is so because marine law has largely been an area of law that has not been well aired in our jurisprudence. Bapela ascribes the lack of research as emanating from the belief that substances entering the sea become diluted by the huge body of water until their concentration becomes unimportant.[13]

This said, this case note endeavors to investigate the application and provenance of customary law rights or cultural practices in marine protected areas. The investigation will consider earth jurisprudence theory as the emerging school of thought on law and governance on the well-being of the earth and all its inhabitants.[14] This is largely motivated by the escalation of the crisis in environmental issues, as instanced by marine pollution.

2 Culture and the environment

In his seminal article on the intersection between these two interest areas or fields, Feris[15] grappled with the conundrum of the deep-seated ties between traditional communities and the oceans and their resources, and the need to adopt and implement stringent measures aimed at protecting these threatened resources. This area of legal contestation, we contend, is scarcely ever studied locally. We draw from the facts and decision in *Gongqose* to demonstrate this view.

2.1 The facts and the legal history

On 22 September 2010 the appellants (MD Gongqose, S Windase and N Juza) were arrested and charged with attempting to fish in a marine protected area without permission, in contravention of section 43(2)(a) of the *Marine Living Resources Act* 18 of 1998 (MLRA) (count 1); entering a national wildlife reserve area without a permit in contravention of section 29(1)(a) of the *Transkei Environmental Conservation Decree* No 9 of 1992 (count 2); entering a national wildlife reserve while being in possession of a weapon or trap, to wit, fishing rods, lines and hooks, in contravention of section 29(1)(b) of the *Conservation Decree* (count 3); and wilfully killing or injuring or disturbing any wildlife animal other than fish caught in accordance

13 Bapela *Legal Analysis of the Prohibition of Marine Pollution* 1. Admittedly, Bapela's research was completed in 2016 and should not be passed off as current. However, despite their best efforts, the authors were unable to find that there has been a more recent change in attitude.

14 Koons 2009 *Penn St Envtl L Rev* 47.

15 Feris 2013 *PELJ* 557-562.

with such regulations as may be prescribed in terms of the *Conservation Decree*, in contravention of section 29(1)(c) (count 4).

The appellants pleaded not guilty to the charges in the Magistrate's Court, Elliotdale.[16] The premise of their defence was that their conduct was not unlawful because they were exercising their customary right to fish. The Magistrate's Court, despite a positive finding on the customary right use, convicted them of contravening section 43(2)(a) of the MLRA but acquitted them of all the other charges. The appellants were granted leave to appeal against their convictions.

One of the grounds of appeal, significant for the purposes of this note, was that the declaration of the MPA by the Minister on 29 December 2000 was reviewable and fell to be set aside, *inter alia* on the ground that in declaring the MPA the Minister failed to recognise the appellants' customary rights.

Before the Appeal was heard in the High Court, section 43 of the MLRA was repealed by the *Marine Living Resources Amendments Act* 5 of 2014 (MLRAA). Despite this development the High Court upheld the convictions.[17] The High Court granted the appellants leave to appeal to the Supreme Court of Appeal. On the whole, the appeal raised four issues, namely the status of customary law; whether the appellants had proved that they were exercising customary rights to access to and the use of marine resources when the offence was committed; whether the MLRA extinguished those rights; and whether the appellants' conduct was unlawful.

2.2 The decision

> A careful judge would have been advised to scrutinize the provenance of each rule. In addition, she would have been advised to begin each case by considering a possible conflict of laws; did common or customary law apply to the facts, and, if the latter, which specific system?[18]

Almost a decade on from the opinion of Bennett on the provenance of customary law rights in litigation, the Supreme Court of Appeal heeded the call to properly scrutinise the provenance of customary law rules in as far as the application of customary rights or cultural practices is concerned. Section 39 of the Constitution has long been recognised as enjoining the

16 *S v Gongqose* (Elliotdale Magistrate's Court) (unreported) case number E328/10.
17 *S v Gongqose* 2016 1 SACR 556 (ECM).
18 Bennett 2009 *Am J Comp L* 11.

court to take stock of customary law whilst promoting the three pillars of our Constitution; *vis* the spirit, purport and object of the Bill of Rights.[19]

To properly locate the above reference and the inference drawn from it, this note shall now discuss the decision in *Gongqose* under the following heading; the curious case of customary law and rights under the Constitution and the significance of terrestrial resources to indigenous communities.

