

# RECOGNITION OF CUSTOMARY FISHING RIGHTS IN SOUTH AFRICAN FISHERIES LAW: LESSONS FROM NEW ZEALAND

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**Abstract:** At present, the South African fisheries legal framework classifies customary fishing communities as merely small-scale fishing communities. Notwithstanding, indigenous communities in South Africa have harvested marine resources and relied on the ocean for generations to sustain their traditional livelihoods and culture. It is argued that, the current legal framework governing fishing rights in South Africa, namely the Marine Living Resources Act of 1998, should especially recognise customary fishing rights of indigenous fishing communities as a *sui generis* fishing right in accordance with the Constitution of the Republic of South Africa, 1996, (Constitution,1966) which confers equal status on customary law as a system of law. This paper investigates the legal framework and key judicial rulings of New Zealand where advancements in the recognition and protection of customary fishing rights have been achieved such as the controversial Foreshore and Seabed Act, 2004 to the more recent the Marine and Coastal Area (Takutai Moana) Act, 2011 including case law such as *Ngati Apa v Attorney General*; *Te Weehi v Regional Fisheries Officer* and the 2021 judgement of *In Re Edwards (Te Whakatōhea No 2)*. Such an analysis is undertaken in line with the directive made in terms of section 39(1)(c) of the Constitution, 1996. It is submitted that New Zealand's approach to recognising customary fishing rights is an example of the best practice that can be achieved when a government concretely undertakes to advance customary fishing rights and empower indigenous fishing communities. The main recommendation is for South Africa to amend its Marine Living Resources Act to similarly give proper recognition to customary fishing rights of indigenous communities and restore the communities' access to marine resources.

Keywords: indigenous fishing, customary fishing rights, Māori fishing rights, small-scale fisheries, customary fishing communities, fisheries legislation

## 1. Introduction

The South African coastline covers over 3 000 kilometers in four coastal provinces (Northern Cape, Eastern Cape, Western Cape and Kwa-Zulu Natal), yielding profits for the industrial fishing industry and sustaining communities' livelihoods (Rice *et al*, 2017; Cochrane *et al*, 2014). Heritage-rich fishing communities reside along these coastal areas of South Africa (Policy for the Small Scale Fisheries Sector in South Africa, 2012; Paterson *et al*, 2014). The cultural and traditional practices of these coastal communities are diverse and are distinct from one another (Sowman *et al*, 2014; Paterson *et al*, 2014). However, the practice of fishing and the value of the ocean is commonplace (*Coastal Links Langebaan*

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*v Minister of Agriculture, Forestry and Fisheries* [2016] ZAWCHC 150; [2017] 2 All SA 46 (WCC), 2017; Sowman *et al*, 2014; Paterson *et al*, 2014). An overview of their fishing history confirms this.

Indigenous fishing communities in South Africa have been fishing for generations (Branch *et al*, 2002; Thompson, 1913). According to archaeological findings (Gribble, 2005; 2006; Hine *et al*, 2010), traces of marine activity along the Eastern Cape, Southern Cape and Western Cape coastline show that indigenous communities were involved in early marine resource usage (Marean *et al*, 2007; Niespolo *et al*, 2021). The Eastern Cape coastal region was later inhabited by the amaXhosa and amaMpondo, who were also involved in fishing and used marine resources for other cultural practices (Sunde, 2014; Cardoso *et al*, 2005). The Khoisan were also found to be actively involved in fishing and dependent on marine resources along the Cape shores (Sunde, 2014; Van Zyl, 2007). They were the first indigenous community encountered by the Dutch, who noted the dexterity of the fishing techniques employed by the indigenous fishers (Thompson, 1913; Boezak, 2017). Further research shows that fishing communities in the Western Cape evolved distinctive customary fishing practices and associated cultural identities (Sowman *et al*, 2013; Sunde, 2016). Along the coast of Northern KwaZulu-Natal, extensive archaeological and ethnographic evidence indicates fishing was an essential activity in the lives of the Tsonga people of the Kosi Bay region (Cockcroft *et al*, 2002; Kyle, 2013). Unlike other coastal regions, the Kosi Bay communities have maintained a long-standing co-management relationship with local authorities to manage the fishing resources (Paterson *et al*, 2014).

Although fishing has been a historical custom and expression of these communities' culture, it is trite that these indigenous coastal fishing communities have suffered continuous marginalisation and have often been criminalised at the behest of South Africa's past and present governmental regimes (Sowman *et al*, 2014; Martin & Raakjaer-Nielsen, 1997).

