

# ADDRESSING VULNERABILITY AND EXCLUSION IN THE SOUTH AFRICAN SMALL-SCALE FISHERIES SECTOR: DOES THE CURRENT REGULATORY FRAMEWORK MEASURE UP?

*Research Article*

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**Abstract**

Small-scale fishers and fishing communities have long suffered marginalisation and discrimination in South Africa. New laws and policies promulgated as the result of a court case brought by small-scale fishers, NGOs and academics attempt to rectify this problem. Drawing on the poverty-vulnerability-marginalisation framework, the paper considers whether this regulatory regime reduces vulnerability and marginalisation within the sector as an important precursor to poverty reduction initiatives, such as improved rights allocation. While the new regulatory regime is a step in the right direction, the paper ultimately finds that there are shortcomings in these laws, many of which have been thrown into sharp relief by the rights implementation process and COVID-19 lockdowns. These include narrow eligibility criteria for fishing rights, a lack of substantive solutions when it comes to vulnerable groups, processes insufficient to prevent elite capture, and impediments to the practice of alternative livelihoods. These shortcomings must be addressed through the appropriate expansion of access rights, consultation with fishers, and more inclusive drafting, if the contribution of small-scale fisheries to development and poverty reduction in South Africa is to be realised.

**Keywords: Small-Scale Fisheries; Fishing Communities; Fisheries Governance; Small-Scale Policy; Vulnerability; Marginalisation**

## 1. Introduction

On the 23rd of October 2020, the South African Minister of the Department of Environment, Forestry and Fisheries (DEFF), Barbara Creecy, invited comments on a proposed split of resources between commercial and small-scale fisheries in the traditional linefish, squid and abalone fishing sectors (DEFF 2020d). This pronouncement was met with backlash from both small-scale and commercial fishers, with both sectors protesting that they should receive greater allocations or not lose current allocations of certain species (Salie 2020; Githathu 2020). The rectitude of these views is not canvassed here. What is of interest for the purposes of this article is the claim made by Minister Creecy that these new allocations would benefit women, youth, and people with disabilities (DEFF 2020d). This statement is not explained or elaborated upon in the invitation to comment and it is not clear why, or indeed how, this would occur – a sentiment echoed by small-scale fishers (Salie 2020). One can only assume that the advancement of the small-scale sector was amalgamated in the minds of the drafters of the invitation with the advancement of these vulnerable groups.

This approach to the governance of small-scale fisheries – championing the disadvantaged but providing little in the way of tangible solutions to those who are really marginalised – is also reflected in the current regulatory framework governing the sector. This framework includes the 2012 Small-Scale Fisheries Policy (SSF Policy), the Marine Living Resources Act (MLRA), and the MLRA Regulations on Small-Scale Fisheries (SSF Regulations). The SSF Policy does at least highlight those problems that need to be addressed – noting the vulnerability of small-scale fishers as well as the marginalisation faced by many in the sector, including women, youth and migrant fishers. However, the rights allocation scheme it proposes undermines much of what comes before and there is a lack of concrete initiatives that could assist in reducing vulnerability and marginalisation in the sector. The MLRA and SSF Regulations pay very little attention to these important issues.

This is not to say that this framework is not a step in the right direction. It is the result of a hard-fought battle with government to recognise the sector and acknowledge the rights of small-scale fishers to livelihoods, food security and equality. The invitation to comment on the proposed resource split, a proposed reclassification of certain fish stocks as small-scale species,<sup>1</sup> and a number of other actions taken by the DEFF (discussed below), provide further evidence that the Department is paying attention to this sector and is attempting to provide for small-scale fisheries in a manner unheard of ten years ago. These achievements, brought about by the collective efforts of small-scale fishers, NGOs, academics and others, are all the more striking when one considers the power and political clout of the large-scale commercial fishing sector and unions in South Africa – an alliance which has consistently argued for the benefits of consolidation and pushed back against the rights of small-scale fishers (Isaacs et al. 2007: 304; Sowman et al. 2014: 35; Salie 2020).

Yet, more needs to be done to ensure that all those within the sector are afforded equal opportunities, and to cater for those who are placed at a disadvantage because of traditional power structures and lack of capacity and resources. It is also clear that the laws themselves, while cognisant of these types of problems, tend to reinforce unequal power structures and a homogenous approach to small-scale fisheries. In particular, the adoption of a community approach as the only model for regulation of this sector (DAFF 2012: 33; SSF Regulations 2016: reg 4; MLRA 1998a: ss1 and 19(1)(d)(i) and (3)) is problematic for

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<sup>1</sup> This proposal was made on the same day as the resource split proposal and applies to oysters, white mussels and the hake handline fishery (DEFF 2020c).

women, migrant fishers, and those in large urban areas or otherwise not part of a fishing community. The wording of these laws further tends to exacerbate the marginalisation and vulnerability of many fishers, such as the youth and those engaging in alternative livelihoods. The latter issue is particularly troubling, given that this type of livelihood strategy is an important means to diversify risk and reduce vulnerability (Allison and Ellis 2001: 383-384) and may decrease pressure on fish stocks (Allison and Ellis 2001: 386), which are heavily overexploited in certain areas of South Africa.<sup>2</sup>

The execution of these laws has also been problematic, with inadequate training provided to fishing communities and the exclusion of bona fide fishers from the allocation process (PCEFF 2020b; FINSA 2020). While these practical implementation issues are not the focus of this article, it is clear that a number of the problems that have arisen in the implementation process can be laid at the door of the current framework, particularly its lack of attention to marginalisation and vulnerability problems within the small-scale sector.

It has been ten years since the SSF Policy was promulgated and, given the changed socio-political context, some authors have called for a review and further development of the current regulatory framework (Sowman and Sunde 2021: 7). The DEFF is now looking to amend the MLRA ‘in its entirety’, with the process commencing early in 2022 (PCEFF 2020e).

This article critiques the manner in which the current regulatory framework governing the small-scale sector addresses vulnerability and marginalisation. Employing the poverty-vulnerability-marginalisation framework (Allison et al. 2011: 216-219; Béné and Friend 2011: 130-131), it considers the social landscape of the small-scale sector in South Africa and the particular problems faced by small-scale fishers and fishing communities. The article identifies the specific vulnerabilities faced by those operating within the sector, as a precursor to the analysis on how the current regulatory framework addresses (or exacerbates) these problems. Thereafter, it suggests ways in which the MLRA, SSF Regulations and SSF Policy may be amended to obviate these problems and better address issues such as livelihood diversification, elite capture and exclusion of vulnerable groups. Ultimately, this article seeks to contribute to these processes with specific recommendations on how the regulatory framework may be improved.

## **2. Methodology**

The article employs legal analysis to evaluate the current regulatory framework (i.e. the legal texts) governing the small-scale sector in South Africa. It departs from the premise that law operates within a very specific social or, more specifically, socio-economic context, and that legal text cannot be ‘read’ in isolation or outside of the context within which it operates (Selznick 2003). A contextual interpretation of a legal text can draw on empirical research or a desktop study of such research. In this instance the latter was chosen as time and the scope precluded empirical research directly with small-scale fishers and fishing communities. The article draws, therefore, on existing empirical research that focuses on the lived realities of small-scale fishers in South Africa, their exclusion from negotiating processes, and their cultural and societal structures which may be at odds with certain prescriptions of the current regulatory framework.

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<sup>2</sup> This is particularly true of inshore areas where resources are easily accessible, and includes stocks such as abalone, rock lobster and harder (DAFF 2016b, particularly pp. 1-2; 29, 40-42 and 87; WWF-SA 2011 p. 10).

Thus, while at its core a study of legal texts, the methodology adopted is not strictly doctrinal. Doctrinal research asks what the law is, rather than considering the operation of the law (Menkel-Meadow 2019: 7). In this regard, doctrinal research treats the law ‘like a sealed system’ and considers ‘only those solutions which fit into the already existing corpus of legal rules and principles’ (Banakar, 2019) when seeking to provide solutions to legal problems. The article instead employs socio-legal precepts in coming to its recommendations.

Socio-legal research is a broad concept, with a number of different areas of study. These include the study of informal systems of legality and order alongside state law, and the biases, motivations and beliefs of those making and enforcing law (Menkel-Meadow: 7-11; Banakar 2019: 3). Much of socio-legal studies involves an examination of the ‘gap’ between formal law and its application on the ground, considering the actual operation and efficacy of the law in practice (Menkel-Meadow 2019: 8; Banakar 2019: 15). Thus, such studies are often used to improve the effectiveness of law and policy (Banakar 2019:15).

In the case of small-scale fisheries, such an approach is, indeed, in accordance with the creation of the SSF Policy and the history of small-scale fishing in South Africa, which has seen a disconnect between the laws governing the sector and the practices of small-scale fishers, and grassroots advocacy to correct this imbalance. It also accords with the South African legal system, which is enjoined to consider not only the law as written but also customary law, which is a fluid system of law and order, adaptable to changing situations and often defying strict categorisation. The consideration of other normative systems, including indigenous and informal systems of order, and their effect on formal law, belies the idea that law is a sealed or a static system, and thus shows the importance of a responsive and flexible system of law in a decolonial context.