2.2.1 The curious case of customary law and rights under the Constitution

> While in the past [customary] law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211 of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.[20]

It is well documented that the history of customary law and its legitimacy as a viable and unique system of law is a troubled one. It had been hoped that the birth of constitutionalism would coincide with a new dawn for the application of customary law.[21] The question of whether this has taken place, has been partly achieved or is not taking place at all does not lend itself to an easy answer. However, the *Gongqose* and *Alexkor* judgments provide in the clearest of terms that customary law is in actual fact considered equal with the common law post constitutionalism and that the rights or cultural practices that underlie it now enjoy full protection. Be that as it may, it must be noted that customary law not only undergoes constitutional scrutiny but is also faced with underlying problems of theoretical location in the new dispensation. To this effect, Ndima[22] identifies a number of theoretical nuances and the proponents of each position: the view that the Constitution perpetuates the inferior status of African law, the view that African values are inconsistent with the South African Constitution, the view that there is a synergy between the African value system and the

19 "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

20 *Alexkor* para 51.

21 Ndima 2017 *Obiter* 15.

22 Ndima 2017 *Obiter* 18-32.

South African Constitution, the view that the communal nature of African culture makes it amenable to the values of the Constitution and the view that certain rules, principles and concepts of traditional African law are central to the resolution of socio-legal disputes. The identification of so many positions in the conceptualisation of customary law under the prism of the Constitution only serves to affirm the absence of a comprehensive African legal theory.[23] With so many divergent views on the standing of customary law, it is no surprise that in *Alexkor* the court sounded a *caveat* against the use of textbooks and old authorities because of their propensity to view it through foreign lenses.[24] Before *Gongqose*[25] it could not have been far-fetched or too naïve to be pessimistic, as was Sibanda when he expressed this opinion:[26]

> During the fifteen years since commencement of the democratic dispensation, much has been done in the name of reforming and integrating customary law in order to make it comport with the South Africa's constitutional project. Without a precise prescription as to what form a constitutionally complaint customary law regime would take, scholars have portrayed the process of incorporation and reform as a delicate balancing act, seeking to promote customary law's cultural uniqueness as an indigenous African enterprise … .

That the Constitution recognises the independence and originality of customary law as a source of law is undisputable. This is amply demonstrated by the inclusion of section 211 into the text of the Constitution.[27] To give provenance to the text of section 211, the court in *Gongqose* noted 3 points of cardinal importance.[28]

> First, customary law 'is protected by and subject to the Constitution in its own right.' … Second, the legislative authority of Parliament to pass laws dealing with customary law has not been ousted. And third, the injunction to apply

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23 Himonga and Bosch 2000 *SALJ* 318.

24 *Alexkor* para 54.

25 While there has been a number of leading cases on customary law post constitutionalism, it is also well worth noting that most of these judgments have not escaped criticism on the application of the proper provenance of customary law and customary rights or cultural rights. By way of an example, the reader is referred to Ntlama 2009 *Stell LR* 2009, which chastises the *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) judgment.

26 Sibanda 2010 *Human Rights Brief* 1.

27 "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

28 *Gongqose* para 23.

> customary law is not rendered subject to any legislation generally, but only to 'legislation that specifically deals with customary law'.

In essence, therefore, it can no longer be either necessary or desirable to question the legitimacy of customary law as a source of law. Not only this but also, we contend, the clear elucidation of this point by the Supreme Court of Appeal means that the temptation to view customary law through the lens of the common law should be a thing of the past. Moving from this clear recognition of customary law as a system of law in its own right, it becomes much easier to grapple with the question of the applicability of customary rights or cultural practices in the light of the Constitution, as the court did in *Gongqose*.

