

ADINA THORN

I am 23 years old and live with my parents in Auckland. My Mum is a primary school teacher, and Dad is a Civil Engineer. I have one younger sister, Caroline and a kitten, Charlie. My Mum was raised in St Heliers, Auckland, and Dad on a cattle farm out of Whangarei. When I was young we lived in Orewa, and attended school there. As Deputy Head Girl at Orewa College I learnt the importance of being tolerant of other people and of being resourceful. That role taught me to be self-motivated. I have positive memories of living in Orewa, and would like to return there one day. I now live in Northcote on Auckland's North Shore.

I started University in 1999 and have completed a Bachelor of Property (BProp). I have just completed writing a dissertation on the law of restitution to complete my LLB(Hons) degree. I hope to have a challenging and exciting career in the law, and would like to be involved in property transactions. I would like to perhaps become a judge one day!

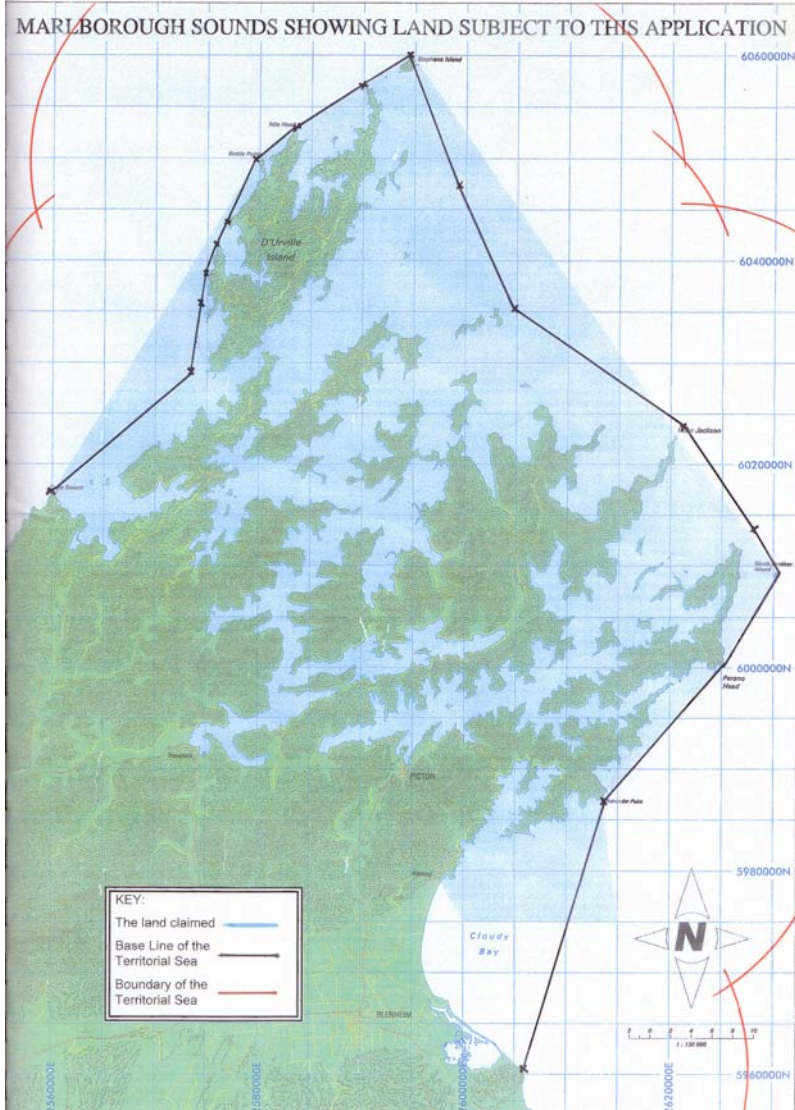


However, in the immediate future I would like to learn to cook!!! And I would really like to tutor Legal System, because I enjoy helping other people and think I would be good at it.

I summer clerked at Simpson Grierson and have worked in Stevens Home and Giving, and as personal assistants, for merchant bankers and a real estate agent for a number of years.

I have travelled quite a bit with my family - I have been to many of the Pacific Islands, (Fiji, Vanuatu, and the Cook Islands) the Chathams, United States, around NZ, and to Australia 5 times. I also spend as much time as possible at my family's bach at Whangamata on the Coromandel Peninsula where I read books, shop and spend time with friends and family.

**LOCATION MAP
AREA CLAIMED IN NGATI APA v AG
3 [2003] NZLR 643**



MANA WHENUA AND THE NGATI APA DECISION

ADINA THORN

INTRODUCTION

This essay examines the way that mana whenua, as a principle of Tikanga Maori (Maori custom law), fits within the English-based New Zealand legal system. Part I of the essay identifies some of the problems associated with translating the principle of “mana whenua” into English. Part II demonstrates the application of mana whenua in the context of the Ngati Apa et al (“*Ngati Apa*”)¹ claim to the seabed and foreshore in the Marlborough Sounds.