The article indicates that, when it comes to small-scale fishing in South Africa, a gap continues to exist between the law as applied or implemented and the law as written, despite changes in the laws governing the small-scale sector. It does so not only with reference to legal texts but also to external sources – empirical studies with fishers and fishing communities, minutes of parliamentary meetings, and grey literature. Studies sourced include both quantitative and qualitative analysis, considering small-scale fishers and subsets of this group (e.g. women working in small-scale fishing), as well as the work of commentators who were present at the negotiation of the SSF Policy and have continued to work with small-scale fishers subsequently. Parliamentary minutes are a further source of current information about the sector, as they present not only the accounts of parliamentarians and the executive, but also the viewpoints of organisations representing small-scale and subsistence fishers and, in some cases, the fishers themselves.

In engaging with grey literature, the authors are mindful of the fact that this type of literature is not peer reviewed in a traditional sense (Adams et al 2017) and should be scrutinised carefully. This includes a consideration of whether a review process has taken place, the extent to which these ideas have been followed in commercial literature, the bodies or persons releasing the research, and, where applicable, the methods used to conduct the research. While the work of IGOs is generally seen as accurate and authoritative (University of British Columbia, 2020), when it comes to sources such as newspaper articles, these have been scrutinized carefully to ensure that the source from which they derive is accurate and factual. In many cases and to obviate problems of misreporting, underreporting and bias, a number of similar sources have been consulted by the authors.

### **3. The Poverty-Vulnerability-Marginalisation Framework**

When considering problems of poverty in small-scale fisheries, there are many different factors at play. Small-scale fishers and fishing communities are vulnerable to a range of shocks and trends that can disrupt their livelihoods, and expose them to poverty. These include resource depletion, climate change, market fluctuations, unsafe working conditions, health problems, and geographical isolation. Small-scale fishers and fishing communities, or parts thereof, are often exposed to marginalisation and social exclusion, which significantly reduces their ability to improve their lives, including through advocating for improved access to resources or even the fulfilment of basic human rights.

The poverty-vulnerability-marginalisation framework (Allison et al. 2011: 216-219; Béné and Friend 2011: 130-131) reflects these realities. For some time, the narrative that poverty in small-scale fisheries is caused solely by dependence on a low-value and dwindling resource, has been seen as overly simplistic (Béné 2003; Allison and Horemans 2006: 757-758). Drawing on this idea, and based on their work in Sub-Saharan Africa and Asia, Allison et al (2006) proposed the poverty-vulnerability-marginalisation framework, which posits that a multiplicity of factors falling under the broad headings of vulnerability (a lack of resilience to shocks or changes) and marginalisation (systemic exclusion leading to disadvantage) also contribute to the impoverishment of small-scale fisheries. Under the framework, vulnerability and marginalisation cannot be overlooked in seeking the causes of poverty in small-scale fisheries or structuring policy interventions to address this problem.

While the elements of the poverty-vulnerability-marginalisation framework are interrelated and overlap, Allison et al. (2011: 231) make the point that interventions to reduce poverty will not be effective without first addressing vulnerability and marginalisation. For example, giving exclusive fishing rights to a community may not reduce poverty and vulnerability in that community if elite capture occurs and rights are not provided to those who would most benefit from them. Similarly, fishing rights may not matter if safety at sea is not addressed and a fisher is injured or killed, or there is insecurity in the community and fishing equipment is stolen. Thus, a good fisheries management framework will address problems of vulnerability and marginalisation alongside poverty reduction measures if it is to be effective.

The vulnerabilities and social exclusion that fishers face will vary from place to place and depend on historical context as well as current realities. Vulnerability is broadly synthesised in the literature on the poverty-vulnerability-marginalisation framework as relating to exposure to risks, sensitivity to these risks and adaptive capacity (i.e. the ability to cope with and recover from shocks using assets and capabilities) (Allison et al. 2011: 218; Béné and Friend 2011: 130-131). In general, however, the exposure and sensitivity of small-scale fishers to risk is high, while their adaptive capacity is often low (Béné and Friend 2011: 130). Ability to cope with risk and avert poverty therefore depends on a number of factors, including access to assets and infrastructure, social safety nets and, in large part, on the ability of fishers to diversify their livelihoods (Allison et al. 2011: 218-220; Béné and Friend 2011: 137). Much of this necessitates a willingness on the part of those making and enforcing law to be flexible – namely considering and working with the assets and resources that fishers have at their disposal, incorporating traditional and local knowledge in management and adapting to situations in diverse fisheries, regions and communities. In particular, although diversification of livelihoods is not always possible for fishers (Allison et al. 2011: 225), it can be an important poverty prevention mechanism where available. Thus, the need to encourage and not interfere with diversification of livelihoods is crucial to reducing vulnerability in small-scale fisheries.

Marginalisation or social exclusion often focuses on issues such as race, gender, ethnicity, sexuality, social status, culture, religion and so on. Yet, it is related to power asymmetry as much as background (Béné and Friend 2011: 131; Allison et al. 2011: 218 and 231). Although these issues are regularly intertwined, with power in fishing communities often held by older men to the exclusion of women and youth, as well as those who may be ostracised for reasons related to sexuality, immigration status, religion, disability and so on, this approach emphasises that marginalisation can take place at both the macro- and microeconomic level in small-scale fisheries. Marginalisation can occur in public institutions, social institutions and communities (Béné and Friend 2011: 131). Thus, factors such as education, political connections and social capital are important aspects of policies looking to address marginalisation issues.

The poverty-vulnerability-marginalisation framework also underscores the need to move away from the idea of homogeneity in historically marginalised groups when structuring interventions to address marginalisation. Those who are not in a historically marginalised group may face marginalisation while some belonging to these groups may in fact have power. In the context of gender, Cornwall notes that, ‘(a)ppling structural models may serve to essentialize gender identities and relations. This can equally produce institutions that “misbehave”... giving voice to elite women who may have little interest in their “sisters” and deepening the gendered exclusion of others’ (Cornwall 2003: 1328). In a similar vein, fishing communities are often treated as homogenous entities, leading to the marginalisation of diverse voices (Cornwall 2003: 1328-1329; Béné and Neiland 2006: 23). This is a problem that often affects women, but may also affect youth, those belonging to minority religions and/or cultures, the disabled, LGBTQ individuals and so on.

Lawmakers should seek to understand and reflect these realities in policy as much as possible. This may require policies targeted not at specific groups or communities but at the activities traditionally performed by such groups, which may relate to the reasons why they are vulnerable or marginalised. The tendency of women in small-scale fisheries to be involved in low paid and insecure pre- and post-harvest work, for example, may mean targeted interventions in these areas, rather than just blanket provisions attempting to provide for women as a homogenous group. Interventions aimed directly at preventing marginalisation (e.g. policies to prevent elite capture of fishing rights or include diverse voices in management decisions) are also crucial when it comes to ensuring that poverty reduction mechanisms aimed at uplifting the vulnerable and marginalised are not co-opted by those with greater power and less need. What is most important, however, is that these types of issues are addressed either alongside poverty reduction interventions or prior to these. Not doing so means that these interventions will be unsuccessful or only address some of the problems in the sector.

In utilising the poverty-vulnerability-marginalisation framework to analyse the current regulatory framework, it is important to understand that small-scale fisheries encompass a broad and diverse field, as do policies and regulations affecting the sector. Examples of potential interventions in each of the three areas of the framework include livelihood diversification projects, education and skills development, infrastructure provisions, and fishing rights (poverty reduction); health services, secure tenure and climate change adaptation (vulnerability); and organizational development, labour and migrant rights, and gender equity (marginalisation) (Allison et al. 2011: 230). However, this is not an exhaustive list and, in coming to its conclusions, the article does not only consider these examples but also builds on the broad precepts of the framework – namely that interventions to improve vulnerability and marginalisation are necessary



in order for poverty reduction interventions to be useful and effective, and that small-scale fishers are exposed to a range of challenges that differ from place to place.

In this regard, there are key areas of vulnerability and marginalisation which the regulatory framework fails to address, and which render ineffective important poverty reduction initiatives such as rights allocation and diversification projects. In addition, and particularly when it comes to the issue of vulnerability, the article takes the view that the regulatory framework is not sufficiently flexible to accommodate the different fishing and livelihood practices or geographical disparities of small-scale fishers in South Africa.

#### **4. Historical Context and Current Realities**

The history of small-scale fishing in South Africa, and the process of negotiating the current SSF Policy, is well known and has been discussed at length by other commentators in the field (Isaacs 2013; Sowman et al. 2014; Isaacs 2016; Sunde and Erwin 2020). As a result, this history will be dealt with only briefly here, with an emphasis on how it has contributed to the exclusion and vulnerability of small-scale fishers and the current realities faced by many of these fishers.

Although there was a lot of hope post-Apartheid that the fishing sector would be transformed, power imbalances within the sector meant the adoption of neo-liberal, 'trickle-down' policies which emphasised privatisation and economic growth, and favoured the large commercial fishing sector over small-scale fisheries (Isaacs et al 2007 p. 302). Social transformation policies adopted in the fisheries sector included better representation of women and people of colour, building up small, medium and micro enterprises (SMMEs), and introduction of a subsistence fishing right in the newly promulgated MLRA (Isaacs et al 2007; MLRA 1998b ss1, 14(2) and 19). A Subsistence Fishers Task Group (SFTG) was also appointed to come up with recommendations for better management of the small-scale sector (Branch et al 2002 p. 439; Clark et al 2002 p. 425). However, no management plan or regulations were ever created, and the idea of 'subsistence' fishing was focused on consumption and largely excluded those small-scale fishers who could be considered more commercial.<sup>3</sup> This task group also focused primarily on ecological concerns and largely ignored the social and cultural elements of subsistence fishing (Sunde and Erwin 2020: 22), a highly problematic position given the clear interlinkages between socioeconomic and sustainability concerns in subsistence fisheries.<sup>4</sup> As a result of this policy, many small-scale fishers flouted the rules and engaged in illegal fishing (Isaacs and Witbooi 2019; Sowman et al. 2011: 576-577; Sunde 2010: 16-17) or used recreational fishing permits to obtain fishing rights denied to them in favour of large, commercial fishers (PCEFF 2020c; Sunde and Erwin 2020: 23-24; Sowman et al. 2014: 33). Women also continue to face discrimination and marginalisation within the fisheries sector.<sup>5</sup>

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<sup>3</sup> A 'subsistence fisher' was defined as 'a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch, but does not include a person who engages on a substantial scale in the sale of fish on a commercial basis' (MLRA 1998b s1).