## **2. The gap in South African fisheries law**

In South Africa, the common fishing categories are: commercial, foreign, recreational and small-scale fishing (Marine Living Resources Act 18 of 1998). Although traditional or customary fishing is not independently classified in the MLRA, indigenous communities represent a distinct category of fisher. These communities are frequently associated with and defined as artisanal, subsistence or small-scale fishers (Branch *et al*, 2002), and these terms are often used interchangeably and can overlap with indigenous fishing communities (Branch *et al*, 2002; Allen, 2019). Researchers characterise subsistence fishing as non-commercial and non-recreational fishing with the following features:

- a) local;
- b) customary, traditional or cultural (and often associated with indigenous or aboriginal peoples);
- c) undertaken for personal or family use;

- d) primarily for nutritional needs;
- e) based on minimal technology; and
- f) undertaken by people with low cash incomes (Branch *et al.*, 2002).

Although the terms “artisanal fishers”, “subsistence” and “small-scale fishers” are used interchangeably, the following differences among them have been identified:

- a) Subsistence fishers are regarded as poor (Branch, May, *et al.*, 2002) people with a long association with fishing for personal consumption (Branch *et al.*, 2002).
- b) Artisanal fishers are defined as poor people with historical cultural (Sunde,2014) involvement, fishing primarily for the sale of their catches instead of personal consumption (Branch *et al.*, 2002).
- c) Small-scale fishers are described as people who harvest marine resources for “consumption, livelihoods, and medicinal purposes and as part of cultural and spiritual practices”(Sowman *et al.*, 2014).

In view of these classifications, it is apparent that customary fishing rights are not properly defined or recognised in any of these three known categories associated with indigenous fishing communities. In South Africa, the custom of fishing is an inherent feature of the culture of many coastal communities (Sowman & Sunde, 2018). It is submitted that, without properly recognising customary fishing rights as an independently defined class of rights, distinguishing it from the aforesaid categories, it will remain unclear how many of these recorded 300 fishing communities are indeed customary fishers (Kyle, 2003). Thus, there is uncertainty regarding customary fishing rights in South Africa due to a this gap in the law, which has been further highlighted in various judicial decisions, which has brought the quandary of traditional fishing rights of coastal communities in South Africa into focus (*Gongqose v Minister of Agriculture, Forestry and Fisheries; Gongqose v S 2018 (5) SA 104 (SCA)*, 2018).

### **3. New Zealand as exemplar**

In this paper, the laws, policies and key judgments of New Zealand are examined to identify the lessons which South Africa can learn from New Zealand where customary fishing rights are legally recognised and protected. Such an analysis is undertaken in line with the directive made in terms of section 39(1)(c) of the Constitution of the Republic of South Africa, 1996. This directive provides that courts may consider foreign law when interpreting the Bill of Rights in South Africa (du Bois and Visser, 2003). Under the Constitution, the influence of foreign law is explicitly framed differently from its international-law counterpart in the preceding provision, therefore limiting its impact to being of persuasive value only (Rautenbach, 2015). The interpretation clause in section 39(1) permits the use of foreign law when interpreting the Bill of Rights by providing that:

“When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.”(Constitution, 1996)

Thus, consulting foreign legal systems is commonplace in the South African judicial decision-making process for purposes of developing South African law. This is done in particular, though not exclusively, with comparable jurisdictions with which South Africa may share some legal history (du Bois & Visser, 2003).

New Zealand has arguably set the benchmark in the advancement of customary fishing rights (Jackson, 2013). It is submitted that New Zealand’s approach to recognising customary fishing rights serves as an example of the best practice that can be achieved when a government concretely undertakes to advance customary fishing rights and empower indigenous fishing communities. The ensuing discussion below provides the historical background to and important subsequent developments in achieving legal recognition for Māori customary fishing rights.

#### **4. New Zealand – Historical Overview**

The indigenous people of New Zealand are the Māori. The sea and fishing are central and traditional elements of Māori tenets and culture (Simmons *et al*, 2015; Jackson, 2013). In the early periods, the Māori were essentially involved in fishing for subsistence purposes. Since they were a relatively small community, their fishing activities did not adversely impact marine stocks (Simmons *et al*, 2015; Jackson, 2013). The Māori were highly skilled fishermen with specialist knowledge of the sea and marine species. The sizeable enterprise of their fisheries was evidence of this fact(Simmons *et al*, 2015; Jackson, 2013). The Māori fishing competencies and aptitude were even recognised by the British colonialists as superior to their own abilities (Simmons *et al*, 2015; Jackson, 2013).

When the colonial powers arrived in New Zealand, Māori fishing activities and practices were governed according to their customs and rules, which had to be strictly observed by the community. These involved the following (Simmons *et al*, 2015; Jackson, 2013):

- defining fishing and ownership rights and demarcating each inshore sub-tribe boundary;
- conservation of habitats and breeding grounds for preservation for future generations;
- prohibition of discard of fishing offal, small fish and any unused bait and littering at sea.

