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Indigenous Peoples' Fisheries Rights – A comparative perspective between Maori and the Sami

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Abstract

The right to fish is intrinsic to the culture of indigenous peoples, including the Sami of Norway and Maori of New Zealand. The Sami currently still seek recognition of their cultural right to fish. Despite recent recommendations by the Smith Commission that Sami rights within the coastal area be recognized, this is yet to be realised. The Attorney General's scathing criticisms have impeded the implementation of Sami rights within the coastal area. This paper offers a comparative perspective between Sami rights and Maori rights with regard to their respective fisheries. It is suggested that a claim based on a combination of indigenous rights, domestic legislation and international law may provide grounds for legislative recognition and implementation of coastal rights for Sami peoples.

Key words: Indigenous Fisheries, Maori, Sami, legislative recognition

> "… Saami fishers have an old customary right and have a right according to international law to their rightful share of fish resources within the Saami territories."[1]

1. Berit Ranveig Nilssen, Sami Parliament Fisheries seminar, Karajok, February 21, 2001.

1. Introduction

Sápmi is a nation without borders but with a shared history and a shared language. Today artificial boundary lines "split" the Sapmi nation, which covers the northern areas of Norway, Sweden, Finland and Russia. The occupation of Sapmi and associated use rights have existed since time immemorial. As with many indigenous peoples upon colonization, policies to assimilate the Sami peoples were introduced by respective governments resulting in loss of culture, loss of language, and loss of identity.[2] Although previous steps to revive the culture were acknowledged, it was the watershed *Alta*[3] case that provided the catalyst for the resurgence and recognition of Sami rights to their traditional resources.

The establishment of the Sami Rights Committee to address Sami legal relations resulted in the introduction of a Sami Parliament and the adoption of the 2005 Finnmark Act. The purpose of the 2005 Finnmark Act was to:

> "… facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life."

The Finnmark Act transferred 95 per cent of Finnmark County in Norway to the inhabitants of Finnmark. This area is managed by a Board of Directors, three from the Sami Parliament and three from Finnmark County Council.

The recent report from the Smith Commission suggests that there is a genuine basis for ensuring Sami culture.[4] The central points include a traditional or customary right to the fishery, independent of existing rights. The people living on the fjords are entitled to fish on the basis of their traditional rights: a "fjord entitlement."[5] These entitlements or rights were to be managed by a Finnmark governance structure and were manifested in a personal allocation that could

2. See H. Minde *"Assimilation of the Sami Implementation and Consequences"* Galdu Cala Journal of Indigenous Peoples Rights No 3/2005 for discussion.
3. See Minde H. 'The Challenge of Indigenism: The Struggle for Sami Land Rights and Self Government in Norway 1960–1990' in S. Jentoft, H. Minde and R. Nilsen *"Indigenous Peoples, Resource Management and Global Rights"* (Eburon, Netherlands, 2003) pp. 75–101.
4. The Coast and Fishery Commission; NOU 2008: 5 *Retten til fiske i havet utenfor Finnmark* [The Right to Fishery in the Sea Outside Finnmark], published on February 18, 2008.
5. Op.cit. p. 411; Lov om retten til fiske i havet utenfor Finnmark [Act on Rights to Fishery in the Sea Outside Finnmark] article 3.

not be traded. Despite these recommendations, Professor Carsten Smith noted that the comments from the Attorney General provided a hurdle for recognition of these rights for coastal Sami peoples.[6] Professor Smith also indicated that the Attorney General's comments focused negatively on the presupposition that a traditional use right can establish the "right to fish" or a "fjord entitlement."[7] The latest reported development reveals that the government is withdrawing support for the draft act.[8]

For Maori indigenous to New Zealand, various tenets underpin their rights to fish. Prior to colonization, Maori custom (*tikanga Maori*) connected Maori intrinsically to their fishery. In 1840, the Treaty of Waitangi ("the Treaty") recognized these rights in Article 2.[9] Post-colonization, the doctrine of Aboriginal title supported the continuity of tribal or customary rights, such as the existing Maori rights to fisheries.[10] Although there have been long periods of non-recognition of Maori rights, by persisting with these tenets, property rights for Maori have manifested in subsequent legislation. Maori now collectively exert an influence on approximately 40 per cent by volume of all fisheries quota, and share in an asset conservatively valued at 700 million New Zealand dollars (as at April 2003).

The customary tenets that underpin a claim by Maori to their fishery are intrinsic to other indigenous peoples, such as the Sami and the Canadian First Nation peoples. Nonetheless, custom law in New Zealand requires incorporation into statute for enforceability.[11] Against this backdrop of indigenous resurgence and impediments to recognition of coastal and fishery rights, this paper will analyze the situation in New Zealand and compare it with the situation of the Sami.

The first part of this paper examines the grounds, pre- and post-colonization, upon which the Maori claimed their rights to the fishery. The review culminates in

6. Carsten Smith "Conclusions of the Coastal Fishing Commission." Speech at the conference Sami Rights in Coastal Landscapes, University of Tromso, 22 April 2009 and The Coast and Fishery Commission; NOU 2008: 5.
7. Smith, ibid.
8. See e.g. the Minister of Fishery and Costal affairs *Ságat* 7.10.09.
9. Agreement between the Crown and Maori signed in 1840 that guaranteed to Maori certain rights.
10. See M. McDowell and D. Webb *"The New Zealand Legal System Structures and Processes"* (Lexis Nexis, Wellington, 2006) Fourth Edition, p 195, "unless these aboriginal rights are extinguished by Statute, purchase or voluntary cession." Also section 88 (2) of the Fisheries Act 1983 (now repealed) explicitly stated that "nothing in this Act shall affect any Maori fishing rights."
11. *Hoani Te Heuheu TuKino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

a New Zealand case study that traces the introduction of the Quota Management System to highlight how these different threads of property rights for Maori fisheries have ultimately been recognized in legislation. In conclusion, the second part of this paper will ascertain whether the current recognition of Maori rights to their fishery can add weight to the Sami claim to their fishery, particularly in terms of assisting with tangible recognition.

2. Maori Perspective and Rights

2.1 Background

Various doctrines support Maori rights to their fisheries. Prior to colonization, Maori cosmology, the Maori world view (*Te Ao Maori*) and Maori custom *(tikanga Maori*) inextricably linked Maori to their fishery. In 1840, the Treaty recognized these rights in Article 2.