PART I - DEFINING MANA WHENUA

According to Justice Durie, the Maori legal order is based on principles rather than prescribed rules.² These principles are dynamic, and, unlike rules, can be changed without recourse to modifying legislation. In similar fashion, Hirini Mead stresses that Maori principles are continually being reviewed according to the social conditions of the time.³

In his jurisprudential writings Ronald Dworkin,⁴ like Durie and Mead, also believes that principles are a necessary and valuable part of the law. While Dworkin was writing in the context of the Anglo-American common law, and more specifically, within the positivist tradition, his reasoning in support of principles being regarded as part of the law is equally applicable to Maori principles such as mana whenua. This is because principles provide important *values* that can be weighed against each other in the administration of law. While rules may be set aside when outweighed by other rules, principles

¹ *Ngati Apa v AG* [2003] 3 NZLR 643.

² E Durie, “Custom Law: Address to New Zealand Society for Legal and Social Philosophy” (1994) 24 VUWLR 325, 331.

³ H Mead, “The Nature of Tikanga” Paper presented to Mai I te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, 11-13 August 2000, 16.

⁴ R Dworkin, “The Model of Rules I”, *Taking Rights Seriously*, in R Dworkin ed., Duckworth, London, 1977, 26-28.

survive to prevail in other instances. Dworkin believes that the values underpinning principles are integral to any system of law.

In my view, the principle of *mana whenua* best fits within the limited category of custom law that has been incorporated and recognised by the English common law. More precisely, it constitutes one of the three categories that William Blackstone⁵ believes comprise the common law. As such, it became part of the existing law when English law was established in Aotearoa (New Zealand) following the signing of the Treaty of Waitangi in 1840.

Finding a precise English definition for “*mana whenua*” is difficult. Most commentators on Maori custom and values, and land claimants do not use the term. Even when it is used, it is often not defined.⁶ There are several possible reasons for this. The most obvious is that Maori who use the term have a general understanding of how it applies within the specific contexts they regard as important, thus making translation unnecessary for them. When it is necessary, there are pitfalls associated with the process of translation. First, as Nin Tomas notes,⁷ there are inherent dangers in defining Maori concepts by reference to seemingly analogous English terms. She says that, in the process of translation, a traditional Maori concept drawn from a unique cultural context faces the real risk of losing its original meaning and becoming redefined according to English cultural norms.

Second, Willard Quine⁸ suggests that language is indeterminate anyway, so that translation can never equate exactly the same meaning to two different words. Thus, when language *x* (Maori) is mapped onto language *y* (English) there is no way for a translator of *x* into *y* to know that he or she has assigned a word of equivalent

⁵ W Blackstone, *Commentaries on the Laws of England*, 1st edn, Murray, London, 1857.

⁶ The Waitangi Tribunal in the following reports asserted “*mana whenua*”, but did not explain its meaning: *Te Roroa Report—WAI 038*, 1992; *The Pouakani Report—WAI 033*, 1993 and *Te Whanau O Waipareira Report—WAI 414*, 1998. The following texts which are frequently cited as authoritative also do not explain what “*mana whenua*” means: J Metge, *The Maoris of NZ, Rautahi*, Routledge and Kegan Paul, London, 1976; R Firth, *Economics of the New Zealand Maori*, Government Printer, Wellington, 1972.

⁷ N Tomas, “Implementing Kaitiakitanga under the RMA 1991” (1994) 2 *New Zealand Environmental Law Reporter* 39.

⁸ W Quine, *Word and Object*, Technology Press of the Massachusetts Institute of Technology, Cambridge, 1960, chapter 2.

meaning. Quine gives the example of an English speaking person observing a speaker of another native language (Maori) watching a rabbit and saying “gavagai”. The first English person may translate “gavagai” to be XYZ. A second English person seeing exactly the same event may translate “gavagai” to be ABC. The meanings assigned to “gavagai” are not equivalent because neither translator knows exactly what is subjectively meant by the Native speaker (Maori) when he or she says “gavagai”. She may be referring, for instance, to the whole rabbit, part of the rabbit, or an undetached rabbit part. Thus, according to Quine’s theory, when an English translator defines Maori words, the English and Maori words can never be equivalent.

Finally, Durie and Boast both believe that the lack of definition surrounding Maori jural terms is at least partially referable to the lack of scholarship and research into Maori legal values to date.⁹ They attribute this to a misguided belief held by the legal fraternity that Maori do not have “laws” that English-based New Zealand law can give effect to, but instead possess only “lores”, being a loose set of disparate values, stories and tales. A recent example of this is provided by Judge Whiting in *Heta v Bay of Plenty Regional Council*,¹⁰ a case concerning the granting of permits to dredge and dispose of sediment in a harbour, where the judge stated “this Court is a statutory-constituted court of law. It is not a court of ‘lore’”.

Despite the inherent risks set out above, it is necessary to define “mana whenua” in order to provide a clear principle by which to analyse the *Ngati Apa* decision.¹¹ I believe that there are two connected aspects to mana whenua. First, “whenua” (land) is the heart and source of a person’s identity, and second, “mana whenua” refers to “sovereignty” or absolute authority of and over the land.

The first aspect of mana whenua refers to whenua (land) as being at the heart and source of one’s identity.¹² Edward Douglas notes that

⁹ Durie, *supra* n2; R Boast et al ed., *Maori Land Law*, Butterworths, Wellington, 1999, 6.

¹⁰ Environment Court, Auckland, AO 93/00, 1 August 2000, noted [2000] BRM Gazette 121 and T Bennion ed., *Maori LR*, Oct 2000.