These traditional customary rules and measures were established to maintain and conserve the sustainability of the fisheries resource for future generations. Members of the Māori community who transgressed these rules were subject to sanction by having their property and canoes confiscated and

destroyed. Persons outside of the Māori community were equally liable to sanction for transgressing these customary rules (Simmons *et al*, 2015; Jackson, 2013).

On 6 February 1840, the British and Māori leadership signed the Treaty of Waitangi (Mylonas-Widdall, 1988), in which Māori fishing rights were guaranteed (Jackson, 2013). This agreement existed in two languages, namely English and Māori (Jackson, 2013). The two texts differed, however, notably in the provisions pertaining *inter alia* to Māori fishing rights (Jackson, 2013). The two versions of the agreement are not a direct translation of each other (Jackson, 2013). The Crown recognised the English version of the treaty as the founding document of New Zealand as a nation, whereas the indigenous Māori people accepted the version in the Māori language (Jackson, 2013; Bess, 2001). The disparities between the two versions of the agreement are evident in two of the three articles (Jackson, 2013; Bess, 2001). For example, Article 2 of the agreement differed significantly between the two versions. Article 2 of the Māori version stipulated that Māori chiefs would retain and maintain ultimate power and control over their lands, villages, and all treasured possessions (Jackson, 2013; Bess, 2001). In the English version, the Crown guaranteed the Māori full, exclusive, and undisturbed possession of their lands, estates, forests, and fisheries, as well as other dominions that they may own communally or individually, subject to a right of pre-emption in favour of the Crown (Jackson, 2013; Bess, 2001). Insofar as the rights of Māori fisheries are protected as part of the broad category referred to in Article 2, the following view has been expressed:

“In the second article of the *Tiriti o Waitangi*, there is no specific mention of fisheries, but the word *taonga* is accepted as encompassing fisheries. Comparatively, in the second article of the Treaty of Waitangi, fisheries are specifically mentioned and Māori were guaranteed the ‘full exclusive and undisturbed possession of their land, forests estates and fisheries’. The definition of fisheries from the Report of the Waitangi Tribunal on the *Muriwhenua* Fishing Claim and similarly accepted by the *Ngai Tahu* Sea Fisheries Report was given as “the activity and business of fishing and that must necessarily include the fish that they [Māori] caught, the places where they caught them, and the right to fish”. It was not restricted to only specific fishing grounds and was developed further in the *Ngai Tahu* Sea Fisheries Report, which stated that ‘*tino rangatiratanga* in relation to fisheries encompasses much more than simply fishing grounds.’” (Jackson, 2013, footnotes omitted)

In view of the above, it is unequivocal that the guarantees stipulated in the 1840 Treaty were, at best, empty promises, as they remained unfulfilled. The Māori land ownership was reduced to three million acres from the estimated 66 million acres that they held before agreeing to the treaty (Bess, 2001). The Māori’s fishing enterprise was equally decimated, with a mere 1 800 Māori remaining in the fishing industry and an even smaller number owning fishing vessels and licences, as most Māori worked as labourers (Bess, 2001).

## 5. The legal framework before 1983

During this period, a series of legal developments have undermined the Māori fishing enterprise and effectively terminated the Māori's authority over New Zealand's fisheries (Simmons *et al*, 2015). The Oyster Fisheries Act of 1866, regulating the management of New Zealand's fisheries, was the first statute allowing non-Māori to lease Māori oyster beds (Simmons *et al*, 2015). The Fish Protection Act followed in 1877 – a comprehensive piece of legislation regulating both sea and freshwater fisheries of the New Zealand fisheries industry (Simmons *et al*, 2015).

The passing of these laws essentially reduced the successful Māori commercial fishing enterprise to subsistence fishing. In addition, in 1877, the New Zealand Supreme Court held:

“Māori customary law was merely the habit of an uncivilised people and did not constitute law as understood by the English legal system and thus Māori ‘rights could not be recognised unless specifically incorporated into legislation.” (*Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 1877)

In *Wi Parata*, the court held that the common-law native-customary-title rule was not applicable to Māori customary rights and claims and, as such, did not survive colonial annexation (see discussion of this in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), 2003). That court deemed the Māori people to lack the necessary “social organisation” on the basis of which their customs could be recognised by a new legal order (*Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA)). Accordingly, the court accepted that the Crown government did its duty to the indigenous community and, therefore, it could not interfere with the government's actions on the matter (*Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA)).

The inclusion of Māori customary interest has historically featured in a number of earlier statutes (New Zealand Parliamentary Background Note, 2003). In addition to the earlier-mentioned legislative recognition of Māori fishing rights, statutory recognition of the Māori fishing rights was referenced in the relevant part of other Acts such as the Fish Protection Act 1877, the Sea-Fisheries Amendment Act 1903, the Fisheries Act 1908, and the Fisheries Act 1983, respectively (Jackson, 2013). Section 8 of the Fish Protection Act 1877 effectively gave statutory recognition to the provisions of the treaty and provided:

“Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.”