The oral nature of customary law being common cause, however, the appellants in *Gongqose* were faced with the challenge of leading evidence to prove the existence of their right not only to go fishing but also to gain access to the MPA to perform their ancestral rituals in terms of custom. From paragraph 27 to 32 the court systematically notes the evidence presented to prove the existence of their right to go fishing in terms of custom, and in paragraphs 28 and 29 in particular addresses the cultural practice related to the use of waters for medicinal reasons. Having considered all factors, the court found that the appellants indeed proved the existence of a tradition of "utilising marine and terrestrial resources".[29]

2.2.2 The significance of terrestrial resources to the Dwesa-Cwebe communities

> The recognition of the right of a subsistence fisher who catches fish for personal or family consumption is *not* the recognition of a customary law right to fish. While the activities of some customary fishers may include subsistence fishing, subsistence fishers are not necessarily persons who fish in terms of customary law. Further, the appellants established in evidence that their customary rights to access to and the use of marine resources were not confined to consumption, but were exercised for purposes of customary rituals, ancestral ceremonies and adornment.[30]

The above passage from the judgment cannot be emphasised enough in demonstrating the significance of the terrestrial resources to the Dwesa-Cwebe communities, of which Mr Gongqose and his co-accused were members. This finding follows on the evidence of Mr Gongqose and Dr Fay pertaining to the hardships experienced by the community pursuant to the declaration of a MPA. Two main things are of interest here: firstly, the averment in paragraph 28 that the ban had adversely affected traditional

29 *Gongqose* para 39.
30 *Gongqose* para 53.

health practitioners in their work, and secondly that the community's right to fish had been infringed upon.

Sight should not be lost of the fact that there is, in positive law, a clear distinction between custom and law.[31] However, taken in a correct context, as we submit the court did, customary law is "inextricably bound to linguistic expression and the traditional world view of the Africans whose narratives, stock-stories and folklore it embodies."[32] Therefore, the evidence of Mr Gongqose on the customs and rules of the use of the terrestrial resources speaks more to what one may refer to as the law that regulated the surrounding communities. This is so, as Ndima noted, because "[i]ts [customary law] meaning is heavily dependent on context. This meaning cannot be found by randomly asking what a particular rule, principle, institution, concept or doctrine means, without regard to the social world in which it appears."[33] In essence, therefore, customary law, when considered in the context and the social reality where it is applicable, may very flexibly arrive at decisions in congruence with constitutionalism.

At present there is no legislation that directly impacts on the regulation of terrestrial resources with specific interests on communal customs and the traditional way of life. One such communal use of environmental resources is the use of the sea for the purposes of ancestral rituals. In *Gongqose* shades of the sacred use of the sea for traditional healing features only as far as it relates to the support of the inference of the existence of relevant customary rights or cultural practices by the surrounding communities. However, mention must be made of the deeply spiritual processes of traditional healing. Ancestors and ancestral spirits are a part of the common language of the majority of African people. In fact, there is an acknowledgement of the widespread belief that "when a man dies, his spirit is incorporated into the collectivity of ancestors, which corresponds to a unilineal descent group among the living."[34] In his phenomenological study of the process of becoming a traditional healer, Sodi[35] identifies three important functions, namely the integration of personality, the acquisition of clinical competence, and the attainment of transcendental experiences. Of importance, however, is his observation that the trainees' period of transition is preceded by illness for a duration of time. While the specifics of the training are by their very nature clandestine, we submit that the need for

31 Bennett 2009 *Am J Comp L* 2.
32 Ndima 2003 *CILSA* 328.
33 Ndima 2003 *CILSA* 328.
34 Ratiba 2015 *Indilinga* 214.
35 Sodi *Phenomenological Study of Healing* 177-180.

access to environmental resources with ancestral connections should not be frustrated by indirect environmental arguments or a regulatory framework. As noted in *Gongqose* in evidence, traditional healers struggled with the regulation of the MPA. It is already indicated above that the period preceding the acquisition of traditional competence to become a healer is a troubled one in some cases and may prove fatal as a result of restricted access to marine resources. This is also especially important if one considers that a customary knowledge system as transmitted from generation to generation does not necessarily conflict with emerging thought on environmental issues; namely earth jurisprudence.

3 Earth jurisprudence

Earth jurisprudence has brought about a shift in theoretical focus from an anthropocentric view to an eco-centric one.[36] In the advancement of the latter view, Kortenkamp and Moore echo the notion that nature should be protected not because it is of value to human beings, but because it has an intrinsic value.[37] We submit that Kortenkamp and Moore's views negate the idea that some components of the earth are not useful, and as such need no protection. Thus, the earth is a subject that needs protection from human exploitation, and is not a collection of phenomena that exists for human use.[38] In the quest of preserving the earth by advancing the principles of earth jurisprudence, caution must be exercised in circumstances that involve customs and rituals. In his preparation for the Earth Laws Symposium Animal Rights and the Rights of Nature at Southern Cross University, Wright stated that:[39]

> … in Earth Jurisprudence, the legitimacy of killing an animal depends on the circumstances, and Earth Jurisprudence itself varies based on the ecological characteristics of locality, local custom and the relationship between nature and the person killing the animal. Writers contrast an indigenous hunter killing a zebra for food in accordance with traditional rituals and customs, with a hunter that is out to make some extra cash.