¹¹ Section 2 of the Resource Management Act 1991 defines “mana whenua” as “customary authority exercised by an iwi or hapu in an identified area”. However, the point made here is that a more in depth consideration of the meaning of “mana whenua” is required.

¹² E Douglas, *Mana Whenua, Mauri Tangata: exploring the relationship between Maori identity and the land*, University of Waikato Centre for Maori Studies and Research, Hamilton, 1983, 1-5.

land is viewed as the source of both group and individual identity and that before the arrival of Europeans in Aotearoa there was “an intimate association of Maori people to their lands”.¹³ He also says that “without land, the people cease to exist. Land is a unifying force, for the tribe and the family”.¹⁴ Asher and Naulls add that “traditionally the land was a source of cultural, spiritual, emotional and economic sustenance, and that remains true today”.¹⁵

The word “whenua” in te reo (Maori language) also means “placenta”.¹⁶ This meaning recognises the Maori practice of burying a child’s placenta in his or her ancestral land after birth.¹⁷ This physical connection establishes a direct and ongoing relationship with a particular area of land, so that from the time the placenta is placed in the earth the land becomes part of the child’s being.¹⁸ Although this may later serve as the basis of a land occupation claim, it is more important in terms of establishing turangawaewae (standing place) so that a person will always belong “here”.

Further, Maori view the land as a living phenomenon. According to Douglas,¹⁹ Maori personify the land by naming specific features and claiming personal associations. The mountains, hills and rivers are named as ancestors “and treated as though the Western distinction between myth and tribal history did not exist”. Thus, when the land is lost, part of the peoples’ identity is lost with it. By way of example, Douglas draws an analogy with the Palestinian people, and believes that their loss of land has led to a situation in which they too “are struggling to maintain their identity as a people”.²⁰

Not only is the land a source of identity for its current occupants, it also links that identity to past ancestors.²¹ When occupying the land, Maori experience strong emotional connections to their relations and whakapapa (ancestors). Thus the proverb: “noku te whenua, o oku tupuna” / “mine is the land, the land of my ancestors”.²² According to Justice Durie, “the land was seen as shared between the dead, the

¹³ Ibid at 1.

¹⁴ Ibid at 3.

¹⁵ G Asher and D Naulls, *Maori Land*, Preliminary Paper 29, New Zealand Planning Council, Wellington, 1987, 2.

¹⁶ Ibid at 4.

¹⁷ Ibid.

¹⁸ Durie, supra n2 at 328.

¹⁹ Douglas, supra n12 at 3.

²⁰ Ibid.

²¹ Ibid at 2; Metge, supra n6 at 107.

²² Firth, supra n6 at 368.

living and the unborn. Current generations were as caretakers, holding on behalf of the ancestors for the generations still to come”.²³ Thus, I believe that one aspect of the meaning of “mana whenua” is the perception that land is the source and heart of a person’s identity.

Second, mana whenua has been described as referring to “mana” or authority through governance, control, or “ownership” of the land.²⁴ It is difficult to reconcile this with the type of land tenure recognised either by the English common law or the Torrens system that presently operates in Aotearoa. Under the classification of legal estates under common law, land is ranked hierarchically according to the number of rights that attach to it, from the highest estate or fee-simple ownership, to a “user-right”, a limited right to use the land for a particular purpose, such as an easement.²⁵ By way of contrast, land governed by Maori was held by the hapu or iwi collectively, and the right to possession extended to the hapu or iwi as a whole.²⁶

Mana whenua has been variously interpreted and is often linked to other concepts. Some research institutions and academics assert that mana whenua is akin to “fee-simple ownership” or an aspect of it, while others equate it to “sovereignty”. The New Zealand Education Department has stated that mana whenua is part of the “tino rangatiratanga” guaranteed under Te Tiriti o Waitangi (Maori text).²⁷ Tomas defines tino rangatiratanga as “retention of absolute control over resources and self”, which is more than the mere possession of existing property as set out in the English text of the Treaty of Waitangi.²⁸ Firth, when discussing “mana and the land”, although not

²³ Durie, supra n2 at 329. Further, Metge, supra n6 at 107: “it is land of our ancestors” and Asher and Naulls, supra n15 at 3: “the continued occupation of a piece of land was the most obvious sign of a link between generations – between the dead, those living and those yet to come”.

²⁴ New Zealand Law Commission, *Maori Custom and Values in New Zealand Law: Study Paper 9*, Wellington, 2001, paras 137-138; New Zealand Education Department, *Maori Language Glossary*: <http://www.tki.org.nz/r/ncea/geo_maoriglossary.doc> (at 18 November 2003); Durie, supra n2 at 330.

²⁵ See Hinde, McMorland and Sim, *Land Law in New Zealand*, Butterworths, Wellington, 1997, 30-33.

²⁶ Boast, supra n9 at 27.

²⁷ New Zealand Education Department, supra n24. The meaning of “tino rangatiratanga” has been strongly contested since it was expressed in Article 2 of te Tiriti o Waitangi (the Maori text) in 1840.

²⁸ N Tomas, “Land, Sovereignty and Tino Rangatiratanga”, in *Work in Flux*, Greenwood et al ed., University of Melbourne, Australia, 1995, 32.

specifically referring to mana whenua, believes that while mana has a variety of meanings, with respect to land it means:²⁹

... the superior power or prestige and intimacy of association which a tribe possesses with regard to its territory as compared with the relation of other tribes to it. The possession of *mana* over the land is correlated with supreme right of ownership, though not with mere occupation.