<sup>4</sup> These linkages are clearly recognised in the FAO's Ecosystem Approach to Fisheries, which specifically advocates for incorporating the human dimension of the fisheries ecosystem into management, including issues such as participation and co-management, gender and equity, poverty alleviation, trade and markets, and the sustainable livelihoods approach (FAO 2009).

<sup>5</sup> It is indisputably clear that this is still the case after the promulgation of the SSF Policy, if we consider that an audit had to be conducted on the small-scale rights allocation process partly because women were excluded from

Given the importance of the small-scale sector, it was perhaps inevitable that small-scale fishers would push back against policies and laws that disenfranchised them so severely. In 2005, a group of small-scale fishers in the Western Cape joined forces with prominent NGOs and academics to fight for rights for the sector and for recognition of their way of life. This led to the launching of an Equality Court action (*George v Minister of Environmental Affairs and Tourism* 2005), a process which eventually culminated in the promulgation of the SSF Policy in 2012 (Isaacs 2016: 284; Sowman et al. 2014: 35-36), which provides for a community-based approach to small-scale fisheries, emphasising community-held rights, and co-management of these rights.

The SSF Policy is the outcome of protracted negotiations between government, NGOs, academics, government, the fishing industry and labour unions (Sowman et al. 2014: 36). Thus, unlike other elements of the current regulatory framework, fishers were heavily involved in this process. Yet the fact that it was a negotiation process between many different stakeholders also meant ‘intense debate and discussion’ on a number of contentious issues, including whether rights allocation should take place on an individual or collective basis and where resources would be found to meet the needs of small-scale fishers, given the allocation of long-term commercial rights (Sowman 2014: 36). There was also uneven representation of small-scale fishers in the process, with particular geographical areas (specifically the Western Cape) more heavily represented than other areas (Sunde and Erwin 2020: 34).

In 2014, the MLRA was amended by replacing the provisions on subsistence fishing with provisions on small-scale fishing and fishing communities, and the SSF Regulations were promulgated in 2016 to provide more detail on the rights allocation process and management of small-scale fisheries. Despite strong objections to the SSF Regulations – including to the narrow eligibility criteria for recognition as a small-scale fisher and a lack of flexibility in applying the community approach – small-scale fishers were either not involved in these processes or their opinions not taken into account (Sowman and Sunde 2021: 4; Sunde and Erwin 2020: 35).

The rights allocation process has also been beset with problems and has left many small-scale fishers with no rights at all (PCEFF 2020b). Some of the issues that have arisen (e.g. lost applications) may be addressed with better planning and implementation. However, many of the problems, including exclusion of women and bona fide fishers, issues with community adjudication of applications, and lack of communication, also highlight problems with current laws governing the rights allocation process. Indeed, the analysis of the regulatory framework that follows in Section 5 suggests that the lack of attention paid to vulnerability and marginalisation issues in the current regulatory framework is a primary cause of many of these problems.

The consequences of the deficient implementation process were thrown into sharp relief by the COVID-19 pandemic and subsequent lockdowns in South Africa, with many fishers having no means of subsistence in a time when many had lost jobs and livelihoods. This was exacerbated by the fact that many small-scale fishers fish with recreational permits because they are unable to obtain fishing rights, but were unable to use these permits during the Level 4 and 5 lockdown periods (DEFF 2020a; Sunde and Erwin 2020: 44-45).<sup>6</sup> Closure of beaches and national parks – which many small-scale fishers cross to reach their fishing grounds (PCEFF 2020b) – and movement restrictions during this time meant that

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this process (PCEFF 2020a). See also Cele (2020) for a recent discussion of the discrimination women fishers continue to face in South Africa.

<sup>6</sup> This prohibition was lifted only on 5 June 2020 when the country moved to a Level 3 lockdown (DEFF 2020b).

small-scale fishers were harassed (and sometimes even fatally shot) by law enforcement, despite having fishing permits (PCEFF 2020b; PCEFF 2020d). Failure of the department to properly inform<sup>7</sup> fishing communities of the lockdown rules on fishing during this time contributed to these problems (PCEFF 2020b; PCEFF 2020d).

Reports of the Parliamentary Portfolio Committee on Environment, Forestry and Fisheries (PCEFF) show that the DEFF is aware of the problems posed by the current allocation process (PCEFF 2020d; PCEFF 2020a; PCEFF 2019a). An audit has been conducted by the DEFF on the allocation of small-scale fishing rights in the Western Cape – a step deemed necessary in view of the exclusion of bona fide fishers and women from the rights allocation process (PCEFF 2020a; FINSA 2019). While the DEFF initially went ahead with cooperative registration, while committing to a separate legal process to incorporate those left out of the process once the audit was complete (Masifundise 2020), Minister Creecy has subsequently approached the High Court to review and set aside this process in the Western Cape to address the many problems that have come to light (Githathu 2021). However, deficient processes in other provinces have not been set aside, leaving many fishers with no access to the resources on which they depend for food and livelihood.

### **5. The Regulatory Framework for Small-Scale Fisheries – A Critical Assessment in Light of the Poverty-Vulnerability-Marginalisation Framework**

The release of the SSF Policy in 2012 represented an important step in recognising the rights and challenges of small-scale fishers and fishing communities in South Africa. This Policy is wide-ranging and deals with both management and rights allocations, as well as issues such as empowerment, capacity-building, and equity concerns that have arisen from the poor treatment of small-scale fishers and fishing communities by government – both under apartheid and democracy – including the lack of opportunities provided to youth, women, the disabled, and other vulnerable groups within the sector.

The SSF Policy makes it clear that there is a need to empower these groups and generally focuses on many of the important issues affecting small-scale fisheries that have come to light in recent years, and are increasingly the focus of international instruments such as the Food and Agriculture Organization's (FAO) Voluntary Guidelines on Small-Scale Fisheries (FAO 2015). These include co-management of fisheries, the need to provide for alternative livelihoods, the long-overlooked role of women in small-scale fishing and fishing communities, safety at sea, social security and disaster relief, adoption of an ecosystem approach to fisheries management, and the need for research into technology to improve monitoring, processing and access to markets, and reduce harmful environmental impacts.

The Policy also provides definitions of small-scale fishers and small-scale fishing which seek to be inclusive of the different practices and groups that work within the sector, although it is arguable that the wording and structure of the SSF Policy tends to favour those at the subsistence end of the spectrum (Young 2013: 297-300). Thus 'small-scale fishers' are defined in the SSF Policy as:

*persons that fish to meet food and basic livelihood needs, or are directly involved in harvesting/processing or marketing of fish, traditionally operate on or near shore fishing grounds,*

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<sup>7</sup> This includes informing fishers in their own language and potentially through verbal means like radio and television, as education and literacy levels in small-scale fishing communities are often low (Jiyane and Fairer-Wessels 2012: 2-23; Sowman et al. 2014: 34; Hauck et al. 2014b: 26-27; Branch et al. 2002: 445).

*predominantly employ traditional low technology or passive fishing gear, usually undertake single day fishing trips, and are engaged in the sale or barter or are involved in commercial activity.*

While ‘small-scale fishing’ means:

*the use of marine living resources on a full-time, part-time or seasonal basis in order to ensure food and livelihood security. For the purposes of this policy, fishing also means the engagement (by men and women) in ancillary activities such as, (pre and post harvesting, including preparation of gear for harvesting purposes), net making, boat-building, (beneficiation, distribution and marketing of produce) which provide additional fishery-related employment and income opportunities to these communities).*

As with the substantive aspects of the Policy, the creation of these definitions follows the approach laid out in the FAO’s Voluntary Guidelines on Small-Scale Fisheries. These Guidelines do not provide a definition of small-scale fishers or small-scale fishing but instead leave it up to each country to define these concepts in accordance with national conditions, through ‘meaningful and substantive participatory, consultative, multilevel and objective-oriented processes’ (FAO 2015: art 2.4). This approach is hardly surprising given the immense difficulty in attempting to define a group that ranges from the chronically poor to the relatively prosperous, and covers a myriad of environments, activities, practices and people. Definitions adopted by different countries or organisations are, therefore, far from universally applicable, a problem identified by the WTO in attempting to reach an agreement on fisheries subsidies that incorporated small-scale fisheries (Auld 2021: 150-151). Apart from being pragmatic, therefore, the approach of the FAO Guidelines is eminently necessary to ensure that an inclusive definition is adopted at national level.