However, the Act was contradictory, as it gave permission for the public to exploit the fisheries but was silent on how those public access rights would be balanced with Māori fishing rights (Jackson, 2013).

In 1894, the Fish Protection Act 1877 was replaced by the Sea-Fisheries Act. The 1894 Act, to the extent that it related to sea fisheries, repealed section 8 of the 1877 Act. In 1904, a subsequent amendment to the 1903 Sea-Fisheries Amendment Act referred to Māori fishing rights but did not mirror the statutory recognition contained in section 8 of the repealed Fish Protection Act (S 14 of the Sea Fisheries Amendment Act, 1903).

In 1908, the promulgation of the Fisheries Act established the regulatory framework of the fishing industry as a whole, as it included provisions for sea fisheries and freshwater fisheries. Similar to its predecessors, this Act also broadly referred to Māori fishing rights, providing that nothing in the Act will impact Māori fishing rights as they relate to sea fisheries (S77(2) of the Fisheries Act, 1908). Despite this broad recognition and protection of Māori customary fishing rights, other provisions in the Act limited the customary fishing rights of the Māori (S17 of the Fisheries Act, 1908). These inadequacies rendered the law meaningless and meant that:

“[t]he statutory provisions protecting Māori customary fishing-rights were worthless without the conjoint ability to self-define the nature of the right. Instead the right was left to be misinterpreted by faceless bureaucrats or a biased judiciary.” (Hooper & Lynch, 1999)

This was the prevailing statutory scheme until its repeal in 1983.

## **6. The legal framework after 1983**

In 1983, New Zealand’s fisheries regulation and management underwent reform aimed at conserving the fisheries industry and resources within New Zealand and its waters (Jackson, 2013). The Fisheries Act, 1983 also included a blanket statement that nothing in the scheme of the Act would affect any Māori fishing rights (S88 (2) of the Fisheries Act, 1983). These isolated legislative provisions referencing Māori fishing rights notwithstanding, the provisions were neither enforced nor did they yield any tangible benefit for the Māori (Jackson, 2013; Bess, 2001). The failure to recognise Māori fisheries in any of the legislative frameworks rendered these few statutory provisions ineffective (Jackson, 2013; Bess, 2001).

In the Muriwhenua report (Bess, 2001), the Waitangi Tribunal found that these legislative provisions:

“were general words, making no specific provision for the protection or advancement of Māori fishing interests, and leaving it very much to the administrators to make of them what they would. Not unexpectedly, that task fell also to the courts.” (Bess, 2001)

Notwithstanding the widespread discrimination and deprivation of their customary fishing rights, by pursuing litigation, the Māori continued to assert and protect their rights under the Treaty of Waitangi, the doctrine of native title, and legislation referencing Māori rights. For the first time in 1986, the New Zealand High Court finally recognised Māori customary (or traditional) fishing rights in the *Te Weehi* matter (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680). The court found that customary

rights were indeed protected by the doctrine of native title, as they had not been extinguished by statute. This was a decisive moment in how the Māori exercised their fishing rights.

In *Te Weehi v Regional Fisheries Officer*, the appellant was charged and convicted in the District Court for catching undersized shellfish and pāua (abalone) contrary to the Fisheries Act; he appealed his conviction (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Hersoug, 2000). The appellant was harvesting on the Motunau beach, on the South Island coastline of New Zealand, which had designated fishing grounds where members of the Ngāi Tahu tribe could fish for personal subsistence (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Hersoug, 2000). The customary fishing rights claimed concerned the foreshore in the intertidal zone, which is the area between the high and low water mark up to 12 nautical miles (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Erueti, 2005; Siewers, 2004). The court considered the meaning of section 88(2) of the 1983 Fisheries Act, which provided that “[n]othing in this Act shall affect any Māori fishing rights” (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Hersoug, 2000). The court thus had to interpret the meaning of the phrase “Māori fishing rights”, as stated in the section, and had to determine whether the appellant, who was a Māori fisherman, was exercising a Māori customary fishing right, rendering his conduct lawful.

The expert evidence was presented by a Māori leader and scholar, who confirmed that a Māori customary fishing right belonged to specific tribes to take fish in the specified area in which the tribe lived (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Mylonas-Widdall, 1988). The court, per Williamson J, found in favour of the appellant and held that he had indeed been exercising a Māori customary fishing right as contemplated in section 88(2) of the Fisheries Act, 1983 (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Mylonas-Widdall, 1988). The court accepted that the customary fishing rights of the Māori existed before British colonisation and continued to exist after the colonial takeover (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Mylonas-Widdall, 1988).