Post-colonization, the doctrine of Aboriginal title recognized the continuity of tribal rights, such as the existing Maori rights to fisheries, unless these rights were extinguished by statute, purchase or voluntary cession.[12] Section 88 (2) of the Fisheries Act 1983 (now repealed) explicitly stated that "nothing in this Act shall affect any Maori fishing rights." Article 2 and the notion of Aboriginal title will be examined in more detail below.

In summary, pre-colonization an indigenous property right to fish was sourced from custom law. Post-colonization, western concepts such as aboriginal title, treaty rights and statute provided for recognition of these rights. However, both pre- and post-colonization, the fundamental issue or concept to be satisfied was one of custom law (*tikanga Maori*). In contrast, a non-indigenous property right to fish is a right determined and regulated by the State.

2.2 Maori World View and Maori Custom: *Te Ao Maori* and *Tikanga Maori*

Maori, like other indigenous peoples, connect spiritually to their environment. The Maori perception of the environment and attitude toward natural resources

12. McDowell Webb above n. 10, p. 195.

is governed by Maori cosmology.[13] In their creation myth, the separation of sky father (*Ranginui*) and earth mother (*Papatuanuku*) resulted in the birthing and development of different ecosystems.[14] Rains, mists and dews symbolize the tears of separation of the spouses, and blood from the torn sinews which had joined them became the sunrises and sunsets. This separation and the on-going conflict between the children of *Ranginui* and *Papatuanuku* manifest in the continuous struggle between various aspects of the environment.[15]

This myth forms part of a much larger genealogy[16] (*whakapapa*) explaining the relationships between the gods, the natural world, and human beings. The *whakapapa* of each god (*atua*) includes the genealogy of all of those elements within their sphere of influence. Each element has an assigned role relating back to the separation of *Ranginui* and *Papatuanuku*. The fulfillment of that role provides a necessary state of balance essential to the Maori world view.[17]

So, as *whakapapa* relates Maori to their environment, these elements are related and the concept of relatedness (*whanaungatanga*) extends to an obligation to non-humans as well. We are all related and should treat each other with respect. This is the concept of restoring balance (*utu*).

Over time Maori have developed customs to preserve the life force (*mauri*) of all natural resources and ensure sustainable management. There is no Maori concept of ownership per se of resources (such as the fishery), but rather one of guardianship over access and use. Thus resources are protected by guardians (*kaitiaki*) who mediate relationships between resources and people to maintain the mauri of those resources.[18] It is from both this Maori world view *(Te Ao Maori)* and Maori custom (*tikanga Maori*) that Maori property rights to fisheries have been established.

These custom tenets are not confined to Maori, but are intrinsic to other indigenous peoples as well. In New Zealand, despite recognition of Maori custom, the

13. See Urlich Klein *"Belief Views on Nature – Western Environmental Ethics and Maori World Views"* (2000) 4 NZJEL 81 for discussion.
14. See C. Barlow *"Tikanga Whakaaro Key concepts in Maori Culture"* (Oxford University Press, Victoria, 2007) pp.10–11.
15. See J. Paterson *"Exploring Maori Values"* (Thomson Dunmore Press, Victoria, 2005) pp. 143–154 for general discussion of these concepts.
16. H. Mead *"Tikanga Maori"* (Huia Publishers, Wellington, 2003) pp. 42–43.
17. See M. Marsden 'The Natural World and Natural Resources' in C. Royal (ed.) *"The Woven Universe Selected Writings of Rev Maori Marsden"* (Estate of Rev. Maori Marsden, Masterton, 2003) pp. 24–54.
18. Marsden, ibid. pp. 54–73.

enforceability of Maori customary rights to fishery continues to rest on incorporation into statute.[19]

2.3 Treaty of Waitangi

In 1840, when the Treaty was signed, the Crown recognized exclusive Maori possession of their fisheries.[20] Article 2 of the English text[21] of the Treaty states:

> *"Her majesty* the Queen of England confirms and guarantees to the Chiefs *and Tribes of New Zealand and to the respective families and individuals thereof* the full exclusive and undisturbed possession of their Lands and Estates Fisheries *and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession …"* (emphasis added).

Through Article 2 the Crown guaranteed to Maori the full, exclusive and undisturbed possession of their fisheries for so long as they desired, a guarantee of full possession of their fishing resource.

Despite this assurance, Prendergast CJ held the Treaty to be a simple nullity.[22] The orthodox view on the legal effect of the Treaty is that unless it has been adopted or implemented by statute, it is not part of domestic law and creates no rights enforceable in court.[23] Matthew Palmer suggests that the Treaty is valid and binding on the Crown in international law.[24] However, it is the "Principles of the

19. McDowell and Webb above n. 10.
20. Walker R. 'The Treaty of Waitangi in the Postcolonial Era' in M. Belgrave, M. Kawharu and D. Williams (ed.) "*Waitangi Revisited*" (Oxford University Press, Australia, 2004) p. 68.
21. There were two versions of the Treaty, one an English text and one a Maori text. The Maori text was signed by, significantly, more Maori than the English text. This indicated that the rights articulated in the Maori text were the rights Maori accepted. Nonetheless, it is the English text/version which is the one most commonly referred to and acknowledged particularly by the Crown. The translation issues of the Maori text are often debated and a source of contention.
22. *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ.
23. See Prendergast CJ's discussion in *Wi Parata* above also see *Hoani Te Heu Heu Tukino v Aotea District Land Board* [1941] NZLR 590 (PC) which states that the Treaty could have no legal effect unless incorporated in statute.
24. M. Palmer "*The Treaty of Waitangi in New Zealand's Law and Constitution*" (Victoria University Press, Wellington, 2008) p. 231.

Treaty" that are referred to in legislation[25] and policy documents,[26] rather than the text of the Treaty itself.

The concept of the "Principles of the Treaty" was actively constructed through the interaction and mutual legitimization of the Court,[27] Waitangi Tribunal,[28] State Agencies, and the Government. This provided a legal yardstick by which an issue could be resolved.

2.4 Aboriginal Title

The doctrine of common law aboriginal title is concerned with the effect of Crown sovereignty upon pre-existing property rights of tribal inhabitants.[29] When the colonizing power declares itself sovereign over a territory, it establishes institutions of governance including courts that apply English law; that being common law and statute law.