The FAO Guidelines further enjoin lawmakers to identify vulnerable and marginalised groups when deciding upon a national definition for small-scale fisheries. The intention of the Policy to identify and protect the vulnerable and marginalised is highlighted in its explicit concern for ‘vulnerable groups’ which are defined as:

*women, children, disabled and elderly persons who have (historically) been marginalized by others in the fishing sector or any person who can show that his/her equal enjoyment of rights and freedoms is affected in a serious manner comparable to any woman (sic), children, disabled or elderly persons (DAFF 2012: v),.*

This broad formulation contains a ‘catch-all’ provision that could extend to other groups within the sector. This arguably includes traditionally ostracised groups, such as those discriminated against on the basis of sexual orientation, HIV status, and culture and religion, as well as groups specific to the fishing sector, such as migrant fishers or fishing communities living adjacent to marine protected areas (MPAs). Fishers living adjacent to MPAs can certainly be said to be historically marginalised in South Africa, with numerous examples in the literature of the difficulties and associated vulnerabilities that arise when MPAs encompassing traditional fishing grounds are declared (Isaacs and Witbooi 2019: 4-5; Sowman et al. 2018: 170-175; Sunde 2014: 78-97; Sowman et al. 2011: 576-578; Feris 2013). Historically too, there has been little or no consultation with these communities prior to the declaration of MPAs and little attempt to provide alternative livelihoods (Sowman et al. 2018: 170-172 and 174; Sunde 2014: 84-97;

Sowman et al. 2011: 576-578), and this problem is likely to become more acute as South Africa moves towards greater MPA coverage of the areas under its jurisdiction.<sup>8</sup>

Importantly, too, these definitions recognise pre- and post-harvest activities like boat-building, gear preparation, processing and marketing – areas in which women are often disproportionately represented (Sowman et al. 2014: 34 and 37; Harper et al. 2017: 97-98) – as small-scale fishing (DAFF 2012: iv). The SSF Policy further promotes small-scale processing activities in various ways, including requirements for partnerships with small-scale fishing communities with a processing license and value chain development.<sup>9</sup>

The SSF Policy is also seen by the DEFF as informing the interpretation of the MLRA, as evidenced by a pronouncement in the DEFF's 2020 Invitation for Comment noting that '(t)he principles and objectives in section 2 of the Act (MLRA) guide the interpretation, administration and implementation of the Small-Scale Fisheries Policy' (DEFF 2020d: 58). It is clear, then, that the SSF Policy should be read in conjunction with the MLRA and SSF Regulations when considering government's response to vulnerability and marginalisation within the sector. This is important, given the sparse nature of the MLRA and SSF Regulations when it comes to dealing with the rights of small-scale fishers and fishing communities.

At face value then, the SSF Policy does well. It covers a wide range of important issues, including poverty reduction initiatives such as education and the creation of transport infrastructure, as well as initiatives to address vulnerability and marginalisation through provisions on safety, social security, disaster relief, dwindling resources, improved health care, and the need for livelihood diversification. It further recognises the use of fishing as a safety-net, particularly for vulnerable households (DAFF 2012: 4-5).

The problems with the regulatory framework come about in the provisions on rights allocation, which are set out in Part 6 of the SSF Policy, and are the subject of the SSF Regulations. Under the poverty-vulnerability-marginalisation framework, the provision of fishing rights and devolution of control over these rights through decentralisation initiatives like co-management, is seen as a poverty reduction mechanism (Allison et al. 2011: 230). This type of initiative aims to improve the lives and incomes of small-scale fishers by strengthening their rights over the resources upon which they depend. However, while the SSF Policy provides inclusive definitions and initiatives to reduce vulnerability and marginalisation in its general provisions, it fails to do so in its provisions on rights allocation. In particular, the ability for fishers to diversify their livelihoods is significantly reduced, certain realities of the South African landscape, particularly the operation of traditional subsistence fishers, are not taken into account, and stringent eligibility rules for rights allocation mean that the current regulatory framework does not go nearly far enough in addressing the longstanding power imbalance between the large-scale commercial sector (and to some extent the recreational sector) and small-scale fishers. Furthermore, a deeper analysis of the general provisions of the regulatory framework show that measures to reduce the marginalisation of particular groups are scarce or likely to be ineffective, and there are very few provisions addressing the devastating effects of elite capture on communities or parts thereof.

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<sup>8</sup> While previously only 0.5% of South African waters were covered by MPAs, a spate of recent declarations to bring South Africa in line with its international commitments has increased this to just over 5% (SANBI 2019).

<sup>9</sup> These issues are discussed further in Sections 5.1 and 5.3 below.

The remainder of the article considers these problems in greater detail, including potential policy solutions. Although it considers problems of implementation in this analysis, it takes the view that many of these problems stem from the regulatory framework itself, and that addressing these problems within the framework would vastly improve the implementation process. There is a tendency to expect or hope that arbiters or decision makers will fill in gaps or address problems in negotiated texts during their implementation, and this was the case with the SSF Policy (Sowman and Sunde 2021: 2-3). However, the consequences of leaving the interpretation of the SSF Policy to government decision-makers have been serious, with the MLRA and SSF Regulations interpreting the SSF Policy in a narrow, formulaic manner, and the rights allocation process beset with problems of corruption and mismanagement (Sowman and Sunde 2021: 4; Villette 2021). Thus, while flexibility is certainly necessary in a framework designed to manage the small-scale fisheries sector, better guidance as to how to apply such a framework is important to ensure consistency, accountability and proper implementation.

### **5.1 Diversification of Livelihoods**

Under the poverty-vulnerability-marginalisation framework, policy and regulations governing the small-scale sector should be sufficiently flexible to allow fishers to use their existing assets and abilities to prevent poverty and vulnerability. An important tool in this regard is recognition of livelihood diversification, which allows fishers and their households to structure their livelihood activities in a manner which reduces their vulnerability to shocks. The poverty-vulnerability-marginalisation framework further considers the ability for government to put in place livelihood diversification programmes for fishers an important poverty reduction mechanism (Allison 2011: 230).

Many small-scale fishers and fishing households in South Africa engage in alternative livelihoods, such as labouring, farming, and tourism ventures, in order to survive (Clark et al 2002: 433-434; Branch et al. 2002: 455-456; Hauck et al. 2014b). Social grants are also an important livelihood supplement in South Africa and provide the majority of household income in a number of coastal communities (Hauck et al. 2014a: 25-26).<sup>10</sup> Recognising this, the SSF Policy defines small scale fishing as ‘the use of marine living resources on a full-time, *part-time or seasonal* basis in order to ensure food and livelihood security’ (emphasis added) (DAFF 2012: iv), and further notes that, owing to historical inequities, ‘cash income from fishing contributes only minimally to the livelihoods of Small Scale fishers’ (DAFF 2012: 2). It also recognises that alternative livelihood opportunities are often scarce, and there is a need for the development of value chains and alternative livelihoods, particularly in coastal towns (DAFF 2012: 6-7).

Yet, while simultaneously acknowledging that many small-scale fishers do not derive the bulk of their livelihood from fishing and may have other types of employment, the SSF Policy requires those applying to be designated as small-scale fishers and members of a small-scale fishing community for the purpose of rights allocation, to show that they derive the majority of their livelihood from fishing and have no other permanent employment (DAFF 2012: 38-39). This not only excludes fishers diversifying their livelihoods from the rights allocation process, but also undermines the efficacy of creating alternative livelihoods for fishing communities. Under the SSF Policy, the usefulness of such initiatives is limited to value-added activities, such as processing or marketing of fish, or as a means of diversifying household income streams, where some members of the household are fishers while others work in a different industry.

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<sup>10</sup> For more examples of the importance of social grants to fisher households in South Africa, see DAFF 2012: 2; Branch et al. 2002: 450; Sowman et al. 2014: 34-35.

The SSF Regulations reproduce the requirement that, in order to be considered a small-scale fisher for the purpose of rights allocation, a person must ‘derive the major part of his or her livelihood from traditional fishing operations’ (DAFF 2016a: reg 4(d)). Unlike the SSF Policy, this regulation does not state that a small-scale fisher can have no other permanent employment. In this instance, the reticence of the SSF Regulations is actually beneficial. Yet the requirement that fishers obtain the majority of their livelihood from fishing remains problematic.

The current regulatory framework’s stance on alternative livelihoods thus contributes to the vulnerability of small-scale fishers in South Africa. In addition to compromising the contribution of the rights allocation process to poverty reduction and development, it contradicts the SSF Policy’s own pronouncements on the ability of small-scale fisheries to act as a safety net for the vulnerable and the fact that fishers may not have access to social security schemes (DAFF 2012: 5 and 21). These provisions also serve to reduce the effectiveness of the administration’s own plans to create alternative livelihoods for small-scale fishers, which include projects around value chain development, work in tourism, and small-scale aquaculture.

Value chain development is an important goal of the SSF Policy (DAFF 2012: 6-7). Given that the current regulatory framework requires fishers to obtain the majority of their livelihood from fishing in order to receive fishing rights, value chain development is arguably the most realistic alternative livelihood strategy.<sup>11</sup> The SSF Policy’s focus on small-scale processing is vital in this regard. Value-added post-harvest activities like processing can be beneficial in the creation of sustainable livelihoods, as these can bring in more income without a corresponding increase in fishing effort. However, pre-harvest activities are not acknowledged as small-scale fishing in the MLRA (MLRA 1998a: s1). Pre- and post-harvest activities also rely on fish being available, which means that many of the same vulnerabilities attendant on fishing will also apply to pre- and post-harvest activities.