This case is significant because it concretised customary-rights claims of the indigenous people of New Zealand, and confirmed that their customary rights were recognised but not awarded to them in the Treaty of Waitangi (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Mylonas-Widdall, 1988; Jackson, 2013). The treaty was of no law-making effect but confirmed the existing rights of the Māori people under Māori customary law, which could only be changed by legislation or by the voluntary surrender of their rights (*Te Weehi v Regional Fisheries Officer* (1986)1 NZLR 680; Mylonas-Widdall, 1988; Jackson, 2013). From this decision, further legal developments both in court and statute continued to recognise and protect Māori customary rights, in particular, their customary right to fish.

The interim settlement of Māori fisheries claims before the Waitangi Tribunal led to the promulgation of the Māori Fisheries Act, 1989. In terms of the long title, this Act aimed:

“(a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing; and (c) To make better provision for the conservation and management of the rock lobster fishery.”

Furthermore, Part 1 of the Māori Fisheries Act 1989 established the Māori Fisheries Commission. Part 2 outlined amendments to the Fisheries Act 1983 with regard to rock lobster. Part 3A introduced a new mechanism for non-commercial fisheries – *taiāpure* (Hersoug, 2000).

The Crown government was required to transfer to the Māori Fisheries Commission 10 per cent of all existing quotas managed under the quota system, and make a payment of \$10 million to the Māori Fisheries Commission to operate the commercial enterprise of Aotearoa Fisheries Limited. These transitional measures facilitated the finalisation and settlement of the fisheries claims (Hooper & Lynch, 1999; Hersoug, 2000).

In 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992 was passed; it effectively recognised both commercial and non-commercial customary fishing rights (Hooper & Lynch, 1999; Hersoug, 2000). With respect to the commercial element, under this settlement, the Māori obtained 50 per cent ownership in Sealord Products Limited, the biggest seafood corporation in New Zealand, owning 23 per cent of the total fishing quota (Hooper & Lynch, 1999; Hersoug, 2000). In addition, provision was made for the Māori to receive a guaranteed 20 per cent of all new species quotas under the quota management system (Hooper & Lynch, 1999; Hersoug, 2000). Regarding the non-commercial element, specific regulations would be issued to recognize Māori customary usage and management of harvesting fish and traditional fishing areas for non-commercial purposes (Hooper & Lynch, 1999; Hersoug, 2000). In effect, this ensured that the non-commercial customary fishing requirements would receive first priority when allocating fishing rights.

Another, important development was establishing the Treaty of Waitangi Fisheries Commission *Te Ohu Kai Moana*, whose mandate was to manage and supervise in consultation with the communities the pre and post-settlement assets, namely the commercial and non-commercial customary fishing rights restored to the Māori communities (Bess, 2001; Bess, 2011). This included the method of allocating and dividing fisheries rights to the communities for their collective benefit (Bess, 2001; Bess, 2011). The importance of legislation expressly recognising and protecting customary fishing rights in New Zealand and the ensuing regulations facilitating the implementation thereof remains a cornerstone of the New Zealand government’s realisation of reconciliation and restoration of the customary fishing rights of the Māori communities (McCormack, 2010). As McCormack observes:

“The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, as an act of reparation, distinguished Māori commercial and customary use rights as separate legal, economic and cultural

categories; the former to be satisfied by the advancement of monies and quota, and the latter by the eventual promulgation of Fisheries (Kaimoana Customary Fishing) Regulations 1998. Customary Regulations are promoted as a tool to enhance Māori local control and management of fisheries and, as such, seem to provide a neat fit with post-neo-liberal policies. In order to operationalise Customary Regulations, Māori tribal groups must first define their rohe moana (territorial sea space) and appoint kaitiaki (resources guardians). Under the regulations, fish can only be taken for ceremonial occasions, such as hui (meetings) and tangi (funerals).” (McCormack, 2010)

The Fisheries Act, 1996 empowers the Governor-General to make regulations from time to time recognising Māori communities’ right to gather and harvest fish for food, and their special connection to traditional fishing grounds for non-commercial purposes. The following two main regulations were subsequently issued for different areas in New Zealand, namely the Fisheries (*Kaimoana Customary Fishing*) Regulations, 1998 apply to the North and Chatham Islands. The regulations permit customary food gathering and the harvesting of fish for non-commercial purposes (Jackson, 2013). The other was the Fisheries (South Island Customary Fishing) Regulations, 1999. These regulations provide for customary food gathering and harvesting of fish for non-commercial reasons (Reg 9 of the Fisheries (South Island Customary Fishing)).