The source of common law aboriginal title doctrine is founded in European notions of international law dating back to the sixteenth century.[30] Aboriginal rights are based largely on the presumption of continuity.[31] The presumption applies regardless of whether the new territory is acquired by conquest, cession or settlement.[32] Crown ownership of title does not extinguish aboriginal rights. The doctrine of aboriginal title recognizes the legal continuity of tribal property rights upon the Crown's acquisition of sovereignty over the territory. Should the Crown wish to extinguish aboriginal title, it can do so through legislation, Crown purchase of title, or voluntary cession by Maori of their rights.

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25. For example Section 4 Conservation Act 1987; Section 9 State Owned Enterprises Act 1986.
26. For example see the policy for the Office for Disability Issues where the Treaty underpins the development of their Strategy and is consistent with the relevant principles of the Treaty. Available at <http://www.odi.govt.nz/publications/nzds/discussion-document/tow.html>
27. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 655, 656 per Cooke P.
28. The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975. An important function of the Waitangi Tribunal was to determine what the "Principles of the Treaty" were.
29. P. McHugh, *The Foreshore and Seabed*, New Zealand Law Society Seminar, July 2004, p. 26.
30. Williams D. "Unique Treaty based relationships remain elusive" in M. Belgrave, M. Kawharu and D. Williams (eds.) "*Waitangi Revisited*" (Oxford University Press, Australia, 2005) p. 381.
31. Law Commission, *Maori Custom and Values in New Zealand Study Paper 9,* Law Commission Wellington March 2001, p. 11.
32. Kent McNeil *"Aboriginal Title and Aboriginal Rights: What's the connection?"* (1997) 36 Alberta Law Review p. 193.

Cooke P. defined aboriginal title in Te Runanganui o Te Ika Whenua Inc Society v Attorney General as:[33]

> "On the acquisition of the territory, *whether by settlement, cession or annexation,* the colonising power acquires a radical title or underlying title *which goes with sovereignty* … the radical title is subject to the existing native rights." (emphasis added).

2.5 Territorial aboriginal title

Aboriginal title can be divided into two categories, territorial and non-territorial. Territorial title represents what is deemed a tribal claim to "full ownership of the land."[34] The concept "full ownership" is not a Maori concept, but one introduced by legislation in New Zealand during the 1860s to convert territorial title to land, or Maori customary land, to freehold titles. Today only small pockets of customary land remain. This represents the imposition of a "freehold" tenure system by the Crown upon land held by Maori.[35]

The jurisdiction of the Native Land Court placed New Zealand in a unique position where the doctrine of customary or aboriginal title (to land above the high water mark) had less impact. This was due to the fact that the original, aboriginal or customary title had been transmuted by the Crown through recognized tenures. These tenures were implemented after sale, cession, confiscation, or transmutation of the land by the Native Land Court.

2.6 Non-territorial aboriginal title

Non-territorial title refers to those rights that may continue to exist in land, even where the customary title (or territorial title) to land has been extinguished. These rights are less than absolute ownership, and might include for example the right to cross land, to fish, and to collect flora and fauna. Non-territorial aboriginal rights do not run with the land. Nonetheless, in both instances, to establish the existence of that territorial or non-territorial title or right requires a claim based on custom law.

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33. [1994] 2 NZLR 20 at 23–24.
34. See P. McHugh *"The Legal Basis for Maori Claims against the Crown"* (1988) 18 VUWLR 1, p. 3.
35. The relevant legislation imposed by the Native Land Court during this period was so detrimental to Maori custom that it has been coined "the Engine of Destruction" – for further discussion see D. Williams *"Te Kooti Tango Whenua"* (Huia Publishing, Wellington, 1999).

In the case of *Te Weehi v Regional Fisheries Officer*;[36] Te Weehi, the claimant, had been harvesting shellfish in an area (shoreline) owned by the Crown. The High Court held that although Maori customary title, or territorial title, to that area (shoreline) had been extinguished, it was still burdened by a non-territorial right, Maori customary fishing. The continuing existence of the right to gather shellfish (*kaimoana*) was noted by Williamson J in *Te Weehi*. The non-territorial right was separate to the territorial right:

> "As the customary right claimed had not been expressly extinguished by statute, it continued to exist. It was non territorial and therefore did not depend on any proprietary right of the Ngai Tahu tribe to the land along the foreshore."[37]

The doctrine of aboriginal title acknowledges that the Crown is the sole source of title to land at common law. However, the Crown's territorial title is subject to the rights of use and occupancy by the indigenous peoples. These rights have legal force on the Crown and as a rule of common law can be enforced irrespective of incorporation within a specific statute. These rights claimed by *Te Weehi* would thus exist at common law regardless of specific incorporation in a statute.[38]

Meyers and Cowan[39] view the *Te Weehi* case as instrumental in empowering the Maori negotiations with the Government on the Maori fisheries claim by pressing the New Zealand government towards serious consideration of Maori sea fishery rights.[40]

Irrespective for Maori, establishing a Treaty right was comparatively easier than asserting an aboriginal or customary right through the court. The Waitangi Tribunal has been established to hear and determine Treaty breaches.[41] Apart

36. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.
37. Ibid, 681.
38. S. C. Bourassa and A. L. Strong *"Restitution of fishing rights to Maori: representation, social justice and community development"* (2000) Asia Pacific Viewpoint, 41 (2), 155–175, at 161.
39. G. D. Meyers, and C. M. Cowan "*Environmental and natural resources management by the Maori in New Zealand*" (Murdoch University, Perth, 1998) p. 31.
40. McHugh P. 'New Dawn to Cold Light: Courts and Common Law Aboriginal Rights' in R. Bigwood (ed.) *"Public Interest Litigation: New Zealand Experience in International Perspective*" (Lexis Nexis, Wellington, 2006) p. 47.
41. See section 6 Treaty of Waitangi Act 1975.

from a few exceptions,[42] the findings are recommendations only, and not binding on the Crown.

To this end, the doctrine of aboriginal title, or native title, is somewhat under-developed in New Zealand compared to jurisdictions such as Canada[43] and Australia.

3. Recent case law developments

3.1 Territorial Title: *Ngati Apa* – Customary Rights to the Foreshore Seabed

By way of contrast, the recent *Ngati Apa*[44] decision and the subsequent enactment of the Foreshore and Seabed Act 2004 (FSA) illustrate an alternative New Zealand reaction to Maori customary rights.