That Firth's definition would equate mana whenua to the highest form of ownership in land is further evidenced by his statement that "the native conception of *mana* in relation to land is thus most nearly akin to the idea of sovereignty".³⁰ "Sovereignty" is a difficult concept to define. Unfortunately, Firth does not elaborate on the precise nature of the rights that attach to his idea of sovereignty. Malcolm Shaw believes that it is about the legal supremacy of internal governmental institutions on the one hand, and the state as a legal person in an external international sense on the other.³¹

I see mana whenua as being connected to both sovereignty as discussed by Firth and the absolute authority or autonomy put forward by Tomas and the New Zealand Education Department. In fact, sovereignty and absolute authority are similar in that both denote absolute control over territory.

Within the English common law, "sovereignty" is not a concept that directly equates to "fee-simple ownership". Sovereignty is a wide reaching concept of public international law that concerns state selfhood³², whereas fee-simple is a concept specific to private land law. Thus, a right in fee-simple is not on par with sovereignty in terms of its reach. Also, while fee-simple ownership tends toward being both individualistic and private, sovereignty tends to invoke a broader range of widely held political considerations.

Another consideration is that the exclusive possession of land that attaches to the notion of fee-simple ownership does not coalesce easily with Maori custom law. Land was held communally under Maori custom law. While certain individuals may have been granted particular rights to certain areas, these rights were generally not

²⁹ Firth, *supra* n6 at 391.

³⁰ *Ibid* at 392.

³¹ M Shaw, *International Law*, Cambridge University Press, New York, 1997, chapter 1.

³² *Ibid*.

viewed as being to the exclusion of the rest of the iwi or hapu.³³ Further, it was common for iwi or hapu to transfer specific user-rights to other groups.³⁴ Boast submits that it would be more correct to view the holder of these rights, whether individual, hapu or iwi, as owning “rights in the land”, rather than “ownership of the land”.³⁵ Thus, the holder owns the “right” and not the land. His statement that:³⁶

... these competing claims of rights coupled with the intricate system of overlapping and intersecting rights held by the members of different kinship groups, makes it difficult to say who “owned” the land

could be viewed (perhaps incorrectly) as reading down Maori rights to land. It is natural, and if Quine is right perhaps even inevitable, that non-Maori will use a fee-simple framework of reference when evaluating land tenure under Maori custom law. Given this, Boast’s submission that Maori have “user-rights” to the land could lead to further diminution of Maori entitlements because no indication is given as to the inherent content or regulatory force attaching to these rights.³⁷ If mana whenua is about absolute authority or sovereignty then the rights that attach to it must not be subjected to any greater rights. The danger of Boast’s “user-rights” definition is that it potentially undermines the supremacy aspect of mana whenua. Even if the term “absolute user-rights” was employed to emphasise that these user-rights are not subject to any greater rights of possession, I believe that “sovereignty” is still the better term because, within an English legal framework of thinking, it includes greater regulatory authority.

Notwithstanding this, in terms of alienation, Boast states that a holder of land had full discretion to grant rights to other hapu and iwi, and to decide what conditions attached to the grant.³⁸ Asher and Naulls posit that the hapu or iwi held a veto right to prevent land being passed outside the iwi indefinitely.³⁹ According to Andrew Erueti, while rangatira (leader/s) had authority to give other hapu or iwi user-rights, they did not have authority to transfer absolute ownership to

³³ Boast, supra n9 at 28; Firth, supra n6 at 377.

³⁴ Ibid; Asher, supra n15 at 5.

³⁵ Boast, supra n9 at 28-29.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid at 28.

³⁹ Asher, supra n15 at 5.

the land.⁴⁰ Firth adds that rangatira could not transfer the land in its entirety unless the hapu or iwi consented.⁴¹

In summary then, “mana whenua” is comprised of the two elements outlined above. First, “whenua” relates to the source and heart of one’s identity and, as such, is of paramount importance to Maori. Second, “mana whenua” denotes sovereignty or absolute authority over the land. The terms “user-rights” and “absolute user-rights” do not adequately capture this meaning. “Sovereignty” provides a closer approximation.

PART II - RECOGNITION OF MANA WHENUA WITHIN THE NEW ZEALAND LEGAL SYSTEM

It is arguable that mana whenua does, in an indirect way, give rise to a cause of action in the Maori Land Court and the Waitangi Tribunal where Maori custom law has been included in the statutes that establish and regulate both bodies, as well as in the Resource Management Act 1991. However, outside these areas, mana whenua is not yet recognised as giving rise to a direct cause of action in New Zealand courts.

According to Blackstone, the English common law is comprised of three groups of laws: (1) general universal rules; (2) particular laws for the courts; and (3) laws of a “particular custom which for the most part affect only inhabitants of particular districts”.⁴² Mana whenua, being Maori custom law affecting the inhabitants of different areas of Aotearoa, fits within this third category. When English-based law was introduced in 1840, it became part of the law applicable from that time within Aotearoa. The New Zealand Law Commission includes Maori principles as an essential part of the pre-existing custom law covered by the Doctrine of Aboriginal Rights, stating:⁴³

aboriginal rights and titles are continued as a matter of law after a declaration of sovereignty and the imposition of English law

⁴⁰ Boast, supra n9 at 30.