Aquaculture too may not be considered small-scale fishing for the purposes of rights allocation, as this is technically a farming activity. The creation of small-scale aquaculture projects is also likely to present significant challenges, as aquaculture in South Africa suffers from lack of investment, over-regulation, the very high cost and experimental nature of starting aquaculture projects (DAFF 2010: 12; PCEFF 2020c), and the limited potential for mariculture along the coastline (DAFF 2010: 12). Thus, while aquaculture projects do make a contribution to rural economies in some areas,<sup>12</sup> the limited potential for aquaculture in South Africa and the fact that it may not be considered a fishing activity suggests that it is unlikely to be effective as a poverty reduction mechanism in many small-scale communities.

For women specifically, the SSF Policy suggests that training as guides, chefs, tour operators, and so on be provided in order to improve work opportunities in the tourism sector (DAFF 2012: 21). Again, this type of activity will not be considered small-scale fishing for the purposes of rights allocation, and is also subject to seasonal fluctuations and risks – the current pandemic being a clear example. Not being able to diversify in and out of fishing when there are no tourism opportunities is, therefore, problematic and creates, rather than reduces, vulnerability. As will be discussed further below,<sup>13</sup> this provision also does not take into

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<sup>11</sup> It is also more realistic than strategies like small-scale aquaculture for cost and feasibility reasons, as discussed below.

<sup>12</sup> This has occurred in places like Saldanha Bay, where some small-scale fish farmers were brought into the value chain (PCEFF 2020c). The DEFF is also developing a small-scale aquaculture programme (PCEFF 2019a).

<sup>13</sup> See Section 5.3 below.

account that for many women this will not be possible or wanted, as it overlooks the remoteness of many fishing communities and the roles that women traditionally play in these communities.

## 5.2 Subsistence Fishers and the Community Approach

There is a long history of subsistence fishing in South Africa (Sunde and Erwin 2020: 7-15). Although fishing for own consumption, including bartering of catch, is catered for within the community model of the current regulatory framework, subsistence fishers largely feel that their traditional ways of life are not being accounted for in this framework and that their voices were not adequately heard in its creation (PCEFF 2020b; Sunde and Erwin 2020: 33-34). In particular, these fishers, who have been fishing with recreational permits for many years, wish to be recognised as subsistence fishers and treated accordingly, including being allowed to trade and sell catch, and not paying fees for fishing permits (PCEFF 2020b; Sunde and Erwin 2020: 33). It is also vital that the contribution of subsistence fishing to social stability and food security be acknowledged and accorded precedence over recreational fishing.

Related to this is the fact that, while subsistence fishers may be part of a community, there are many who are not. In this regard, Branch et al. (2002: 442), in their survey of subsistence fishers for the SFTG, noted that '(t)he household was chosen as the unit of analysis, because it is generally the basic social and economic unit for people at a subsistence level' and that 'individual fishers were found operating in isolation and with no family connection, particularly in metropolitan areas.' More recently, the rights of individual subsistence and artisanal fishers were raised by a Committee member of the PCEFF who noted that there was 'a distinct gap in the discourse on individual rights' (PCEFF 2020e). Sunde and Erwin (2020: 33) also point out that one of the concerns raised by subsistence fishers in KwaZulu-Natal during the negotiation of the SSF Policy was their 'unique tradition of working as individuals'.

Being part of a fishing community is one of the eligibility criteria for obtaining small-scale fishing rights (DAFF 2012: 33; SSF Regulations 2016: reg 4; MLRA 1998a: ss1 and 19(1)(d)(i) and (3)) and the MLRA defines a small-scale fisher, in the first instance, as belonging to a fishing community (MLRA 1998a: s1). The SSF Regulations (2016a: reg 4) further require that fishers organise themselves into cooperatives to be eligible for fishing rights, significantly narrowing the options for community organisation that had been provided for in the SSF Policy.<sup>14</sup> Both the SSF Policy (DAFF 2012: v) and the MLRA (MLRA 1998a: s1) state that there must be close historical ties for a fishing community to exist, while the SSF Regulations provide further that a fishing community must consist of at least twenty people (DAFF 2016a: reg 4(2)). This simultaneously excludes individuals and small family groups from getting a license as well as those living in large urban centres whose 'communities' may be sprawling townships with tens of thousands of people, many of whom do not work in fisheries at all and certainly do not have 'shared aspirations' or 'a history of shared small-scale fishing' (MLRA 1998a: s1).

Thus, there are fishers who fish at an individual and household level who are not provided for in the current regulatory framework. This means that these fishers will continue to fish with recreational permits with their associated vulnerabilities<sup>15</sup> or fish illegally, which often entails dangerous practices like fishing

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<sup>14</sup> The SSF Policy provided for community-based legal entities, the nature and composition of which 'will be decided on by the fishing community and must be informed by which type of legal entity will best serve the interests and needs of the particular community.'

<sup>15</sup> These include small catch allowances, inability to trade and sell catch, and the fee associated with the permit. As discussed in Section 4, during the 2020 lockdown in South Africa, recreational permit holders were also barred from fishing.



at night or in rough seas. Not only does this perpetuate the marginalisation of these fishers, it belies the supposed flexibility of the current framework, showing that the ability for the framework to adapt to different fisheries and areas, is poor. It also undermines their access to important assets (fishing rights) that can prevent poverty and reduce vulnerability. As a result, the SSF Policy's requirement that small-scale fishers who wish to receive rights must be part of a fishing community, is problematic for many subsistence fishers.

Following on from this approach, the amendment to the MLRA removed the 'subsistence fisher' designation, and replaced it with the current community model. Although the provision for subsistence fishers in the MLRA clearly did not assist these fishers, many of whom were still not able to obtain rights, it at least had the potential to provide an individual permit for those fishers not part of a community. By doing away with this designation, fishers not part of a fishing community can only apply for rights under the commercial fishing rights allocations or for recreational fishing permits, avenues which have generally been inadequate in catering for the needs of small-scale fishers in the past.<sup>16</sup>

This presents a compelling reason to acknowledge these fishers and allow individual subsistence rights within the framework governing the small-scale sector. Indeed, the removal of the 'subsistence fisher' designation in the amendment of the MLRA, and the potential re-introduction of such a category to assist those left out of the current rights allocation process, has been raised a number of times in the PCEFF by subsistence fisher organisations, NGOs, and committee members (PCEFF 2020d; PCEFF 2020c; PCEFF 2020b). The DEFF has responded by agreeing to consider this issue as part of the MLRA review (PCEFF 2020e; PCEFF 2020d).

### **5.3 Measures to Reduce Marginalisation of Defined Groups**

The SSF Policy, as discussed, defines vulnerable groups as 'women, children, disabled and elderly persons who have (historically) been marginalised by others in the fishing sector or any person who can show that his/her equal enjoyment of rights and freedoms is affected in a serious manner comparable to any woman (sic), children, disabled or elderly persons' (DAFF 2012: v). At face value, this is a positive provision that could set the stage for a policy that addresses marginalisation issues as a precursor to the provision of fishing rights and other poverty reduction mechanisms in line with the poverty-vulnerability-marginalisation framework. However, there are many aspects of the Policy and the regulatory framework as a whole which could be improved in this regard, not least of which are the rights allocation eligibility conditions, which provide that rights may only be applied for by South African citizens over the age of eighteen who have at least ten years' experience in the small-scale sector, and are involved in fishing, processing or marketing on a daily basis (DAFF 2012: 38; DAFF 2016a: reg 4(1)).

Despite this, the regulatory framework does deal fairly extensively with marginalised groups, at least in the SSF Policy. The MLRA notes simply that there is a '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' in its section on principles and objectives (MLRA 1998a: s2(k)). While this provision does inform the rest of the MLRA, it is not specific to small-scale

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<sup>16</sup> In regard to commercial rights allocations, very few rights have traditionally gone to small-scale fishers (Isaacs et al. 2007: 307; Sowman et al. 2014: 31-32). The attempt to grow SMMEs in the fishing sector post-Apartheid, for example, was largely unsuccessful, with many fishers becoming 'armchair fishers' or being forced to merge with other companies to exercise their rights (Isaacs et al. 2007: 306-310; Isaacs 2013).

fisheries, nor does it provide anything in the way of solutions to the problems faced by these groups. The SSF Regulations require that a co-management plan must specify ‘measures to promote involvement of women and persons with disability’ (DAFF 2016a: reg 4(c)(iv)) as well as measures to assist child-headed households and youth (DAFF 2016a: regs 4(c)(v)-(vi)). While this is important, fulfilling these requirements does not necessarily mean that these groups will be designated as small-scale fishers or receive fishing rights. Indeed, this provision has to do with management of fish stocks, not allocation of rights. Nor do either of these provisions have a ‘catch-all’ to cover other categories of marginalised fishers.

However, the MLRA and the SSF Regulations must also be read against the backdrop of the SSF Policy, which is far more detailed, although often couched in vague and voluntary language. The SSF Policy provides not only for opportunities for vulnerable groups to be developed under a co-management agreement (DAFF 2012: 30), but also for the rights of these groups to be promoted in allocation decisions. Thus it goes further than the SSF Regulations in promoting vulnerable groups as a collective.