Unlike *Te Weehi*, the facts of *Ngati Apa* were concerned with a territorial right to the foreshore and seabed. Ngati Apa, a tribal group (*iwi*) located in the Marlborough Sounds fjord-region in New Zealand, sought to establish mussel farms. After being denied resource consent by the local authority, Ngati Apa applied to the Maori Land Court for determination of ownership of the foreshore and seabed. The local authority challenged this action by questioning the jurisdictional powers of the Maori Land Court to make such a determination, and claimed that the Crown owned the foreshore and seabed.

On 19 June 2003, the New Zealand Court of Appeal[45] held that the Maori Land Court did have the jurisdiction to determine whether areas of New Zealand's foreshore and seabed are Maori customary land under Te Ture Whenua Maori Act 1993. This decision[46] overturned a line of precedent dating back to the 1877 decision in *Wi Parata v Bishop of Wellington,*[47] and affirmed by the New Zealand

42. See section 8A(2) Treaty of Waitangi Act 1975 where the jurisdiction to order the return of land is limited to Crown forestry land and land transferred under the State Owned Enterprises Act 1986. This has been exercised once, see Turangi Township Remedies Report [1988] Wai 84, 5.4.1.
43. *Delgamuukw v British Columbia* [1997] 3 SCR 1010. See also Walters M. 'Promise and Paradox: The Emergence of Indigenous Rights Law in Canada' in B. Richardson, S. Imai, and K. McNeil *"Indigenous Peoples and the Law"* (Hart Publishing, Oregon, 2009) pp. 37–38.
44. *Attorney General v Ngati Apa* [2003] 3 NZLR 643, 644.
45. *Attorney General v Ngati Apa* [2003] 3 NZLR 643 paras 91, 124, 182.
46. Ibid. 644, see para 215.
47. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur 72.

Court of Appeal in the 1963 *Ninety Mile Beach*[48] decision. Academic writing in the 1980s and 1990s[49] resolved that the *Ninety Mile Beach* case had been wrongly decided, so it is perhaps no surprise that the Court of Appeal followed overseas precedent, and held that legislation must be explicit if it is to extinguish customary rights to land.[50]

Prior to *Ngati Apa*, the Crown had been content to rely on the assumption that it owns the foreshore by a prerogative right in New Zealand, the same way that it does in Britain.[51] In recent years, legislation such as the Territorial Sea and Fishing Zone Act 1965 deemed the area from low water mark to the three-mile limit to have always been vested in the Crown, and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 extended this to the current 12-nautical-mile limit.

Ngati Apa created much hostility in various sections of society. In haste, the then Labour government introduced the FSA designed to vest ownership of the foreshore and seabed in the Crown, extinguishing Maori customary title. The government response after *Ngati Apa* can be compared to the government response after *Te Weehi*. After *Te Weehi*, Maori customary rights to fisheries were extinguished[52] and replaced with private property rights to fisheries. These rights were extinguished with the consent of Maori who received considerable compensation for the loss. After the *Ngati Apa* decision, Maori customary rights to the foreshore and seabed were unilaterally extinguished without consent of Maori, and without any compensation.

In 2009, the new National government established a Panel comprising former Chief Judge of the Maori Land and High Court Justice, Eddie Durie; historian and

48. *In Re Ninety Mile Beach* [1963] NZLR 477.
49. See Paul McHugh *"Aboriginal title in New Zealand courts"* (1984) 2 UCLR 235–265 and *"The legal status of Maori fishing rights in tidal water"* (1984) 14 VUWLR 247; also see R. Boast, *"In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History"* (1993) 23 VUWLR p. 145.
50. See Boast R. 'Foreshore and Seabed in New Zealand Law: A Legal-Historical Introduction' in C. Charters and A. Erueti (eds.) *"Maori Property Rights and the Foreshore and Seabed The Last Frontier"* (VUP Wellington, 2007) p. 9.
51. R. Boast, A. Erueti, D. McPhail and N. Smith, *"Maori Land Law"* (Lexis Nexis, Wellington, 2004), p. 105.
52. Fisheries Regulations do allow for customary take and also the use of customary tools, however these regulations are subject to the restrictions of the government.

academic Associate Professor Richard Boast; and cultural and Maori language expert Hana O'Regan, to review the FSA.[53]

After national meetings (*hui*) and feedback, the Panel found that the FSA was discriminatory. It failed to enhance Maori rights over land (*mana whenua*) and advanced the general public interest at the considerable expense of Maori interests. Confirming the legal views espoused in the *Ngati Apa* decision, that native or aboriginal or native title existed unless it was evident that this title had been clearly and plainly extinguished, the Panel offered a raft of options to respond to the *Ngati Apa* case. These included negotiating with Maori a nationwide settlement which would result in instituting a new statute, and a "mixed" model to recognize and provide for customary and public interests in the coastal marine area.

These two options would require a repeal of the FSA, and the enactment of new legislation. Given the initial reaction to this legislation from Maori, the Courts, international bodies and the public,[54] although it is hardly surprising that the Panel reached this decision, it is in fact encouraging. In this author's opinion, if a mixed title (*sui generis*) approach were adopted, it would mitigate the distance between the *Te Weehi* and the *Ngati Apa* aftermath.

3.2 Non-territorial and territorial title: *Gumana* – Native Title rights to land and fisheries

In a recent Australian case, *Gumana v Northern Territory of Australia,*[55] subject to establishing customary rights to the foreshore and seabed, it was determined that native title rights, and native title rights including non-territorial rights such as fishing, can be recognized for the traditional owners. The appellants[56] sought two declarations. The first was a declaration that the grant of freehold interest to the Arnhem Land Aboriginal Land Trust (under the Land Rights Act) extending to the low water mark, entitled the applicants to control access to the whole area. The second was under the Native Title Act, a declaration of native title over lands

53. *"Pakia ki uta, pakia ki tai"* Ministerial Review of the Foreshore Seabed Act 2004.
54. UN Special Rapporteur Rudolpho Stavenhagen ECOSOC *"Report of the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms, Mission to New Zealand"* UN Doc E/CN.4/2006/78/Add.3.
55. (2005) 141 FCR 457 Selway; and also *Gumana v Northern Territory of Australia* [2007] FCAFC (2 March 2007).
56. The Arnhem Land Aboriginal Trust, Garwirrin, Gumana and others.

and waters, including the lands and waters within the inter-tidal zone and outer waters of the bay (the foreshore and seabed).

In *Gumana*, subject to establishing that the traditional owners were possessed under the traditional laws of the customs, the common law recognized native title within the foreshore and seabed area. However, there may be other competing interests such as the public right to fish and navigate. Absent a contiguous land title, this would result in a non-exclusive situation. Nevertheless, native title is recognized by the common law within the foreshore seabed area.