In 2003, the Court of Appeal delivered its judgment in *Ngati Apa v Attorney-General* after several Māori tribes (*Iwi*) had applied for declaratory relief (*Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), 2003; (Australian Indigenous Law Reporter, 2003). In its assessment of the English common-law doctrine of native title and its application in New Zealand, the court addressed the controversial *Wi Parata* judgment and its rejection of the Māori’s native title and subsequently applied in the 1963 *Ninety Mile Beach* ((*In Re the Ninety Mile Beach* [1963] NZLR 461 (CA); Boast, 1993) decision, which found that “Māori customary title to land depended ‘wholly on the grace and favour’ of the Crown” (Tate, 2004; Siewers, 2004). The Court of Appeal thus confirmed the two legal regimes by which customary rights could be recognised in New Zealand: first, customary fishing rights recognised under the *Te Ture Whenua Māori* Act, 1993 and under historical legislation from 1862 to 1865 (New Zealand Parliamentary Background Note, 2003; Hooper & Lynch, 1999); secondly, aboriginal title, recognised in terms of the common-law doctrine of aboriginal title (New Zealand Parliamentary Background Note, 2003).

## **7. Legal developments since 2004**

Following widespread public and political dissatisfaction, the New Zealand government, in response to the *Ngati Apa* judgment, passed the controversial Foreshore and Seabed Act, 2004 (Siewers, 2004; Bess, 2011). This legislation nullified the meaningful impact and implementation of the judgment on the basis of four key principles – namely, access, regulation, protection and certainty (Siewers, 2004; Bess, 2011). The contentious legislation enabled the misconception that the general public would be denied access to beaches should the Māori communities be entitled to claim their customary rights to

the foreshore (Siewers, 2004; Bess, 2011). The intention of the government was to ensure that Māori communities were not able to claim any customary rights of ownership to the foreshore and seabed as envisaged in the judgment (Siewers, 2004; Erueti, 2005). Contentiously, the Act made the following provisions:

- It vested all rights to the foreshore and seabed in the Crown, thereby expressly extinguishing any extant Māori customary title to the foreshore and seabed (S13 of the Foreshore and Seabed Act, 2004).
- Where Māori communities held an existing customary title, but for the extinguishment under the Foreshore and Seabed Act, 2004, they had to demonstrate those rights in terms of the narrow criteria set out – namely, exclusive use and occupation of the coastal marine area and that they had not lost access or customary title through substantial interruption since 1840 (Ss 32-33 and 36 of the Foreshore and Seabed Act, 2004).

The legislation came into operation in 2005 and was met with warranted contempt by the prejudiced Māori communities (Bess, 2011). In 2009, a ministerial review panel (New Zealand Ministry of Justice Report, 2009) was established to review the problematic legislation (Bess, 2011). The review panel report, among other findings, found that the Foreshore and Seabed Act failed properly to recognise and protect the customary rights of the Māori and further deprived the indigenous communities of having their customary-rights claims adjudicated by the court (Bess, 2011). The review panel further proposed resolutions for the government to consider in consultation with the communities – including that the Māori traditional interest under a customary title to the foreshore and seabed be duly recognised in new legislation (Bess, 2011).

In 2010, the government announced its decision to pass a new statute that would supersede the Foreshore and Seabed Act. In 2011, this new statute, the Marine and Coastal Area (*Takutai Moana*) Act, was passed in 2011 (Bess, 2011). Unlike its predecessor, the *Takutai Moana* Act entitles Māori communities to seek recognition of their customary marine title in the coastal marine area by either approaching the courts as envisaged in the *Ngati Apa* decision or by entering into recognition agreements with the government directly (Marine and Coastal Area (*Takutai Moana*) Act, 2011). Importantly, the government expressly acknowledges the significance of proper legal recognition and protection of the marine customary rights of the Māori communities:

“This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.” (Preamble of the Marine and Coastal Area (*Takutai Moana*) Act, 2011)

In response to the statutory due date specified in the Act, (S 100(2) of the Marine and Coastal Area (Takutai Moana) Act, 2011), the High Court received over 200 applications for recognition of customary marine title orders after the Act came into operation ((*Re Edwards (Te Whakatōhea No. 2*, 2021). In 2021, the High Court of New Zealand delivered a judgment in *Re Edwards (Te Whakatōhea No 2)*. This case is considered to be one of the most important judicial decisions since the *Takutai Moana* Act was passed (*Re Edwards (Te Whakatōhea No. 2)* , 2021; Yang, 2021). The case concerned coinciding claims over the same coastal marine areas in the eastern Bay of Plenty by different Māori groups located around the area. The main issue was whether the various Māori groups satisfied the customary-marine-title criteria contemplated in section 58 of the *Takutai Moana* Act (*Re Edwards (Te Whakatōhea No. 2)* , 2021; Yang, 2021). The three-fold criteria required the applicant communities to show that:

1. They held their customary marine title in the particular coastal marine area in accordance with their *tikanga* (meaning Māori customary values and practices).
2. They had continued to have exclusive use and occupation of the area since 1840 without substantial interruption.
3. Their customary marine title was not by law extinguished in that particular area (S 58 of the Marine and Coastal Area (*Takutai Moana*) Act, 2011).