The above utterance buttresses the Dwesa-Cwebe communities' practice of exercising their customary law right to fishing. The customary law right has always been in existence and practised by the Dwesa-Cwebe communities. The testimony of Dr Fay alludes to historical evidence of

36 Koons 2009 *Penn St Envtl L Rev* 47.
37 Kortenkamp and Moore 2001 *J Environ Psychol* 1.
38 Burdon 2012 *AJLP* 31.
39 Wright 2012 https://boulderrightsofnature.org/wp-content/uploads/2AR-RON.pdf 1.

fishing and the collection of shellfish since at least the 18th century by the members of the communities.[40]

In circumstances where customs and rituals are not at stake, earth jurisprudence is endeavouring to forward the protection of nature. A prime example of the advancement of this notion is article 71 of the Constitution of Ecuador, which codifies the rights of nature.[41] Read on its own, the codification of the rights of nature is by all accounts a good act of draftsmanship in the advancement of an earth-centred approach to environmental preservation. While in section 39(1)(c) the South African Constitution allows for the consultation of foreign law in coming to a decision in matters before courts, the South African regulatory framework grapples differently with the issue of environmental protection. For the purposes of this case note, the consideration of the regulatory framework will be limited to that part of it dealing with marine protection.

4 Regulatory framework of marine law

4.1 Introduction

The growing concern for the protection of the marine environment has led to a need for some form of statutory protection and regulation. This is evident in the *Gonqose* case, where the Dwesa-Cwebe communities were dispossessed of their land. Historically they had relied on forest and marine resources for their livelihood. The deprivation was done in terms of regulatory frameworks such as the *Transkei Nature Conservation Act* 6 of 1971[42], the *Sea Fisheries Act* 58 of 1973[43] and the *Marine Living Resources Act* 18 of 1998 (MLRA).[44] The common goal of the aforementioned regulatory framework was to protect the marine environment. The repeal of the abovementioned regulatory framework, with the exclusion of the MLRA, directs our focus to the Constitution, the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPA) and *Marine Living Resources Act* as the current regulatory framework for our topic.

40 *Gongqose* para 39.

41 Nature, or *Pacha Mama*, where life is reproduced and occurs, has the right to respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. The state shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

42 *Gongqose* para 4.

43 *Gongqose* para 5.

44 *Gongqose* para 2.

4.2 The Constitution of the Republic of South Africa, 1996

The Constitution provides for an unqualified right to the environment and unequivocally makes it clear that the legislator is empowered to provide a regulatory framework to advance the goals of a clean environment.[45] The legislator has endeavored to do so through the promulgation of legislation to this effect.

4.3 National Environmental Management of Protected Areas Act

The Dwesa-Cwebe Nature Reserve is affected by this Act in terms of Section 9(d) of the NEMPA, which incorporate nature reserves within the specific types of protected areas.[46] Of interest to this note is section 2, which deals with the objectives of the Act, particularly the promotion of the participation of local communities in the management of protected areas. The *Gonqose* case exposes a lack of participation by local communities as indicated in the Act as one of its objectives.[47] It highlights the efforts taken by the Dwesa-Cwebe communities against the enforcement of the prohibition of fishing in the protected areas by alluding to the correspondence exchanged from 2006 to 2008 between the communities and the Department of Environmental Affairs and Tourism and the numerous meetings held between the representatives of two parties concerning access by the communities to and the sustainable utilisation and

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45 Section 24 of the Constitution provides that "everyone has the right (a) to an environment that is not harmful to their health or wellbeing; 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."

46 "The system of protected areas in South Africa consists of the following kinds of protected areas: (a) special nature reserves, national parks, nature reserves and protected environments; (b) world heritage sites, (c) marine protected areas; (d) specially protected forest areas, forest nature reserves and forest wilderness areas and (e) mountain catchment areas."