It is by virtue of traditional laws and customs required to establish native title that a connection is recognized with the relevant land or water space. These relevant rights and interests are recognized by common law. Absent any legislation that expressly extinguishes these rights, native title rights are warranted within the areas claimed.

From the reasoning in *Gumana* it would appear that if Maori held title to the high water mark, it would follow that this grant of an estate to the low water mark should confer a right to exclude from the inter-tidal zone, including a right to exclude those seeking to exercise a public right to fish or navigate. This would grant an exclusive right to their fishery. Although this case was decided after settlement of the fisheries claim for Maori, the reasoning can readily be applied to similar jurisdictions where indigenous peoples seek a right to their fishery.

4. Legislative Recognition of Indigenous Property Rights in New Zealand

4.1 Fisheries Act

Custom law or *tikanga Maori* is a source of rights increasingly recognized in New Zealand. These rights were taken into account when passing early fisheries legislation.

4.2 Fisheries Amendment Act

In the years before 1986 and the introduction of property rights based legislation, the New Zealand open access wild capture fishery was managed through input controls. These input controls or regulations resulted in an over-capitalized in-

dustry with too many fishing boats and unsustainable exploitation.[57] As a result, fishers earned low profits and government faced significant surveillance and management costs. Consequently, management was reformed during the 1980s and 1990s.

The 1986 Fisheries Amendment Act introduced the Quota Management System (QMS).[58] This created a private property right to catch fish. The granting of a private property right in commercial fisheries, through the introduction of the QMS, vested this right within an individual entity whose interest primarily was to derive and maintain the greatest economic benefit.

4.3 Quota Management System

The QMS is based on the individual transferable quota (ITQ), a private property right to catch a quantity of fish in a specific location during a specific period of time. This property right can be traded (bought and sold) on the open market. ITQs are defined as a share of the total allowable commercial catch (TACC) and the New Zealand government adjusts this TACC to restrict to sustainable levels the amount of fish landed.

Fishers can contribute to stock utilization and sustainability decisions through the various government bodies by providing submissions on stock levels.[59] This process inevitably feeds information to the overall sustainability issue, and assists government to set quota and TACC levels. Upon setting of the TACC, the fisher's ITQ is calculated as a percentage of the TACC, resulting in an annual catch entitlement (ACE). This represents the output from the fishery. The QMS bestows a private property right.

57. Symes R. 'Towards a Property Rights Framework' in R. Symes (ed.) *"Property Rights and Regulatory Systems in Fishing"* (Blackwell Science, Australia, 1998).
58. Refer to section 2 and Part IV of the Fisheries Act 1996 for full definition.
59. See Cath Wallace *"Environmental Justice and New Zealand's Fisheries Quota System"* (1999) 3 NZJEL p 33, for discussion of the fisheries quota system.

The adoption of the ITQ has been viewed as a step towards securing sustainable fisheries supported by legislation and administrative machinery.[60] The respective fisheries legislation appears to be directed towards creating a property right.[61] It is arguable that inefficient management practices and perhaps the desire to obtain a tradable and economically-based "property right" within the fishery resource prompted the introduction of the quota management system.

Article 2 of the Treaty guaranteed to Maori rights to their fishery. The introduction of the QMS not only breached these guaranteed property rights for Maori, but also the protections afforded to Maori in the Fisheries Act[62] and custom law. Custom law (*tikanga Maori*) is sourced from tenets such as collectivity, guardianship, protecting the life force (*mauri*) of the resource, and ensuring the resource is available within the collective for future generations. However, it is the principles of the Treaty, not the text, which are included in legislation. New Zealand requires incorporation into statute for enforceability.

4.4 Settlement Process

Legislative recognition of custom law or *tikanga* is, at best, limited, and subject to non-Maori interpretation and overriding provisions.[63] The text of the Treaty has not been incorporated into domestic legislation, and it is domestic legislation which is binding on the State. Irrespective, Maori appealed to the *Waitangi*

60. See A. Scott 'Development of Property in the Fishery' Marine Resource Economics, 5: 1988, pp. 289–331. Also see R. Connor 'Are ITQs Property Rights? Definition, Discipline and Discourse' in Ross Shotton (ed.) "Use of Property Rights in Fisheries Management, Proceedings of the Fish Rights 99 Conference Fremantle, Western Australia" 11–19 November 1999 Workshop presentations. FAO Fisheries Technical Paper 404/2. Available also <http://www.fao.org/docrep/003/X8985E/x8985e04.htm#WHAT%20ARE%20PTOPERTY%20RIGHTS%20Chairman%20Peter%20Millington,%20Fisheries%20Western%20Australia,%20Perth> last accessed 2 March 2009.

61. Refer *New Zealand Federation of Commercial Fishermen (Inc) v Minister of Fisheries* CP 294/96 and on appeal as CA 82/97, CA 83/97 CA 96/97 where both the High Court and Court of Appeal declared quota as property only subject to the overriding powers of the legislature.

62. M. Durie *"Nga Tai Matau Tides of Maori Endurance"* (Oxford University Press, Australia, 2005) p. 114.

63. The inclusion of Maori concepts in legislation is problematic. For instance see Section 7(a) of the Resource Management Act 1991, the definition of kaitiaki has been challenged, also section 6 (e) and (a) are subject to the overriding purpose of the Act in section 5 which does not refer to tikanga. Other references are also subject to legislative provisions and processes, see for example Te Ture Whenua Maori Act 1993.

Tribunal[64] and courts (High Court and Court of Appeal) for recourse on the breach of their rights to their fishery. The Waitangi Tribunal produced two major fisheries reports: the 1988 Muriwhenua, and the 1992 Ngai Tahu reports. These reports recognized that customary Maori fishing rights included a commercial component, and that such rights were capable of evolving as recognized commercial rights in fishing.

This dynamic understanding of the right to development was also recognized by the High Court and Court of Appeal.[65] It was accepted that as a result of the quota management system, Maori had either lost their rights or were stopped from developing them as they were entitled.