The SSF Policy also discusses specific subsets of this group in greater detail, particularly women. Indeed, the Policy has an entire section devoted to transformation and gender issues (DAFF 2012: 19-21), an issue that is specifically highlighted by the poverty-vulnerability-marginalisation framework as an important intervention to reduce marginalisation in the sector. This section acknowledges the important role that women play in small-scale fisheries, the discrimination they have faced in past policies and as a result of ‘entrenched patriarchal beliefs and practices’ (DAFF 2012: 19), and the fact that women wish to go to sea but lack access to vessels and equipment. The Policy then sets out several action points that include economic empowerment; participation in management, policy and institutional structures; and education and training in business administration, marketing and other skills that will promote the ability of these women to obtain alternative livelihoods, including in aquaculture (DAFF 2012: 20-21).

Other notable provisions relating to women include the need to ensure that women’s ‘special needs in respect of working conditions are addressed’ (DAFF 2012: 22), that ‘(c)apacity building initiatives must...address the concerns and needs of women’ (DAFF 2012: 26), that priority should be given to women’s involvement in cooperative activities (DAFF 2012: 32), that women be given preferential treatment in rights allocations (DAFF 2012: 36), that women be assisted to develop value-added activities (DAFF 2012: 36), and that women’s role as fish processors be strengthened (DAFF 2012: 46).

In allocating rights, the DEFF may further impose a condition requiring ‘special provisions for women’ (DAFF 2012: 47). The recognition that small-scale fishing includes pre- and post-harvest activities and the emphasis on processing also facilitate the inclusion of women in small-scale fisheries as these are the aspects of the sector in which women have traditionally been involved.<sup>17</sup> In this, the SSF Regulations can also be said to be assisting women to a certain extent, as they aim to promote small-scale processing by requiring that fishing communities enter into partnerships with at least one fishing community with a processing licence (DAFF 2016a: reg 6(10)). However, the MLRA narrows the definition of small-scale

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<sup>17</sup> Lentisco and Lee have emphasised that while women are often seen as ‘processors’ and only involved in post-harvest activities, this is short-sighted as women often make important contributions in the pre-harvest sector, as well as other areas (Lentisco and Lee 2015: 2-3). This is certainly true in South Africa, where women are often involved in activities like net-making and mending, collecting bait, applying for fishing licenses and so on (Sunde 2010: 13 and 16).

fishing set out in the SSF Policy to include only fishing, processing and marketing (MLRA 1998a: s1), thus excluding pre-harvest activities such as net-making, gear preparation and boat building (DAFF 2012: iv).

There are also provisions in the SSF Policy that attempt to provide for women in a manner that may not necessarily be of assistance to them. A good example of this is the provision in the SSF Policy which suggests that training as guides, chefs, tour operators, and so on be provided to women in order to improve work opportunities in the tourism sector (DAFF 2012: 21). This is an odd provision, when we consider that the vulnerability of many fishers and fishing communities stems from their geographical remoteness and isolation. This provision also shows a certain lack of understanding of the role that many women play in fishing communities as homemakers, community organisers, pre- and post-harvest workers, and gatherers of resources (Sunde 2010: 13) where initiatives to support and uplift women could be better focused. There is also no reason that these types of opportunities should not be extended to all members of a fishing community as a means of livelihood diversification and/or reduction of pressure on resources. Indeed, this provision would be far better aimed at those fishers living adjacent to MPAs. Training of those within these communities, no matter their gender, to capitalise on the tourism benefits of MPAs would be more beneficial than a blanket statement that women should be assisted in this regard.

Specific mention of other marginalised groups is also made in the SSF Policy, although these provisions are not as extensive as those on women. Under the section on fishing rights, the Policy notes that, apart from women, disabled persons may be given preferential treatment in rights allocations (DAFF 2012: 36). Disabled fishers are also exempt from the requirement to be involved in fishing, processing or marketing on a daily basis to be awarded fishing rights (DAFF 2012: 38). As with the provisions on women, the DEFF may impose conditions on rights and permits that require special provision for disabled and elderly fishers (DAFF 2012: 47).

As reflected in the SSF Regulations, the SSF Policy notes that co-management plans must ‘provide guidance on how to make provision for the needs and interests of young fishers under the age of 18, and in particular those from child headed households’ (DAFF 2012: 29-30). In determining whether a fisher is a small-scale fisher for the purpose of rights allocations, the SSF Policy also enjoins decision-makers to take into account other factors, which may include providing opportunities to young adults without ten years’ experience and non-South African citizens (DAFF 2012: 37-38).

Small-scale fishers living adjacent to MPAs are not specifically provided for in the context of rights allocation or alternative livelihood opportunities. The SSF Policy does include participation of small-scale fishing communities in the creation of MPAs as one of its overarching objectives (DAFF 2012: 16), although very little else is said about this issue thereafter, and this is certainly not enough to truly address the marginalisation and poverty faced by these communities. In this regard, Sowman et al. (2018: 177) suggest a range of measures that could be taken to ensure that the social impacts of MPA designation are addressed, including clear processes for local participation and management, incorporating social indicators into monitoring and evaluation procedures, and conducting of social impact assessments.

The SSF Policy is also problematic in that there is uneven representation of different groups. This means that some vulnerable groups are largely overlooked and the over-emphasis on women does not adequately reflect the nature of marginalisation. Although women do make up a large proportion of the small-scale

fisheries sector<sup>18</sup> and many are, indeed, marginalised, one cannot simply assume that all women are marginalised or that there are no degrees of marginalisation. While the definition of vulnerable groups, with its ‘catch-all’ provision, appears to take this into account, the remainder of the SSF Policy lacks this sort of nuance. The Policy has very little in the way of specific provisions on any group other than women, and this vagueness has led to problems providing for other marginalised groups. A good example of this is provided by Sunde (2014: 98-99), who notes that, despite the SSF Policy incorporating an ecosystem and human-rights based approach to the governance of small-scale fisheries, authorities seem to believe that the Policy does not apply within MPAs and to the communities living adjacent to them.

Yet, even in its provisions dealing with women, the Policy is somewhat lacking. As Sowman et al (2014: 40) point out, the Policy does not really suggest mechanisms through which to bring about its goals to uplift and empower women. It may be that the Policy intended to leave these type of nuts and bolts provisions for regulation, which is often done in overarching policy frameworks. Certainly, in regard to management of fisheries, the Policy clearly states that operational details are to be left for regulation or operating procedures (DAFF 2012: 18). If this was the intention, however, the lack of emphasis on marginalised groups in the SSF Regulations, particularly in regard to management issues, is a glaring oversight – especially when we consider that these types of issues, while perhaps not perfectly represented and detailed, are an important part of the SSF Policy.

The idea that the SSF Policy will inform the other aspects of the regulatory framework is also problematic if we consider that rules of legal interpretation require inconsistencies to be resolved in favour of the legislation and regulations. This may mean that the definition of small-scale fishing is truncated, given that the definition of small-scale fishing in the MLRA is narrower than the definition in the Policy. The SSF Regulations similarly do not adopt the nuanced approach of the SSF Policy to rights allocation for fishers who do not meet all the criteria to be designated as a small-scale fisher, simply reproducing the majority of these criteria verbatim (DAFF 2016a: reg 4).

#### **5.4 Elite Capture**

Elite capture is a common problem in decentralisation initiatives that aim to devolve some level of control over resources to local communities (Béné and Neiland 2006: 22-23). In South Africa, previous attempts to transfer control over fisheries resources to ‘community trusts’ led to the capture and mismanagement of trust benefits by non-fishers (Isaacs and Hara 2015: 9-10). There are many reasons why elite capture may occur, including cultural norms and poor institutional structures, but this is essentially a problem of power imbalance that requires marginalisation issues to be addressed if such initiatives are to be fully effective.

Under the current regulatory framework the community approach is the only way in which most small-scale fishers will be able to obtain fishing rights on which they can subsist. The requirement that there be close historical ties within this community, while undermining certain fisher’s livelihoods, does at least increase the chance that it is bona fide fishing communities receiving rights, which reduces the likelihood of elite capture. However, elite capture can occur with decentralisation reforms even in legitimate communities (Béné and Neiland 2006: 22-23). This idea was also largely undermined by the requirement in the SSF Regulations that a ‘community’ had to consist of at least twenty fishers, which led to the

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<sup>18</sup> It is estimated that women make up around half of the global small-scale fisheries sector and 32% of the South African small-scale fisheries sector (The World Bank 2012: XVIII; Harper et al. 2013: 57; Harper et al. 2017: 98).

joining together of different groups to form artificial communities without a shared history of small-scale fishing (Sunde and Erwin 2020: 36).

There is also evidence that the requirement of close historical ties did not prevent bad actors capitalising on the small-scale rights allocation process. A study conducted in Ocean View in Cape Town shows that there were some pretending to be bona fide fishers who demanded fees to help community members obtain rights – to the exclusion of many bona fide fishers who did not have the education or means (e.g. access to technology or transport) to navigate the complicated processes necessary to register and run a cooperative (Schultz 2017: 9-17). There were also cases of criminal elements in communities co-opting rights allocation processes when it came to high-value resources such as abalone (Isaacs and Witbooi 2019: 4).

These practices are a problem of marginalisation, where those who have little in the way of power, connections, education, and access to information are being sidelined in the allocation process. Undoubtedly, this requires better implementation by government, and particularly more resources dedicated to the rollout of fishing rights. However, clearer guidance, direction, and a mandate to deal with marginalisation issues before allocating rights within policy frameworks is also an important aspect in ensuring that elite capture does not occur, that resources will be allocated fairly, and that implementation processes are consistent and equitable.