⁴¹ Firth, supra n6 at 396.

⁴² Ibid; Blackstone, supra n5 at 67; *Halsbury’s Laws of England*, 4th edn, Vol 12(1), Butterworths, London, 1998, paras 601, 602, 605 and 606.

⁴³ NZ Law Commission, supra n24 at para 47.

throughout a particular territory”, irrespective of the means of acquisition.

For custom law to be legally recognised in accordance with Blackstone’s third category, *Halsbury’s Laws of England* states that it must be: (1) immemorial; (2) reasonable; (3) certain, and (4) continued without interruption since its origin.⁴⁴ Several cases demonstrate the use of this category when dealing with the rights of indigenous peoples within the British Commonwealth. They include *Mullick v Mullick*,⁴⁵ in which the Privy Council held that “a Hindu idol, according to long established authority, founded upon the religious customs of the Hindus, and the regulations thereby by courts of law, is a ‘juristic entity’”, and *Le Tagaloa Pita et al v AG*⁴⁶ in which Cooke P held that the Samoan Constitution *must* be read by reference to traditional settings. *Guerin v R*,⁴⁷ a decision of the Supreme Court of Canada, and *Mabo v State of Queensland*,⁴⁸ a decision of the High Court of Australia, are more recent examples concerning pre-existing native land rights which show that the courts are capable of construing Blackstone’s third category flexibly.

Although Tomas views Maori custom law as a separate “indigenous” source of law that is self-complete, the “imported” New Zealand legal system does not currently recognise any competing system, as such. Instead, for Maori custom law principles to be considered valid and enforceable under New Zealand law they must fit within the framework of Blackstone’s analysis, and, if they are to have any concrete outcome in terms of legal rights, be supported by proof sufficient to satisfy the *Halsbury’s* tests.

The orthodox position under New Zealand law is that the *only* protection afforded to Maori custom law principles such as mana whenua is by way of statute, “customary title,” as defined under Te Ture Whenua Maori Act 1993, or via the “doctrine of aboriginal title” which is sometimes also referred to as “customary title”.

The Ngati Apa Claim To The Seabed And Foreshore In The Marlborough Sounds

⁴⁴ *Halsbury’s*, supra n42 at para 606.

⁴⁵ (1925) LR 52 Ind App 245, 250

⁴⁶ [18 December 1995] CA, Western Samoa, CA 7/95.

⁴⁷ (1984) 2 SCR 335.

⁴⁸ (1992) 175 CLR 1.

Ngati Apa claim that they have mana whenua over the seabed and foreshore of the Marlborough Sounds. They assert that these resources are a source and essential aspect of their identity, that they traditionally had authority or absolute user-rights over those resources, and that their authority should be legally recognised. They are particularly concerned about the Government issuing private licences to third parties under section 12(1) and (2) of the Resource Management Act 1991, thereby excluding Maori from these areas.⁴⁹

In 1997 Ngati Apa sought declaratory orders from the Maori Land Court that the seabed and foreshore in the Marlborough sounds was Maori customary land “held by Maori in accordance with tikanga Maori” under section 129 (2)(a) of Te Ture Whenua Maori Act 1993, (“the Act”). Further, Ngati Apa argued that title should be investigated under section 132 of the Act.⁵⁰ In the alternative, the claimants sought a declaration that the Crown holds the land in a fiduciary capacity for their benefit under s 18(1)(i) of the Act. The Crown argued that the claimants could not be successful because customary title to the seabed and foreshore had been extinguished by case law and legislation.⁵¹

Judge Hingston, giving an interim decision in the Maori Land Court, distinguished *In re the Ninety-Mile Beach*⁵² and held that legislation had not extinguished customary title. The Attorney-General and others appealed to the Maori Appellate Court, which granted leave for the decision to be heard in the High Court. Ellis J in the High Court⁵³ held that the Maori Land Court did have jurisdiction under the Act but declared that the land below high water mark was beneficially owned by the Crown at common law and was further declared to be so by section 7 of the Territorial Sea Contiguous Zone, and Exclusive Economic Zone Act 1977, and section 9A of the Foreshore and Seabed Endowment Revesting Act 1991. Thus it

⁴⁹ F McLeod, “Maori customary title to the foreshore and seabed and the allocation of coastal permits under the Act”, Resource Management Bulletin, (1998 BRMB 101).

⁵⁰ The Maori Land Court and High Court can make status orders under s131(1) that the land is Maori customary land. Once a status order is made, the Maori Land Court has exclusive jurisdiction under s132 to investigate title, and it may make a vesting order under s132(4). The effect of a vesting order is that the land’s status changes from customary land to Maori freehold land.

⁵¹ [1963] NZLR 461.

⁵² Maori Land Court, 22A Nelson MB 1, 22 December 1997; noted in *Maori LR Dec 97/Jan 98*, 4; [1998] NZ Law Review 485.

⁵³ [2002] 2 NZLR 661.

could not be, or have been, Maori customary land.⁵⁴ Instead it was held that the Crown was the beneficial owner of the seabed and foreshore.

I question how the Crown could become the “beneficial owner” of the seabed and foreshore for Maori in the traditional sense, without there first being a splitting of legal and beneficial interests.⁵⁵ If there had been a splitting of legal and beneficial interests, Ellis J is silent as to how this has occurred.