47 "(a) to provide, within the framework of national legislation, including the National Environmental Management Act, for the declaration and management of protected areas; (b) to provide for co-operative governance in the declaration and management of protected areas; (c) to effect a national system of protected areas in South Africa as part of a strategy to manage and conserve its biodiversity; (d) to provide for a diverse and representative network of protected areas on state land, private land, communal land and marine waters; (e) to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas; (f) to promote participation of local communities in the management of protected areas, where appropriate: and (g) to provide for the continued existence of South African National Parks."

benefit of marine resources in the marine protected area.[48] These efforts were unproductive. It is our contention that the dearth of participation by cultural communities in the declaration and management of protected areas, as the provisions of this section seem to imply, flies in the face of the cultural rights of such communities.

It is our further view that the NEMPA's attitude of advancing ecological preservation while absolutely disregarding the rituals and customs of the communities affected invites consequences akin to those alluded to by Himonga: "the obvious result is that state law is often ignored where it is not compatible with the social and cultural milieu in which it is applied."[49] This disregard of state law where there is dissonance with customary rights and cultural practices is what Mr Gonqose and others were relying on in their continual use of the MPA contrary to the regulation as stipulated. The parties had been fishing there previously, and had been taught how to fish by their fathers, who in turn had been taught by their fathers. This is part of their legacy that had been passed down from generation to generation.

The *Gongqose* case serves to indicate the dangers of legislating, so to speak, "above the heads" of customary communities and their interests in their customs. Preventing people directly or indirectly from practising their cultural beliefs and customs cannot be said to be beneficial or in any way to advance the notion of a diverse society. In essence, we submit that *Gongqose* is an unkind pointer to the fact of lack of an apparent willingness by the legislator to make informed decisions regarding the participation by local communities with regard to the management of protected areas as enjoined by the provisions of section 2 of the NEMPA.

4.4 Marine Living Resources Act 18 of 1998 (MLRA)

In its long title, the MLRA provides that it aims for the long-term sustainable utilisation of marine living resources and the protection of certain marine living resources.[50] These aims coincide with what was taught to Mr Gonqose and company in ensuring that there would always be more fish for the future.[51] This makes one question the necessity of promulgating "foreign"

48 *Gongqose* para 13.

49 Himonga 2011 *Acta Juridica* 115.

50 *Marine Living Resources Act* 18 of 1998, long title: "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; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa; and to provide for matters connected therewith."

51 *Gonqose* para 27.

provisions of law to limit a customary law right. Section 2 makes provision for the need to conserve marine living resources for both present and future generations, a need which was acknowledged long before the declaration of protected areas.[52] The Dwesa-Cwebe communities have demonstrable skills in and knowledge of preserving marine living resources for present and future generation. As indicated above, one of the methods used to preserve marine species is by not catching or taking away fish with eggs and juvenile fish when they fish.[53]

5 Conclusion

In paragraphs 50-59 in particular *Gongqose* provides the clarity necessary to infer that customary law is finally taking its place as an equal with the common law in our legal amalgam. Read in a proper context, and debunking its "otherness" in our legal milieu, section 211(3) of the Constitution is central to every proactive infusion of customary law post constitutionalism. No doubt one swallow can never make a summer, but *Gongqose* serves as a model for interpretation that promotes both customary rights and cultural practices. The stance taken here, we submit, calls on the courts to become active participants in the creation and sustaining of the constitutionally valid practices of customary law and custom. It is not in dispute that a safe environment is constitutionally guaranteed. However, nothing should ever

52 Section 2 states the objectives and principles of the Act, namely: "(a) the need to achieve optimum utilisation and ecologically sustainable development of marine living resources; (b) the need to conserve marine living resources for both present and future generations; (c) the need to apply precautionary approaches in respect of the management and development of marine living resources; (d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and marine culture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government; (e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation; (f) the need to preserve marine biodiversity; (g) the need to minimise marine pollution; (h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act; (i) Any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry; (k) the need to promote equitable access to and involvement in all aspects of the fishing industry and, in particular, to rectify past prejudice against women, the youth and persons living with disabilities; (l) the need to recognise approaches to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty; and (m) the need to recognise that fish may be allocated through a multi-species approach."

53 *Gonqose* para 27.

suggest that cultural rituals and norms pose a harm to our common wellbeing.