In this regard, the SSF Policy requires that the DEFF inform communities about a number of important issues, such as the criteria to be declared a community, through appropriate means. These include community workshops or information campaigns through mediums such as the radio and newspapers (DAFF 2012: 39). Furthermore, while the impetus for the declaration of a fishing community and designation of small-scale fishers comes from the community, the Policy foresees an important and fairly hands-on role for the DEFF, including ‘extensive consultation’ between the department and community prior to declaring a fishing community (DAFF 2012: 39) and in selecting fishers to make up the fishing community (DAFF 2012: 36), as well as workshops, training and education in regard to the choice and creation of a legal entity (although not in regard to the actual running of such entity) (DAFF 2012: 41). It also provides for conflict resolution mechanisms to resolve a number of different issues, including disputes about eligibility to be a member of a community-based legal entity (DAFF 2012: 44-45). It further calls on NGOs to assist fishing communities in identifying bona fide fishers, and requires the Minister, Department or an independent third party to verify that all those on the list of fishers meet the criteria to be designated as a small-scale fisher (DAFF 2012: 40).

The SSF Regulations do not discuss the provision of information to communities at all, but do have some provisions on participation and verification. These include the fact that the department must assist fishing communities to register as co-operatives and apply for fishing rights (DAFF 2016a: regs 2(6)(a) and (d)) and that management plans must set out training and support needs (DAFF 2016a: reg 4(4)(c)(iii)). The Regulations put the onus solely on the department to verify whether those on the list of fishers indeed meet the criteria to be designated small-scale fishers (DAFF 2016a: regs 2(2)-(3)).

Unfortunately, a number of the provisions in this framework, particularly in the SSF Policy, appear to be voluntary, noting in many cases that the action ‘may’ be taken. The provisions in the SSF Regulations are mandatory but less extensive than those in the Policy and do not provide for information-sharing. Many of these initiatives must also be driven by a community or fishers, which is problematic if we consider that

many fishers may not have the knowledge or means to initiate these processes. The provisions on verification in the SSF Regulations are also an unfortunate narrowing of the SSF Policy provision requiring NGOs to assist in this process, given the current shortage of staff and resources in the DEFF (PCEFF 2020c; PCEFF 2019b). Thus, while the current regulatory framework has some good provisions that may assist in preventing elite capture, it could certainly go further in helping to prevent this practice.

### **5.5 Narrow Eligibility Conditions**

The current regulatory regime puts up a number of barriers to the devolution of fishing rights to small-scale fishers. Stringent requirements regarding age, community, nationality, fishing practices and so on serve not only to exclude many vulnerable small-scale fishers from obtaining fishing rights, but also reflect that the balance of power and interest in the fishing sector remains with the large commercial and recreational sectors. Indeed, the Policy mentions in its section on value chains and alternative livelihoods that while support will be provided to small-scale fishers to improve their productivity and incomes, the commercial sector must also continue to grow (DAFF 2012: 6). The large recreational sector, on the other hand, is poorly regulated and managed and these fishers have very few restrictions placed upon them (PCEFF 2020c; Sunde and Erwin 2020: 23-24).

This makes little sense. In the first place, resources are already strained and there is scarcely room for growth, particularly in large commercial fishing which already sees highly competitive quota processes for limited resources. Secondly, the longstanding inequities in the fishing sector and acknowledged contribution of small-scale fisheries to poverty reduction and development suggest that small-scale fisheries should be prioritised over large commercial and recreational fisheries. In particular, the recreational sector remaining largely unregulated while small-scale fisheries are strictly controlled is a clear demonstration of the inequity and inequality that continue to plague the sector.

Naturally, there must be restrictions for sustainability purposes. Inshore resources in particular have been heavily depleted by poaching and overfishing, and allowing further overfishing is not the answer. Nevertheless, the framework largely approaches the small-scale sector as one to be strictly managed, rather than adopting a flexible approach which works with small-scale fishers to address poverty reduction and vulnerability concerns. It acknowledges the problems and opportunities inherent in the sector, but does not address them through concrete policy and regulation. It gives rights to communities while taking them away from individual small-scale fishers. It acknowledges some vulnerable groups and not others, while doing very little for any of them. In short, it is a framework that largely retains the status quo in regard to the large and powerful commercial fishing industry and fishing unions, thus overlooking the vital contribution of small-scale fisheries to poverty prevention and development. As noted by Sunde and Erwin (2020: 46): ‘The needs of subsistence fishers have had to be accommodated in the very limited space on the periphery of the commercial and recreational sector.’

This is a form of exclusion and marginalisation that exacerbates the vulnerability of small-scale fishers, and must be addressed if the framework is to make a meaningful contribution to poverty reduction in small-scale fisheries. This is especially important when we consider that commercial fishing is more capital intensive than small-scale fishing, that there are tens of thousands of small-scale fishers and over a hundred fishing communities along South Africa’s 3000 kilometres of coastline (Branch et al. 2002: 440; Clark et al. 2002: 428),<sup>19</sup> that employment in commercial fisheries, while it does generally pay better than

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<sup>19</sup> This is likely an underestimate, however (Sowman et al. 2014: 33).

small-scale fishing, is usually not a year-round occupation,<sup>20</sup> and that the small-scale fisheries sector creates livelihoods not only for fishers but all those involved in pre- and post-harvesting, marketing, and selling of the fish. Thus, while large commercial fisheries and recreational fisheries (through tourism) do make economic and social contributions, these are not nearly as extensive as those of small-scale fisheries.

Depriving fishers from accessing the sea further denies their Constitutional rights to access to food and livelihood (Constitution of the Republic of South Africa. 1996: ss22 and 27). For many fishers, fishing is a longstanding tradition which has shaped their culture and identity (Sunde and Erwin 2020), and denying access is also a violation of their Constitutional rights to culture and religion (Constitution of the Republic of South Africa. 1996: ss30 and 31). These rights may be limited by a law of general application (Constitution of the Republic of South Africa. 1996: s 36), taking into account factors such as stock depletion and environmental concerns and balancing competing interests. However, it is difficult to imagine how such a limitation could be considered reasonable and justifiable while the commercial and recreational fishing sectors continue to be prioritised and unregulated, and even to grow.

## **6. Analysis and Recommendations**

The rollout of fishing rights and the creation of cooperatives during the last few years have highlighted that the current regulatory framework falls short in a number of respects in functioning as a poverty reduction and development mechanism in the small-scale sector. To address these problems, the framework must pay more attention to reducing the vulnerability and social exclusion faced by so many in the sector, which can be achieved through certain key amendments that more accurately reflect the lived realities of small-scale fisheries.

### *Reducing Vulnerability through Diversification of Livelihoods*

In line with the poverty-vulnerability-marginalisation framework, it is imperative that the rights allocation process recognise the livelihood diversification strategies currently used by many small-scale fishers. Instead of requiring that small-scale fishers must obtain the majority of their livelihood from fishing, a narrative that recognises current realities should be adopted. The reliance on fishing for food security and livelihood (i.e., the conditions of poverty and vulnerability) should be sufficient grounds to obtain fishing rights. Under this approach, fishers and fishing households that use these resources as an important means of survival but derive the majority of their livelihood from, for example, social grants or labouring, would not be excluded from obtaining fishing rights.

This would also clear the way for alternative livelihood creation. However, it is necessary that projects are adopted in line with what is possible and what will be most effective. In this regard, projects should be adapted to particular areas and communities, and there should be a focus on developing value chains and alternative livelihoods in consultation with these communities. Local fishers must also be involved in the creation and planning of such projects, and this participatory element of alternative livelihood creation can and should be included in current laws and policies governing the small-scale sector. This will ensure that

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<sup>20</sup> Large commercial fishing enterprises often target a limited number of species or use only one type of fishing method. This, coupled with the much higher catch volumes these boats are able to produce, means that they are unable to fish year-round because of issues such as seasonal migrations and catch and effort limits (including quota limits, closed seasons and so on). Clark et al have noted that in certain fisheries this can leave crews unemployed for up to ten months of the year (Clark et al. 2002: 434).

the regulatory framework works with, rather than against, fishers to reduce poverty and vulnerability in the sector.

### *Subsistence and Consumption Exemptions*

In South Africa's northern neighbour, Mozambique, there is a general subsistence exemption for citizens, whereby all may take what they need from the sea for personal use without a permit (Johnstone and Johnstone 2014: 130). It is unlikely that such an exemption would be possible in South Africa, which has developed its fishing fleet so as to be able to fully fish its own exclusive economic zone. In addition, this approach has put stress on coastal resources in Mozambique (Béné et al. 2010: 335). However, the possibility of a consumption or subsistence *permit* remains, and this should be provided for in the current regulatory framework.

The main drawback of a consumption permit is that it is too limiting for those small-scale fishers who trade or sell their catch, or part thereof, for subsistence purposes. Thus, while there are some who would make use of a consumption permit, it would be a poor alternative to a commercial right under a cooperative for those fishers left out of the community allocation process. Instead, what is needed is a dedicated subsistence permit that allows individual small-scale fishers to catch, trade and sell limited amounts of fish. As in the current laws governing small-scale fisheries, such permits would likely need to cover a basket of fish species (DAFF 2012: 36-37; DAFF 2016a: regs 1 and 6), which would vary depending on the area in which the fishing is to take place and, to prevent 'armchair fishers'<sup>21</sup> and capture of the process, the permit would need to be non-transferable. The fees for obtaining such a permit should also be minimal or waived.