Section 58(2) of the *Takutai Moana* Act includes further safeguards by defining the term “substantial interruption” not to mean circumstances where the coastal marine area may have been accessed by others for different usages in terms of licences (resource consent) issued in the area during the relevant period.

Furthermore, in agreement with all the applicants, the court employed two independent subject experts (*pūkenga*) with specialist knowledge to assist the court in the factual inquiry to understand the Māori customary values and traditional practices (*tikanga*) (*Re Edwards (Te Whakatōhea No.2*, 2021; Yang, 2021). Following a detailed consideration of all the issues and prevailing law, the court determined that the various applicant groups satisfied the criteria for holding shared customary marine titles over the areas specified (*Re Edwards (Te Whakatōhea No.2*, 2021; Yang, 2021). The court accepted that the shared exclusivity and occupation of the coastal marine areas by the applicant groups aligned with the overall purpose of the Act, and the customary marine title contemplated in section 58 of the Act (*Re Edwards (Te Whakatōhea No.2*, 2021; Yang, 2021). The court, furthermore, held that the confiscation, resource consents and usage by external parties did not automatically constitute a substantial interruption for purposes of section 58 (*Re Edwards (Te Whakatōhea No.2*, 2021; Yang, 2021).

Dissatisfied with the findings of the High Court, certain groups approached the Court of Appeal for relief in the matter (*Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori*

*Trust Board*, 2023). The appeal primarily revolved around how applicants had to comply with the requirements for recognising a customary marine title under Section 58 of the *Takutai Moana Act*.

In reversing the High Court's finding, the Court of Appeal clarified that the applicant group must demonstrate that they continued to hold the area in accordance with *tikanga* to occupy and use the area exclusively from 1840 to the present. However, they need not show uninterrupted use to satisfy the court that section 58 criteria are met (*Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*, 2023). As a result, the appellants must approach the High Court for revised recognition orders based on this interpretation of the law.

## **8. Lessons from New Zealand**

Considering the development of customary marine rights, three valuable lessons can be drawn from New Zealand's experience.

### **(i) Lesson 1: Restoring customary marine rights**

Deprivation of the customary rights of indigenous communities such as the Māori is a prominent feature of colonisation. For Māori communities, early statutes refer to their historical customary fishing rights and their rights to maintain their traditional marine heritage and livelihood. Although successive governments often attempted to undermine and deny their customary marine rights, only in the last two decades has judicial recognition been given to their customary marine rights. The courts have recognised the duty of the government to restore and not merely redress the issue of customary marine rights. The notion of restoring customary rights is an important element for the legal recognition and protection of a customary right. It also clearly distinguishes customary marine rights inherent to indigenous communities from other fishing rights issued by the government.

### **(ii) Lesson 2: Establishing a special tribunal**

The Waitangi Tribunal is a standing commission of inquiry established under the Treaty of Waitangi Act, 1975. The tribunal investigates, by means of a quasi-judicial process on an ongoing basis, the failures and violations of the Crown government in respect of treaty obligations and related government actions affecting Māori communities. The tribunal provides a permanent mechanism for aggrieved communities to lodge their grievances. It also issues reports and makes recommendations to the government (legislature and judiciary) to address the issues raised. Importantly, the tribunal serves as a vital starting point for the government to develop and implement recognition and protection of customary-rights processes. The tribunal also maintains records of the grievances raised and holds the government accountable for remedial actions that have to be taken and implemented in response to the grievances, in consultation with the affected communities.

**(iii) Lesson 3: Judicial recognition requires legislative recognition**

The New Zealand experience demonstrates that judicial recognition of customary rights remains unrealised and unfulfilled where the government deliberately fails to initiate and develop substantial laws to restore lost rights. The adoption of a piece-meal approach, which facilitates the recognition of customary marine rights on a narrow basis, further prejudices the affected communities. The controversial – now repealed Foreshore and Seabed Act, 2004 – is evidence that political interference can impede the recognition and protection of customary rights. Therefore, in the absence of an appropriate legal mechanism to ensure the full recognition and protection of customary rights, indigenous communities cannot achieve restoration of their customary marine rights. Judicial recognition and protection of customary marine rights must equally be realised and expressed in legislation. The *Takutai Moana* Act, 2011, as the prevailing law, gives legal expression to the recognition and protection of customary marine rights. This enables communities to assert their customary-right claims according to the legal standard required and ensures that the government evaluates each claim consistently and transparently on this legal basis.

**9. Key takeaways**

It is acknowledged that the approach developed in New Zealand is not a panacea for South Africa it however, demonstrates that the successful recognition and protection of customary fishing rights does not happen suddenly but must be developed and refined over time. The outlined lessons drawn from the New Zealand legal system cannot be gainsaid, as it provides critical guidance for the South African government to reform and refine the laws and suitably develop the fisheries legal framework in defining and recognising customary fishing rights.<sup>1</sup> Table 1 below identifies developmental areas that should be considered when developing and improving South African law and policy in recognising and protecting customary fishing rights.