Ngati Apa appealed the decision. Thus, the Court of Appeal had to determine whether the Maori Land Court had jurisdiction to determine whether the claimants had customary title to the seabed and foreshore.

The “Ngati Apa” Court of Appeal Decision

In the Court of Appeal, Elias CJ was careful to emphasise that the Court was deciding only the preliminary question of whether the Maori Land Court had jurisdiction to determine whether the claimants had “customary title” as defined by the Act and not the secondary question as to whether they had *in fact established customary title*:⁵⁶

... the significance of the determinations this Court is asked to make should not be exaggerated ... the outcome of this appeal cannot establish that there is Maori customary land below high water mark Whether or not the appellants [the claimants] will succeed in establishing in the Maori Land Court any customary property in the foreshore and seabed lands ... remains conjectural.

The Court of Appeal unanimously held that the court’s ability to establish whether customary title to the seabed and foreshore had been extinguished, remained extant.⁵⁷ That *mana whenua*, as part of customary law, was also preserved is supported by Tipping J’s reasoning that “Maori customary title is no different from any other

⁵⁴ Ibid.

⁵⁵ Per Lord Browne-Wilkinson, *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669 (HL).

⁵⁶ Per Elias CJ, *Ngati Apa v AG* [2003] 3 NZLR 643, para 7-8.

⁵⁷ A full bench of five judges heard this case. The decision comprises 4 separate judgments each of which reaches the same conclusion.

common law interest which continues to exist unless and until it is lawfully abrogated”.⁵⁸

What then is the interest preserved? Having been incorporated into New Zealand law, *mana whenua* retains neither its purity nor its supreme strength as a principle of Maori custom law. In the process of incorporation, it became less than sovereign and no longer absolute. Maori customary law under *Te Ture Whenua Maori Act* is re-aligned in accordance with the doctrine of aboriginal title to fit within the parameters of the New Zealand legal system. Thus, it is a fallacy to equate *mana whenua* as it is recognised by Maori custom law with *mana whenua* as it is recognised by New Zealand law.

The doctrine of “aboriginal title” is not derived from any rights Maori have under *Te Tiriti o Waitangi/the Treaty of Waitangi*. Neither is it derived from the wholesale application of English common law into the Aotearoa (pre-colonial) and New Zealand (colonial) jural contexts. Aboriginal title is the product of mixing politics and law to produce a practical doctrine of constitutional law which accepts imperial expansion into foreign territories and legitimates the establishment and imposition of the new governing institutions over any prior inhabitants or governing institutions.⁵⁹ What is essential to note is that in this process, and despite Maori having pre-existing and indigenous status, the “legality” of *mana whenua* and any other Maori legal principles becomes reliant on the New Zealand courts for recognition and enforcement. Probably the clearest enunciation of the nature of aboriginal/customary title to date is found in the 1994 Court of Appeal decision of *Te Runanganui o te Ika Whenua Inc Society vAG*,⁶⁰ in which it was stated:⁶¹

... on the acquisition of the territory [New Zealand] ... the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, the title vests in the Crown. But ... the

⁵⁸ [2003] 3 NZLR 643, para 185.

⁵⁹ *Ibid.*

⁶⁰ [1994] 2 NZLR 20.

⁶¹ Per Cooke P, [1994] 2 NZLR 20, 23-24. This position is consistent with the law in other countries where English common law was introduced. *Inter alia* (1) Marshall CJ in the United States Supreme Court in *Johnson v M'Intosh* (1823) 21 US (8 Wheaton) 543, 574, 603, held that the Crown's interest in land was charged with the Natives right to possession. (2) The Privy Council, on appeal from Canada, in *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46, held that the Crown's estate “is encumbered by the rights of the Indian inhabitants”.

radical title is subject to the existing native rights It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statute.

However, the Court unanimously agreed that a future Act of Parliament could successfully extinguish title to the seabed and foreshore.⁶² Tipping J stated that customary title could be extinguished by:⁶³

... a decision of a competent court amending the common law. But in view of the nature of Maori customary title, underpinned as it is by the Treaty of Waitangi, and now by the Ture Te Whenua Maori Act, no court having jurisdiction in New Zealand can properly extinguish Maori customary title.

Tipping J's reasoning that "a competent court" *could*, in certain circumstances extinguish customary title is open to debate. I have not been able to find any precedent to support it, and believe that a competent court could not extinguish customary title, because if the court rather than the Crown could remove customary title it would mean that the relationship would always be subject to third party intervention. Furthermore, if the court is able to set aside a legal relationship of the Executive (or Crown), it will violate the constitutional separation of powers. The courts have consistently asserted that the onus of proving that customary title has been extinguished rests with the Crown.⁶⁴ While this statement does not suggest that only the Crown through Parliament can remove customary title, it does suggest that the Crown *should* be the only body because it bears the onus of proof.

A less radical interpretation of Tipping J's comments is to read them as meaning that, in the process of interpreting the law, a court may hold that aboriginal title has been extinguished. *Ngati Apa* shows that the standard to be met before statutory extinguishment can occur is extremely high. In order for the Crown to extinguish customary title, it must demonstrate a "clear and plain" purpose⁶⁵ or "make its

⁶² N Tomas and K Johnston, "Who Owns the Foreshore and Seabed of Aotearoa?", [2003] NZ Law Review, 462.

