

# Securing Rights

## Policies and legislation need to be put in place to secure the rights of fishing communities to their territories

In South Africa, on 22 May 2012—International Day for Biological Diversity—three members of a traditional fishing community who had been charged with the intention to fish within the Dwesa-Cwebe marine protected area (MPA) were found guilty by a magistrate (see article on page 4). The fishers had argued that they have a customary right to fish in the MPA as it comprised their ancestral lands. The magistrate noted the protection provided by the South African Constitution to the freedom and rights to land and unrestricted practice of their customs by ordinary citizens. However, as it was not within his powers as a magistrate to pass judgment on the constitutional validity of the Marine Living Resources Act (MLRA), under which the MPA was declared, he ruled the fishermen guilty, noting, however, that the constitutional validity of the MLRA was highly debatable.

The fishers will now challenge the MLRA in the High Court on the basis that as traditional fishers with a customary system of law they have a constitutionally protected customary right to access the marine resource in question.

In Indonesia, on 16 June 2011 the Constitutional Court annulled the Hak Pengusahaan Perairan Pesisir (HP3 or coastal water concessions) provision contained in the Management of Coastal Areas and Small Islands Act, 2007 (No. 27), based on a petition by a civil society coalition, the Reject HP3 Coalition (see article on page 22). The HP3 provision allowed for issuing concessions for undertaking business such as aquaculture and mining in coastal areas up to 12 nautical miles from the coastline, covering the sea surface and water column down to the sea bed, through issue of 20-year leases, renewable for a total period of 60 years. The court declared the HP3 provision to be inconsistent with the Constitution, given the constitutional requirement that the State's control over land, waters and natural resources should be to promote "the greatest welfare and prosperity of the people". The court was of the view that the HP3 provision would promote privatization and compromise the rights of the people, including fishing and other traditional communities, to benefit from natural resources from generation to generation.

In both cases, the courts upheld the claims of fishing communities. While the South African case is one of restitution of customary rights based on the

post-apartheid constitution that treats statutory and customary law as equal, the Indonesian case is one of preventing dispossession of the rights of traditional communities and customary law communities based on the 1945 constitution.

Both these cases raise questions about the extent to which legislation on fisheries and coastal area management are in conformity with provisions that protect customary rights and other social, economic and cultural rights of local communities, including fishing communities, particularly in national constitutions and international and national human-rights law.

These questions are extremely valid today. Across the world, fishing communities are being displaced or are being threatened with displacement from their 'territories' to make way for, among other things, tourism, oil and gas exploration, large-scale infrastructure projects, and exclusionary forms of conservation, in violation of their rights.

No wonder that actions by fishing communities in defence of their territories is gaining ground in several countries. Such actions may

take the form of legal challenges, as in South Africa and Indonesia. They may also take the form of proactive campaigns seeking specific legal recognition of the rights of fishing communities to their territories (see article about Brazil on page 8).

Even as fishing communities and their organizations embark on such actions, States and other relevant bodies need to pay heed to the imperative to align policies and legislation on fisheries and related issues with constitutional provisions that protect the rights of fishing communities, and other relevant human-rights obligations. Where constitutions do not have adequate provisions to protect the rights of indigenous and local, as well as fishing, communities to their territories, they should be amended. Policies and legislation that secure the rights of fishing communities to their territories—also essential for enabling fishing communities to contribute to social, economic, environmental and food security goals in the long term—need to be put in place.

It is to be hoped that the international guidelines for securing sustainable small-scale fisheries (see article on page 35), currently being developed by the Food and Agriculture Organization of the United Nations (FAO), will provide an impetus to such processes.