The Waitangi Tribunal and courts also established that Maori fishing rights were held and exercised as a consequence of custom law (*tikanga Maori*) and *whakapapa* relationships, and that both the extended family (*whanau*) and individuals benefited from fishing rights and those *whakapapa* relationships.[66]

The Waitangi Tribunal, High Court, and Court of Appeal acknowledged that the introduction of the QMS impinged upon the right of Maori to develop this resource. The Waitangi Tribunal, High Court, and Court of Appeal also recognized that the basis for this claim to the fishery was one sourced in *tikanga Maori*. The tenets that underpin this right are based on custom, and the management of this right is also based on custom.[67] Irrespective, the resultant settlement from this appeal to the Waitangi Tribunal and Courts was ultimately a private property right for Maori in the form of quota, shares, and cash.

In legal proceedings, Maori obtained from the High Court and the Court of Appeal,[68] by way of interim relief, a declaration that the Crown ought not to take further steps to bring fisheries within the quota management system. This prompted the Crown to negotiate with Maori on Treaty fishing rights. These negotiations

64. The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975 as a forum to hear disputes between Maori and the Crown and make recommendations.

65. *Ngai Tahu Maori Trust Board & Ors v Director General of Conservation & Ors* [1995] 3 NZLR 553, Cooke P., Richardson, Casey, Hardie Boys, Gault J.J. See also Waitangi Tribunal, Muriwhenua Fishing Claim Report (1988) pp. 234–235.

66. Findings on the nature and extent of fisheries rights have been made by the Waitangi Tribunal (Muriwhenua Fishing, Ngai Tahu Sea Fisheries and Fisheries Settlement Reports) and the Courts (*Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 at pp. 307–312 per High Court and pp. 375–376 per Court of Appeal).

67. Ibid.

68. *Te Runanga o Muriwhenua Inc v Attorney- General* [1990] 2 NZLR 641.

led to a two-stage settlement of claims over Maori commercial and customary fisheries.

The first step was an interim arrangement effected by the 1989 Maori Fisheries Act, which was enacted to allow for the recognition of Maori commercial fishing rights secured by the Treaty.[69] This Act established the Maori Fisheries Commission, and provided for a proportion of quota holdings or the equivalent value in cash as compensation for commercial fishing claims. The Maori Fisheries Commission was to also promote Maori involvement in the business and activity of fishing.[70]

A Deed of Settlement, dated 23 September 1992, was entered into between the Crown and Maori, effectively settling the commercial fishing claims by Maori. Subsequently the 1992 Treaty of Waitangi (Fisheries Claims) Settlement Act was enacted to give effect to the settlement of claims relating to Maori fishing rights provided for in the Deed of Settlement. It included:[71]

(a) the reconstitution of the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission ("the Commission");
(b) payment of cash to the Commission (which was to be used to purchase a 50 per cent shareholding of Sealord Products Limited);
(c) provision for the allocation of 20 per cent of quota for any new species brought into the quota management system;
(d) provision for the making of regulations to recognize and provide for customary food gathering by Maori; and
(e) empowerment of the Commission to hold the assets and develop a model to allocate the assets to Maori.

In return, Maori agreed that the Deed settled all Maori commercial fishing rights and interests. Maori also agreed to accept regulations for customary fishing, to stop litigation relating to Maori commercial fisheries, to support legislation to give effect to the Deed of Settlement, and to endorse the quota management system. Despite the legal recognition that Maori owned all the fisheries, in a magnanimous gesture, Maori gifted half the fishery back to the Crown.[72]

69. Refer Long Title of Maori Fisheries Act 1989.
70. Section 5 (a) Maori Fisheries Act 1989.
71. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 clause (l).
72. Walker R. above n. 20, p. 68.

Although the Deed of Settlement was entered into in 1992, consultation and court battles between tribes (*iwi*) prolonged for ten years agreement on a model to allocate the asset. A contentious issue, taken on appeal to the Privy Council, concerned the matter of who is an *iwi,* and whether the concept could extend to include an urban Maori group.[73] The findings were consistent with the traditional definition of *iwi* displacing claims by urban Maori groups.

Subsequent to the development of a model to allocate these fishery assets to Maori, the 2004 Maori Fisheries Act (MFA) was passed to codify the allocation model and enable Te Ohu Kaimoana to transfer fisheries assets to Maori. The settlement asset resultant from this process included for each *iwi* (1) quota shares (both inshore and deepwater), (2) shares in Aotearoa Fisheries Limited (AFL,[74] a Maori-owned company), and (3) cash.

Pursuant to MFA, AFL is now a majority shareholder in several companies. As a Maori-controlled company, AFL provides dividend payments to *iwi*.

The right to development recognized by the Waitangi Tribunal and again by the Court[75] provided a process to establish private property rights for Maori, both in terms of quota shares and shares in AFL. Although this right to development has ultimately been manifested in a private property right for Maori, the tenet that underpins this right and management is one based on custom.

4.5 Maori rights – Conclusion

Recognition of the various doctrines that support Maori rights to their fishery has resulted in legislative recognition of these rights. Maori are now in a position

73. *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 1 17 (PC); *alt cit Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission; alt cit Pereara v Treaty of Waitangi Fisheries Commission.* This was referred to by Justice McGechan – see *Manukau Urban Maori Authority & Ors v Treaty of Waitangi Fisheries Commission & Ors* (28.11.03 McGechan J., Auckland HC, CP 122/95; CP 171/97), McGechan J. at para [9] "In July 2001 the Privy Council affirmed the Court of Appeal's finding that an iwi was a traditional tribe."
74. Aotearoa Fisheries Limited was established pursuant to section 60 of the Maori Fisheries Act and is required to manage its assets in a commercial manner (section 61). See Subpart 3 of the Maori Fisheries Act 2004 for full provisions pertaining to AFL.
75. *Ngai Tahu Maori Trust Board & Ors v Director General of Conservation & Ors* [1995] 3 NZLR 553, Cooke P., Richardson, Casey, Hardie Boys, Gault J.J. See also Waitangi Tribunal, Muriwhenua Fishing Claim Report (1988) pp. 234–235.

where they collectively exert an influence on approximately 40 per cent by volume of all quota and a share in the fisheries asset package.

5. Does the recognition of Maori fishery rights provide a precedent for the recognition of Sami rights to their fishery?

5.1 Maori and Sami: equalities and differences

Maori have established rights to their fishery. For Maori, the overarching right was an indigenous right fundamental to their custom, doctrine of native title, and the Treaty. It is now important to address the challenge of whether the recognition of these rights for Maori to their fishery can equate to, or provide a precedent for, a Sami right to their fishery.