⁶³ *Ngati Apa*, supra n56 at para 185.

⁶⁴ *R v Sparrow* [1990] 1 SCR 1075,1099; *Mabo v Queensland* (1988) 166 CLR 186, 213-214; *Te Runanga O Muriwhenua v AG* [1990] 2 NZLR 641, 655.

⁶⁵ Per Keith J and Anderson J, *Ngati Apa*, supra n56 at para 148.

intention crystal clear”.⁶⁶ Tipping J stated that, in the absence of express words, a “necessary implication” could extinguish customary title.⁶⁷ As to the meaning of “necessary implication”, Tipping J cited dicta of Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*⁶⁸:

... it is one which necessarily follows from the express provisions of the statute construed in their context ... a necessary implication is a matter of *express language* and logic *not* interpretation”. (emphasis added)

With respect, an implication is not a matter of express language but is a matter of construction by reading in words that are not themselves contained in a document. If “[a necessary implication] *follows* from the express provisions”, it is indeed a matter of interpretation external to the document. The Court of Appeal in *Ngati Apa* held that the legislation⁶⁹ referred to had not extinguished customary title to the seabed or foreshore.

Finally, the majority held that the 1963 decision of *In re the Ninety-Mile Beach*⁷⁰ had been wrongly decided. That decision held that if the land contiguous to the foreshore had lost the status of customary land, then Maori had also lost title to the foreshore. Tipping J, in accordance with Blackstone’s third category, states that *In re the Ninety-Mile Beach* did not begin from the correct starting point, that Maori customary title was part of the common law from the time English sovereignty was proclaimed.⁷¹

In summary, the Court of Appeal held that: (1) the Maori Land Court had jurisdiction to decide on customary title to the seabed and foreshore; (2) Maori customary title to the seabed and foreshore had not been extinguished by case law or by legislation; and (3) the decision of *In re the Ninety-Mile Beach* had been wrongly decided.

⁶⁶ Per Tipping J, *ibid* at para 185.

⁶⁷ *Ibid*.

⁶⁸ [2002] 2 WLR 1299, 1131. This dicta was adopted as authoritative by the Privy Council in *Russell McVeagh v Auckland District Law Society* [19 May 2003] PC 34/02.

⁶⁹ Namely the following enactments: Harbours Acts 1878 and 1950; Territorial Sea and Fishing Zone Act 1965; section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977; sections 9 and 9A of the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act 1991.

⁷⁰ [1963] NZLR 461.

⁷¹ *Ngati Apa*, *supra* n56 at para 204.

Proving Customary Title

Until legislation is passed to prevent it happening, the *Ngati Apa* decision enables the claimants to bring a case before the Maori Land Court. Regardless, in order for claimants to have their customary title to the seabed and foreshore recognised, they must first overcome the hurdle of proving their entitlement.

Former Attorney General and Minister in charge of Treaty Negotiations, Douglas Graham, has proposed an amended five-part *Halsbury*-type test under which claimant groups must prove the following elements on the balance of probabilities:⁷²

1. exclusive possession at the time the Crown acquired sovereignty; and
2. continuing possession up to the present time; and
3. continuation of customary practices; and
4. maintainence of a physical link with the land; and
5. that the claimants' practice has not been abandoned (because once abandoned it is lost permanently).

This is an extraordinarily difficult test to satisfy because it requires the claimants to show, for example, that they have used resources in the sea and foreshore since the time of English colonisation, and that this practice has never been abandoned. It pays no regard to the effects of colonisation or to any Crown actions based on the erroneous view that it held an unburdened title to the seabed and foreshore. As the Crown has issued private licences to many areas,⁷³ many customary practices have been forcibly abandoned. The test breaches equitable principle preventing anyone relying on their own prejudicial actions or a mistaken interpretation of the law. Instead it establishes both as legitimate bases for preventing many future applicants gaining their rightful legal entitlements.

⁷² D Graham, *The Legal Reality of Customary Rights for Maori*, Stout Research Centre, Victoria University of Wellington, Wellington, 2001, 7-9. Graham does not suggest that this test is specifically designed to resolve the seabed and foreshore issue even though it contains some of the "standard requirements" set out by the courts as being necessary to prove customary ownership under early native land legislation and English common law.

⁷³ These have been granted under sections 12(1) and (2) of the Resource Management Act 1991, legislation allowing foreshore and seabed exploitation for commercial purposes and various fisheries legislation prohibiting Maori access to their resources.

Even if the Maori Land Court establishes that claimants do in fact have customary title under section 131 of Te Ture Whenua Maori Act 1993, the Maori Land Court has a discretion as to whether to vest title to Maori freehold land under section 132. Tipping J suggests that, for policy reasons, the Maori Land Court may decide not to vest the land in the claimants.⁷⁴ If the land is found to be customary land, however, but is not vested in the customary owners, it is uncertain how the land would be administered. Further, Gault P,⁷⁵ and to a lesser extent Elias CJ,⁷⁶ suggest that if the customary interest is established, this may consist of an interest of a different, and quite possibly lesser type, than is capable of being registered under the Land Transfer system. The Maori Land Court may not be able to give legal effect to it because the principle of the Act is to enable Maori customary land to be brought under the Land Transfer system,⁷⁷ and the Land Transfer Act does not presently recognise such interests. Also, since the interest is in the sea the type of interest able to be recognised may be constrained by other legislation⁷⁸ and private grants to other users.