It is suggested that a separate consumption permit should also be considered, which would essentially be a replacement for the recreational permit for those fishing solely for consumption, but which would take precedence over the recreational permit and be recognised as a consumption permit as such. This would obviate the sort of problems seen during the lockdown should similar regulations restricting movement be promulgated in the future, and provide much needed recognition that these fishers use such permits for survival rather than recreation.

A consumption permit, with its small allocation of fish, would entail a simplified application procedure, along the lines of applying for a recreational permit. A subsistence permit would likely require more. However, should a subsistence permit be made available, it is vital that the procedure to apply for this permit not be unnecessarily complicated or technical, and that both information and assistance are provided to small-scale fishers, as is required for the creation of cooperatives under current laws. Something akin to community paralegals<sup>22</sup> might be utilised to assist these fishers in understanding and completing permit applications, and ensuring that those applying for a subsistence permit are, indeed, bona fide fishers. Although the DEFF is chronically understaffed, there is the potential for the department to work with NGOs and other organisations to broaden their reach in this regard, as noted in the SSF Policy in regard to registration of fishers. Greater use of simple technology, such as software applications for mobile phones, can also be an important means of improving access for small-scale fishers, many of whom may find it difficult to travel long distances to make permit applications, or access technology like desktop and laptop

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<sup>21</sup> Fishers who are unable or unwilling to exercise their fishing rights and instead transfer these to companies.

<sup>22</sup> Community paralegal programmes are used in many parts of the world to advise citizens on the law and help them gain access to justice. Functions of community paralegals include assisting with advocacy, acting as mediators, investigating incidents, and educating people on the law and their rights.



computers, printers and scanners. This would accord with the SSF Policy's recognition of the benefits of technology within the small-scale sector.

### *Better Provision for Marginalised Groups*

Stronger procedures need to be put in place within the current regulatory framework to uplift marginalised groups and ensure that they are allocated both fishing rights and a seat at the table when it comes to decision-making that affects them. In order to do so, laws put in place to govern cooperative leadership, co-management, and rights allocation must be clear and unequivocal about the need to promote marginalised fishers and the types of initiatives that could assist in this regard.

Although marginalisation is not always based on defined groups, the broad definition of vulnerable groups in the SSF Policy would be a useful starting point to determine who would benefit from these types of initiatives and to consider where intervention could be beneficial. Such interventions could relate to programmes that focus on activities primarily undertaken by women,<sup>23</sup> or assist in the creation of specialised cooperatives (e.g. a cooperative for fish processors).<sup>24</sup> Educational initiatives are also crucial, and could include assistance with value chain development, fishing techniques, and sustainable harvesting practices. Furthermore, provisions setting out initiatives for traditionally marginalised groups in the current regulatory framework should use mandatory language (where feasible), and more provisions reflecting those aspects of the SSF Policy that deal with marginalised groups should be included in the MLRA and SSF Regulations.

Consultation with affected groups is also vital, and stronger consultation provisions should be included in the current regulatory framework. This includes not only consultation prior to taking actions that are potentially damaging to livelihoods, but also consultation to ensure that development interventions designed to reduce vulnerability and marginalisation will be appropriate and effective and have the commitment of the groups they are attempting to assist. The development of partnerships, creation of social impact studies, and reliance on social indicators may also be necessary when designating MPAs or taking other decisions that could adversely affect fishers and fishing communities, including general conservation measures, marine spatial planning, and infrastructure creation. Without taking these steps, initiatives to uplift these groups may be vague, ineffective, inappropriate, or even harmful, as demonstrated. Thus, a requirement to implement these types of measures should be included in the regulatory framework to better facilitate their adoption.

### *Preventing Elite Capture by Addressing Marginalisation*

An important factor in allowing for elite capture of fishing rights is the lack of alternatives to the community approach in the current regulatory framework. One way to get around this is to have an option to obtain an individual subsistence permit, provided such permit is non-transferable. For many fishers, however, community living and communal fishing is their way of life. Alternatively, fishers may wish to be part of a fishing community to gain access to certain fishing grounds or other benefits of a community entity. In this type of case the exclusion of fishers from, or lack of a voice in, the rights allocation process is highly problematic. Thus, the laws governing rights allocation should be robust enough to ensure that this does not occur – they must facilitate engagement with fishing communities and fishers, the provision of

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<sup>23</sup> These contributions sit both within and without the fisheries value chain, and are often not recognised in policies and laws governing the sector (Sowman et al. 2014: 40; Sunde 2010: 13).

<sup>24</sup> Lentisco and Lee (2015: 19-20) provide several examples of how this type of organising can empower and support vulnerable groups.

information in understandable formats, and adequate assistance and training to set up and run cooperatives. There should also be stronger, clearer procedures put in place to uplift historically marginalised groups, as well as consultation with these groups, as discussed.

It is also vital that there is close scrutiny of the process and involvement of fishing communities in rights allocation, not simply self-styled ‘community representatives’.<sup>25</sup> Engaging with communities in a meaningful way can help to determine who is actually involved in fishing, who the community would like to represent them, and what needs to be done to ensure that fishers are able to manage cooperatives effectively – in terms of literacy skills, business training and sustainable management of resources. In order to engage fishers in this process, government should provide information directly to fishers in their own language and potentially orally (through the radio, television, or mobile technology<sup>26</sup>), hold community meetings,<sup>27</sup> and provide simplified and inexpensive procedures through which to access government institutions – particularly in regard to permit applications.

In order to fulfil these obligations, it is important that the regulatory framework allow for the limitations of government entities. While not requiring that decision-making powers be devolved to non-government entities, there are a number of civil society organisations and fisher forums in South Africa that work directly with small-scale fishers and fishing communities and could be an invaluable source of assistance in providing information and training, and helping with registration procedures. While the SSF Policy allowed for NGOs to assist in the context of registration, the SSF Regulations do not and this is a significant obstacle to the DEFF fulfilling its requirements under the current regulatory framework.

#### *Expanding Eligibility Criteria for Fishing Rights*

The rights allocation process will not be effective at reducing poverty and vulnerability in small-scale fisheries until the regulatory framework not only addresses marginalisation and vulnerability in specific provisions, but also acknowledges its greater marginalisation problem. In creating stringent eligibility criteria for rights allocation and ignoring the lived realities of small-scale fishers, the framework excludes many small-scale fishers from practicing their traditional livelihoods. This exacerbates the food insecurity, poverty and vulnerability of these fishers, and foments illegal activity and social instability.

Clearly a more equitable distribution of fishing rights within the fisheries industry is required. Apart from the specific policy amendments suggested, a broadening of the eligibility conditions for fishing rights and greater flexibility within the framework, and particularly in the SSF regulations, is necessary. This could include removing restrictive conditions that affect youth, immigrants, individual fishers, and so on, or at least providing for greater flexibility in applying these conditions. Whatever is decided, it is imperative

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<sup>25</sup> As Schultz notes ‘(t)he ability of constituents (whether fishers or non-fishers) to engage with government officials and other external actors can easily be compromised by the opaque mediation of community-based ‘broker-representatives’, who distort the communication of information between constituents and external actors’ (Schultz 2017: 18).

<sup>26</sup> These mechanisms are seen as an important means of disseminating information to small-scale fishers and fishing communities, particularly as ICTs become more widespread (Morgera and Ntona 2018: 296-297; Jiyane and Fairer-Wessels 2012: 22-23 and 31-32).

<sup>27</sup> It is important that all interested community members are invited to these meetings, however. Studies have shown the exclusion of women and bona fide fishers from ‘community’ meetings in the past (Jiyane and Fairer-Wessels 2012: 29; Schultz 2017: 13-17).

that fishers representing different provinces, areas and communities be not only included in this process, but drive the discourse.

Amendments to the eligibility conditions may mean reduction in quota allocations in the large commercial sector and improved regulation of the recreational sector, to ensure that the sustainability of fish stocks is not compromised. However, it is very clear that rights allocations should never have been skewed as far as they have been in favour of these sectors. There should always have been a better balance, given the long history of small-scale fishing in South Africa and the ability for small-scale fisheries to create livelihoods and improve food security for many of the poorest people in the country. The Minister's recent pronouncements on the allocation of more species and higher catch percentages to the small-scale sector indicates recognition of this disparity and some attempts to rectify it. This should also be reflected in the current regulatory framework, and vulnerability and marginalisation problems addressed, if these initiatives are to work effectively.

## **7. Conclusion**

The creation of the SSF Policy in 2012 was an important step in recognising the small-scale fisheries sector in South Africa, its challenges and opportunities, and its contribution to livelihoods and food security. Yet, while the regulatory framework governing the sector has succeeded in some respects, it has fallen short in others. There is no doubt that the framework requires some revision to address vulnerability and marginalisation effectively in small-scale fisheries. Without addressing these problems, many in the sector will not be able to access fishing rights or other benefits that could contribute to their development.

This article has sought to identify key areas in which amendments to the framework could be made to better provide for the sector, including recognising alternative livelihoods and individual subsistence fishers in rights allocation, preventing elite capture, better provision for marginalised groups, and expanding the eligibility criteria to accommodate the sector as a whole. These suggestions also seek to improve the flexibility and adaptability of the framework, in order in order to accommodate the changing landscape and diverse nature of small-scale fisheries in South Africa.

**Conflict of Interest Statement**

On behalf of all authors, the corresponding author states that there is no conflict of interest.

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