Various threads underpin Sami rights to their fishery, including rights based on custom, international covenants, and domestic legislation.[76] The Lapp Codicil of 1751, article 12, can probably also be interpreted in such a way.

In contrast to Norway, New Zealand has a common law system with an unwritten constitution. And unlike the Norwegian Lapp Codicil, the New Zealand Treaty was an agreement entered into between the Crown and Maori which guaranteed Maori a right to their fishery. For the Sami peoples, the Lapp Codicil does not assure the same rights as the Treaty.

Although there is a doctrine in Norway prohibiting the acquisition of property rights in the sea, in New Zealand an indigenous right or customary title to the foreshore and seabed is to be tested in the near future. If Maori traditional or customary rights can be confirmed in this area, and following the reasoning in *Gumana,* a title could be granted within the foreshore seabed area. Such title could possibly exclude the rights of navigation.

Sami use rights have existed since time immemorial. Although the current legal system in Norway is predominantly a civil system, it is suggested that this recog-

76. In 1999 *Det Norske Storting* (The Norwegian Parliament) adopted a Human Rights statute that provided certain International Human Rights Conventions status as Norwegian statutory law. See also L. Watters *"Indigenous Peoples and the Environment: Convergence from a Nordic Perspective"* UCLA Journal of Environmental Law and Policy (2001).

nition of indigenous rights to the foreshore and seabed may provide important developing jurisprudence for Sami rights.

5.2 Legislative and Case Law recognition

Today the legal system in Norway is a mixture of customary law, the civil law system, and common law traditions. Although influenced by two European legal systems, the Norwegian legal system also retains strong old Nordic traditions. According to Justice Bruzelis:[77]

> "The Norwegian legal system could neither be classified as continental nor Anglo-Saxon. However the Norwegian legal system has been influenced – in varying degrees – by both these main European legal systems, but also retains some strong old Nordic legal traditions."

Despite the retention of strong Nordic legal traditions within the Norwegian legal system, the recognition of indigenous peoples through international law and covenants[78] has stimulated the process of domestic law in Norway, reinforcing the protection of Sami peoples. Amendments to the Constitution,[79] adoption of new legislation,[80] and approval of international covenants applicable to indigenous peoples are clear evidence that Sami peoples are advancing their rights.

The role of human rights in Norwegian law was strengthened in 1994 by the adoption of Article 110 c in the Norwegian Constitution (Human Rights Article). The 1999 Norwegian Human Rights Act (21 May 1999 no 30) article 2 incorporated international human rights conventions that prevail over other legislation when added by Parliament to the list of conventions in the Act. Although the Finnmark Act does not cover fishing rights in salt water, it attempts to strengthen Sami rights by giving the entire population of Finnmark greater influence over property in the county.

Case law[81] has provided a catalyst for the establishment of a Sami Parliament, and opened the window to incorporate legal jurisprudence from other jurisdictions determining indigenous rights claims. For instance, in an early decision of

77. Justice Karin M. Bruzelius *"Judicial Review within a unified Court system."* Available also <http://www.venice.coe.int/WCCJ/Papers/NOR_Bruzelius_E.pdf> last accessed 17 October 2009.
78. ILO 169, Article 27 ICCPR.
79. Article 110A.
80. Human Rights Act 1999, to strengthen the position of human rights in Norway.
81. See Minde above n 3 and discussion of the *Alta* case.

the Supreme Court of Norway, *Brekken* case, the Court determined the agreement included by necessary implication the right of Sami to engage in their traditional activities in the present day.[82] In the Supreme Court *Alta* case, for the first time international law relating to indigenous peoples and human rights was considered, but not emphasized by the Court, through the advocacy of the Sami people.[83] In recognizing the Sami as a distinct people entitled to special rights, the Court applied Article 27 of the ICCPR, institutionalizing international covenants. In addition the Court considered the role of custom in the law.

In the *Selbu* and *Svartskog* cases in NRt. 2001, p 769 and 2001 p 1229, the Supreme Court recognizes, respectively, Sami land rights to reindeer husbandry and private property, and property rights for the Sami community. The Supreme Court also adapted their evaluation of proof for acquiring land rights to the Sami way of using the land.

In general these Court decisions establish precedents that are binding. However, according to Professor von Ebyen:[84]

> "… even if precedents are not regarded as binding they will none the less … always carry considerable weight, and there is no reason to believe that the legal authority will be alarmingly weakened."

The Maori endured long periods where their rights went unrecognized, however, this did not mean these rights were extinguished. Although it has been difficult to secure, a right to claim a common law or native title to their fishery remains. For the Sami peoples without a common law claim to native title rights, it is suggested New Zealand legislative and case law developments could provide a firm basis for the recognition of the Sami right to their fishery.

5.3 Recognition of traditional laws and customs

The legal jurisprudence, including the adoption of the doctrine of *terra nullius* and a narrow interpretation of the Lapp Codicil, led to further marginalization

82. See Norsk Retstidene (NRt.) 1968 p. 394. See also L. Watters *"Indigenous Peoples and the Environment: Convergence from a Nordic Perspective"* UCLA Journal of Environmental Law and Policy (2001) p. 279.
83. See NRt. 1982 p. 241. See also Watters, ibid. p. 280.
84. W. E. von Ebyen "The Attitude towards Judicial Precedent in Danish and Norwegian Courts" available also <http://www.cenneth.com/sisl/pdf/3–3.pdf.> Last accessed 15th October 2009.

of Sami rights. Nonetheless, legal cases such as the *Alta* case and the resultant establishment of the Sami Law Committee are clear evidence, according to Oyvind Ravna,[85] that the Sami legal culture did not succumb to assimilation policies.

Subject to satisfying various conditions such as use and occupancy[86] or traditional laws and customs;[87] common law recognizes customary or aboriginal/native title. It is undisputed that from time immemorial Sami peoples have exercised their traditional customs and use rights over their land and sea. These traditional rights were recognized in the Lapp Codicil in 1751 and in case law.[88]

The traditional laws and customs of the coastal Sami peoples recognize their connection with, and rights to, their fishery. In the opinion of the author, these rights continue to exist and are not diminished by contrary legislation, even though they are not recognized in legislative terms by the government. It is also suggested that these rights are not contingent upon ownership of the contiguous land, and exist independently.

For Maori, like other indigenous peoples, no distinction was drawn between land above and land below the water. Customary title existed equally above the high water mark and below the high water mark. Even if the land above the high water mark was not owned by Maori, this did not extinguish customary title to the land below the high water mark.