Implications For The Future Application Of Mana Whenua

Tomas and Johnston believe that the real difficulty of recognising customary title is that of working out the incidents of ownership.⁷⁹ They note that, in accordance with *Halsbury's*, there is no *prima facie* public right of passing along the seabed and foreshore that would compete against the claimants' mana whenua interest, unless legally effective public rights have been granted.⁸⁰ In England, *Halsbury's* rebuttable presumption is that the seabed and foreshore is *prima facie*

⁷⁴ *Ngati Apa*, supra n56 at para 196.

⁷⁵ *Ibid* at para 106. His Honour notes: "interests in land in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition both in tikanga Maori and in a developed common law informed by tikanga Maori, are not interests with which the provisions of Part VI [of the Act] are concerned".

⁷⁶ *Ibid* at para 10.

⁷⁷ *Ibid* at para 104.

⁷⁸ See for example the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

⁷⁹ Tomas and Johnston, supra n62 at 1.

⁸⁰ *Halsburys*, supra n42 at paras 9 and 18. At para 9: "the public has no right of passing along or across the foreshore, except in the exercise of the rights of navigation of fishery, or in respect of lawfully dedicated right of way from one place to another over the foreshore; there is no right of stray or recreation use".

vested in the “common right of the Crown, unless it has passed to a subject by grant or by possessory title”.⁸¹ However, the circumstances which give rise to the English common law presumption are not the same as exist in Aotearoa/New Zealand where Maori have a legitimate pre-existing claim based on mana whenua over the foreshore and seabed.

Overseas cases in which customary title has been recognised suggest that proving “ownership” of foreshore and seabed is a question of fact in each case. A spectrum of different rights have been established ranging from a right to mere occupation,⁸² to a right that relegates the Crown’s radical title “to a comparatively limited right of administrative interference”.⁸³ Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria*⁸⁴ stated that establishing the nature of the right “involves the study of the history of the particular community and its usages in each case”.

Some incidents of title have been recognised under New Zealand law. Fenton CJ, when discussing customary title to mudflats, acknowledged the possibility of absolute ownership but awarded rights similar to a “privilege or easement” for policy reasons.⁸⁵ Further, when the Maori Land Court vested rocky outcrops off Great Barrier Island in Ngati Rehua, it vested the land in the resident iwi “as kaitiaki for themselves and, in accordance with the tikanga of whanaungatanga”.⁸⁶

Likewise, if future claimants are to establish customary title, it will be a question of fact in each case whether it exists and a question of law what its incidents are.

⁸¹ Ibid at para 9.

⁸² *St Catherine’s Milling and Lumber Co v The Queen* (1888) 14 App Cas 46, and the *William Webster Claim* (reproduced in FK Nielsen, *American and British Claims in Arbitration*, Government Printing Office, Washington DC, 1926).

⁸³ *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 410. Further, the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 110-119, held that such a right may be anything from usufructory rights to exclusive ownership.

⁸⁴ [1921] 2 AC 399, 404.

⁸⁵ *Kauwaeranga* (1884) reported in A Frame, “Kauwaeranga Judgment” (1994) 14 VUWLR 227, 241.

⁸⁶ *Application by John Di Silva*, 23/2/98, Maori Land Court, Taitokerau District, 30.

CONCLUSION

As stated in Part I of this essay, there are two important aspects of mana whenua. One of these is individual and group identity, which is tied to particular areas of land by specific tikanga. This can be extended to areas of foreshore and sea as well, even if the legal definitions under New Zealand law mean that it has to be artificially construed as a right to land. Hapu and iwi group identity is not restricted to areas that are held in fee-simple title by Maori, but is tied to a territoriality that is unconstrained by physical possession or ownership. Since 1840, iwi territoriality has stabilised, although disputes regarding boundaries and representation of groups are now major issues facing Maori. That hapu and iwi identity is linked to territoriality has already been recognised by the Crown in its dealings with Maori over fisheries resources and legislatively, under the Resource Management Act 1991 and other legislation.

The second important aspect of mana whenua identified is its sovereign regulatory power or “autonomy” under Maori custom law. Mana whenua, in compliance with Blackstone’s third category, is part of New Zealand law. However, legal orthodoxy shows that on integration into the New Zealand legal system it is subsumed beneath western foundational political/legal principles such as the “undivided sovereign” and also becomes subject to New Zealand governmental processes, including those of Parliament and the courts. The unavoidable consequence of this is that it then becomes realigned to fit English common law ideas about customary rights, the strictures of *Halsbury’s* tests and any derivatives of those tests.

Although mana whenua has limited recognition under New Zealand law, it remains a fully autonomous concept under Maori custom law, as recognised and supported by practices carried out by Maori. Furthermore, while there is legislative inclusion of mana whenua in a number of statutes,⁸⁷ it remains only a consideration to be taken into account, and does not give rise to a substantive and recognised legal cause of action. I believe that, in order for mana whenua to have stronger force under New Zealand law, the regulatory authority that attaches to it under Maori custom law must be legally acknowledged and recognised. Otherwise, it will remain an ephemeral concept of limited consequence outside of Maori communities.

⁸⁷ See for example section 8 of the Resource Management Act 1991.