*Table 1: Developmental Areas and Practical Recommendations for South Africa from New Zealand*

<b>DEVELOPMENTAL AREA</b>	<b>NEW ZEALAND Law and policy</b>	<b>SOUTH AFRICA Current law and policy</b>	<b>Practical Recommendations for South Africa</b>
<b>Primary legislation that recognises customary fishing rights (non-commercial purposes).</b>	The Fisheries Act, 1996 Part 9 (ss 174–186A) provides for customary fishing and customary fisheries management by means of regulations. The <i>Takutai Moana</i> Act, 2011 defines customary marine title.	The Marine Living Resources Act, 1998, recognises and regulates all fishing rights, and must define customary fishing rights, not merely small-scale fishing rights.	As the main law, the Marine Living Resources Act, 1998 must be amended to define customary fishing rights, not merely to be included as part of small-scale fishing rights generally.

<p><b>Supplementary legislation and regulations that support the recognition of customary fishing rights for non-commercial and related purposes.</b></p>	<p>Fisheries (Kaimoana Customary Fishing) Regulations, 1998. Regulations, 1999 for the South and Stewart Islands. Fisheries (Amateur Fishing) Regulations, 1986.</p>	<p>Regulations Relating to Small-Scale Fishing, 2016 The provisions of the regulations do not refer to, or contemplate, any customary fishing rights as the criteria specifically applies to small-scale fishing rights generally.</p>	<p>Special customary fishing rights regulations must be developed to specifically protect and regulate the customary fishing rights of indigenous fishing communities.</p>
<p><b>Policies and programmes that promote and strengthen the recognition and regulation of customary fishing rights.</b></p>	<p>Treaty strategies and supporting policies to ensure the Crown fulfils its obligations and maintains partnerships and effective maintenance of the relationships with the Māori communities as envisaged in the 1992 Deed of Settlement Act.</p>	<p>The Small-Scale Fisheries Policy, 2012, sets out the manner in which the government must implement the small-scale fisheries rights system by adopting a human-rights-based approach, but is silent on the recognition and protection of customary fishing rights.</p>	<p>The South African fishing rights legal framework namely legislation, policy measures and indigenous community-oriented programmes must be adopted and revised to provide <i>sui generis</i> protection for customary fishing rights in South Africa.</p>
<p><b>Adoption of additional measures to support and manage the legal recognition and protection of customary fishing rights.</b></p>	<p>Compliance support for managing customary fishing regulations at local level to the responsible <i>Kaitiaki</i> for the designated customary fishing areas.</p>	<p>No additional measures in the current legal framework.</p>	<p>Additional supporting measures to be developed in consultation with the indigenous communities as stewards of the marine living resources.</p>
<p><b>Institutional and other measures to support the legal framework for the recognition and protection of customary fishing rights.</b></p>	<p>The Ministry of Fisheries has overall responsibility for managing fisheries, in partnership with local customary management, to strengthen New Zealand's customary fisheries. Waitangi Tribunal is a special platform that deals exclusively with indigenous communities.</p>	<p>No such measures in the current legal framework.</p>	<p>It will be valuable to establish a permanent forum to meaningfully assist and engage indigenous fishing communities on an ongoing basis.</p>

## 10. Conclusion

In South Africa and New Zealand, customary fishing communities have, in the absence of laws recognising and protecting customary fishing rights, invariably been subjected to criminal sanction by law enforcement measures. Thus, a fisheries legal system that already marginalises indigenous fishing communities and then further criminalises<sup>ii</sup> them for exercising their customary and traditional rights of harvesting marine resources, will in the absence of specific and *sui generis* laws to protect those rights, continue to discriminate indigenous fishing communities as in the case of South Africa. Criminal law, through law enforcement measures, is therefore left to fill the gap. While the transformation of the legal framework does not happen overnight, it is nevertheless imperative for the South African

government to take deliberate action and implement measures to change the fisheries law and policy in consultation with indigenous fishing communities, thereby achieving the proper recognition and protection of customary fishing rights.

### **Declaration of Interest Statement**

The author declares that there is no conflict of interest.

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- i Refer to the lessons discussed under headings 8 above.
- ii See for example In 2011, David Gongqose and his co-accused were arrested for attempting to fish in the no-take marine protected area in Dwesa Cwebe Eastern Cape; see *Gongqose v Minister of Agriculture, Forestry and Fisheries; Gongqose v S*; in 2013, members of the Langebaan traditional net-fishing community were arrested for fishing in the restricted zone B of the Langebaan Lagoon in the Western Cape; see *Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries*.