In 2004 the New Zealand government introduced legislation, FSA, which vested title to the foreshore and seabed to the Crown.[89] This piece of legislation effectively extinguished any customary title to this area. However, according to the Right Honorable Minister Pita Sharples, the FSA is set to be repealed, to possibly allow Maori the right to take a case to Court to have their customary right to the foreshore and seabed heard.[90] This could result in the recognition of a right or a *sui generis* or shared title to this area. Nonetheless, initial recognition of a customary title to the foreshore seabed for Maori, is paramount prior to any *sui generis* or shared title.

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85. O. Ravna 'Sami legal culture – and its place in Norwegian law' in Jorn Oyrehagen Sunde and Knut Einar Skodvin (ed.) *"Rendezvous of European Legal Cultures"* Fagbokforlaget (2010).
86. *Delgamuuku* above n. 43.
87. *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.
88. See e.g. Nrt. 1968 p. 394, 1968 p. 429, 2001 p. 769 and 2001 p. 1229.
89. Section 13 (1).
90. Hon. Dr. Pita Sharples "Treaty Issues" lecture given to Contemporary Treaty Issues Class, LAW 421, Faculty of Law, University of Auckland, 2nd October 2009.

6. Conclusion

Various Maori rights, including custom (*tikanga Maori*), the doctrine of the aboriginal title and Treaty underpin their claim to fishery. The common theme in establishing these rights is one based on custom. The rights of Maori to their fishery, as articulated in the Treaty, were not incorporated into legislation. It was the ability of Maori to pursue their rights through the Courts, and particularly the Waitangi Tribunal, that inevitably resulted in the Settlement. These rights have now been recognized in legislation apportioning a share of the fishery as quota shares and cash to Maori. There was no recourse by Maori to international instruments or covenants in support of their claim, and recent appeal for recognition of their rights through international covenants has not been as successful.[91]

For the Sami peoples, a right to fish is a right immemorial derived from customary practice. The combination of domestic legislative recognition, international law recognition, and case law findings should surely provide a robust base to implement new legislation that provides adequate recognition and protection of indigenous fishing rights for Sami peoples. Informed by international and domestic legislation, the developing jurisprudence from the Supreme Court of Norway[92] suggests the willingness of the Court to adopt jurisprudence from other jurisdictions[93] recognizing indigenous rights.

The recommendations of the Smith Commission propose a right for Sami fishery based on their traditional rights: a fjord entitlement. This is consistent with international law, domestic law, academic writing, and case law, but contrary to the opinion of the Attorney General and the Norwegian government. The view of the Attorney General and central Norwegian authorities is that international law does not establish a right to fish, and traditional use is not a sufficient basis to establish a right.

It is acknowledged that the Smith proposal may not be accepted. It is also acknowledged that the recognition of a right immemorial derived from customary

91. See Committee on the Elimination of All Forms of Racial Discrimination "Decision 1 (66): New Zealand Foreshore and Seabed Act 2004" (11 March 2005) CERD/C/66/NZL/Dec.1.
92. See e.g. Nrt. 1968 p. 394, 1968 p. 429, 2001 p. 769 and 2001 p. 1229. See also Watters above n 76 for discussion on this developing jurisprudence.
93. Although common law jurisdictions, both Canada and Australia provide a developing jurisprudence that recognizes indigenous rights and title. See for example M. Walters 'Promise and Paradox: The Emergence of Indigenous Rights Law in Canada" in Richardson, Imai and McNeil (eds.) *"Indigenous Peoples and the Law"* (Hart Publishing, Oregon, 2009) pp. 21–50.

practice can be problematic to realize. However, it seems that the growing recognition and acknowledgment of indigenous rights through international instruments, such as the Declaration for the Rights of Indigenous Peoples, together with legislative recognition of fundamental indigenous rights to a resource, such as Maori fishing rights, cannot be dismissed. The increasing amount of jurisprudence that has recognized this also cannot be ignored.

If a Sami "right" can be established and results in a "fjord right," and if this "fjord right" is to be a "shared right," then it is suggested that this primary "fjord right" be granted to the indigenous coastal Sami. This primary "fjord right" can then be "shared" with others. Primary recognition of this right is imperative to solidify the right of Sami peoples as the indigenous peoples of Sápmi.

7. Looking Forward – A Proposed Model?

The Smith proposal includes the establishment of a body to manage rights, as well as the procedure for recognizing customary rights in the fjords of Finnmark. A similar model and process was implemented by the New Zealand government, which determined and apportioned this right to Maori.

Fiji adopted a similar approach. The Qoliqoli Bill 2006 proposes to transfer proprietary rights of *qoliqoli* areas (beach, lagoon and reef) from the State of Fiji to qoliqoli owners who are ethnic Fijians, and also for the establishment of a Tribunal to administer the use of resources within these areas.[94]

In New Zealand these rights have been allocated. Perhaps the body proposed by Smith in Norway could embark upon an appropriate and robust consultation process with the Sami people to allocate and manage their asset, very similar to the process undertaken by Maori. Upon development of a satisfactory model it is recommended that legislation be enacted to provide certainty to both Sami and non-Sami peoples alike.

In the alternative, if the Smith proposal is not realized in legislation, barring civil unrest, the only recourse available to Sami in the opinion of the author, is through the judicial system and international bodies with committed Counsel.

94. When Parliament was dissolved on 5 December 2006 the Bill was still before the Joint Sector Standing Committee for review. Although concern has been raised about who introduced the Bill, the mechanism that recognizes and proposes to administer the use of resources bears similarities.

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Рыболовство коренных народов – сравнительный анализ между маори и саамы

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Резюме

Коренные народы, в том числе саамы и маори (коренное население Новой Зеландии) исконно занимались выловом рыбы. Сегодня саамский народ ищет признания культурного права на рыбную ловлю. Несмотря на недавние ре-

комендации Комиссии под руководством Смита, по признанию прав саамов в прибрежной зоне, до сих пор еще не предприняты шаги по ее реализации. Резкая критика *главного юрисконсульта правительства* является препятствием для реализации права саамов на вылов в прибрежной зоне. В статье предлагается сравнительный анализ между правами на рыбный промысел саамского народа и народа маори. Предполагается, что требование, основанное на праве коренных народов, национального законодательства и международного права может служить основанием для законодательного признания и реализации прав ведения прибрежного промысла саамов.

Ключевые слова: рыболовство коренных народов – маори – саамы – признание прав