Bibliography

Literature

Bapela *Legal Analysis of the Prohibition of Marine Pollution*
Bapela MP *A Legal Analysis of the Prohibition of Marine Pollution* (LLM-thesis University of Limpopo 2016)

Bennett 2009 *Am J Comp L*
Bennett TW "Re-introducing African Customary Law to the South African Legal System" 2009 *Am J Comp L* 1-31

Burdon 2012 *AJLP*
Burdon PD "A Theory of Earth Jurisprudence" 2012 *AJLP* 28-60

Feris 2013 *PELJ*
Feris L "A Customary Right to Fish when Fish are Sparse: Managing Conflicting Claims between Customary Rights and Environmental Rights" 2013 *PELJ* 555-580

Himonga 2011 *Acta Juridica*
Himonga C "Taking the Gap: Living Law Land Grabbing in the Context of Customary Succession Laws in Southern Africa" 2011 *Acta Juridica* 114-139

Himonga and Bosch 2000 *SALJ*
Himonga C and Bosch C "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or just the Beginning?" 2000 *SALJ* 306-341

Koons 2009 *Penn St Envtl L Rev*
Koons JE "What is Earth Jurisprudence: Key Principles to Transform Law for the Health of the Planet" 2009 *Penn St Envtl L Rev* 47-59

Kortenkamp and Moore 2001 *J Environ Psychol*
Kortenkamp KV and Moore CF "Ecocentrism and Anthropocentrism: Moral Reasoning about Ecological Common Dilemmas" 2001 *J Environ Psychol* 1-12

Ndima 2003 *CILSA*
Ndima DD "The African Law of the 21st Century in South Africa" 2003 *CILSA* 325-345

Ndima 2017 *Obiter*
Ndima DD "The Shape and Content of Post-Apartheid African Law: Academic Scholars in Conversation" 2017 *Obiter* 15-33

Ntlama 2009 *Stell LR*
Ntlama NN "Equality Misplaced in the Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)" 2009 *Stell LR* 333-356

Ratiba 2013 *Indilinga*
Ratiba MM "The Gods Will Get You: A Plea, Exploration and Assessment of Possibilities for the Rescuing of the Phiphidi Waterfalls and Other Sacred Cultural Sites" 2013 *Indilinga – African Journal of Indigenous Knowledge Systems* 142-159

Ratiba 2015 *Indilinga*
Ratiba MM "'*Badimo ba Fihlile Mosomong*' – Is there a Place for Cultural Ethos and Practices at the Workplace? African Cultural Practices and Beliefs Revisited" 2015 *Indilinga – African Journal of Indigenous Knowledge Systems* 210-221

Sibanda 2010 *Human Rights Brief*
Sibanda S "When is the Past not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation" 2010 *Human Rights Brief* 1-5

Sodi *Phenomenological Study of Healing*
Sodi T *A Phenomenological Study of Healing in a North Sotho Community* (LLD-thesis University of Cape Town 1998)

Case law

Alexkor Ltd v Richtersveld Community 2004 5 SA 460 (CC)

Gongqose v Minister of Agriculture, Forestry and Fisheries 2018 5 SA 104 (SCA)

S v Gongqose (Elliotdale Magistrate's Court) (unreported) case number E328/10

S v Gongqose 2016 1 SACR 556 (ECM)

Shilubana v Nwamitwa 2009 2 SA 66 (CC)

Legislation

Constitution of the Republic of Ecuador, 2008

Constitution of the Republic of South Africa, 1996

Marine Living Resources Act 18 of 1998

Marine Living Resources Amendment Act 5 of 2014

National Environmental Management: Protected Areas Act 57 of 2003

Transkei Environmental Conservation Decree No 9 of 1992

Internet sources

Wright 2012 https://boulderrightsofnature.org/wp-content/uploads/2AR-RON.pdf

Wright G 2012 *Animal Rights and the Rights of Nature* https://boulderrightsofnature.org/wp-content/uploads/2AR-RON.pdf accessed 7 November 2019

List of Abbreviations

AJLP	Australian Journal of Legal Philosophy
Am J Comp L	American Journal of Comparative Law
CILSA	Comparative and International Law Journal of Southern Africa
J Environ Psychol	Journal of Environmental Psychology
MLRA	Marine Living Resources Act
MLRAA	Marine Living Resources Amendment Act
MPA	Marine Protected Area
NEMPA	National Environmental Management of Protected Areas Act
PELJ	Potchefstroom Electronic Law Journal
Penn St Envtl L Rev	Penn State Environmental Law Review
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review