JURIDICAL ENCOUNTERS

Māori and the Colonial Courts 1840–1852

SHAUNNAGH DORSETT

> ‘*Juridical Encounters* is a rich, intellectually robust, and cogently argued legal history. By plotting the various ways in which Māori encountered, used, or repudiated the British legal system Shaunnagh Dorsett demonstrates the vital role colonial courtrooms played as sites of cross-cultural encounter and political debate, bringing a fresh and exciting perspective to New Zealand’s colonial past.’
> – Associate Professor Angela Wanhalla, University of Otago

From 1840 to 1852, the Crown Colony period, the British attempted to impose their own law on New Zealand. In theory Māori, as subjects of the Queen, were to be ruled by British law. But in fact, outside the small, isolated, British settlements, most Māori and many settlers lived according to tikanga. How then were Māori to be brought under British law?

Influenced by the idea of exceptional laws that was circulating in the Empire, the colonial authorities set out to craft new regimes and new courts through which Māori would be encouraged to forsake tikanga and to take up the laws of the settlers. Shaunnagh Dorsett examines the shape that exceptional laws took in New Zealand, the ways they influenced institutional design and the engagement of Māori with those new institutions, particularly through the lowest courts in the land. It is in the everyday micro-encounters of Māori and the new British institutions that the beginnings of the displacement of tikanga and the imposition of British law can be seen.

Juridical Encounters presents one of the first detailed studies of the interactions of an indigenous people in an Anglo-settler colony with the new British courts. By recovering Māori juridical encounters at a formative moment of New Zealand law and life, Dorsett reveals much about our law and our history.

> ‘This is a book that opens up an almost entirely new territory of legal historical research and places Māori agency at the forefront of the narrative. By unearthing little-known stories of Māori direct engagement in New Zealand’s early courts, Dorsett shines a light on important aspects of our early colonial history.’
> – Professor David V. Williams, University of Auckland

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Part I

Whose Law? Which Law?

1. Preliminary Matters

Part I looks at the 'big picture'. It examines the key legal and intellectual forces which framed metropolitan and colonial approaches to thinking about the relations between Māori and British law, and the institutions, in particular curial institutions, through which these relations could be crafted. This part, then, unpacks different strands of political and legal thought on the related matters of Māori amenability to British law and institutional design. How did the Crown, private stakeholders and settlers view the matter of the jurisdiction of British law over Māori – both as a question of law and as a practical concern? When did British law apply to Māori, and when should it apply? These, of course, were questions that admitted of no one simple answer. Administrators (both local and imperial), the judiciary and even settlers all had opinions on the matter. Some opinions held more weight – they underpinned the crafting of legislative regimes and influenced institutional design. Others remained just that – opinion – and were never realised in policy or law. Despite this, they are still important as they show the plethora of ways the crafting of Crown–Māori legal relations could be imagined and the contingency of the choices ultimately made. How administrators and others thought about the legal relations between Māori and British law was intimately tied to questions of institutional choice and design and the ultimate shape of those courts, and allied offices, which formed key sites of Māori engagement with British law.

Institutional design did not happen in a vacuum. Design choices were a complex response to both the dominant intellectual and political forces of the time and to pragmatic local concerns, primarily to do with law and order. The most obvious intellectual/political force, perhaps, was the heightened concern in the 1830s of former anti-slavery advocates for the worsening position of indigenous inhabitants of the Empire. The effects of rapid settlement on vulnerable populations was undeniable.[1] These philanthropists transposed a dominant ideology of amelioration and protection from the context of slavery to that of the aboriginal peoples of the Empire. In the

1 For a study of the decline in Māori population across the nineteenth century see Ian Pool, *Colonization and Development between 1769 and 1900: The Seeds of Rangiatea*, Springer, Cham, 2015, p. 8.

process, the idea of amelioration took on new overtones and new meanings. In particular, in the 1830s amelioration became associated with notions of 'assimilation': that the best way to protect and improve the conditions of indigenous inhabitants of British settlements, particularly those in the Antipodes, was not just cultural assimilation to settler society, but legal assimilation to British law. Moreover, as had been the case in the context of improving the conditions of slaves, amelioration (regardless of its particular variant) was best achieved through legal regulation. The ideology of amelioration through legal regulation was given its ultimate institutional form in the 1837 report of the House of Commons Select Committee on Aborigines (British Settlements).[2]

However, colonial administrators were not free to simply devise new legal frameworks for indigenous peoples, ameliorative or not. Policy initiatives, and more particularly the institutions through which they were to be implemented, were constrained by a framework of broad constitutional principle – a matter to which the Select Committee arguably paid insufficient attention. Colonial administrators, particularly those in London, took the framework of imperial constitutional principles seriously – however unsystematic or ambiguous those principles might actually have been. Of course ambiguity was not always a problem, particularly for imperial authorities.[3] Ambiguity could allow for significant flexibility in policy design and for the retrospective justification (or disallowance) of colonial initiatives. The small bureaucracy in London at the Colonial Office was not in a position to 'micro-manage' colonial possessions. Constitutional or political ideas and principles were, as Zöe Laidlaw notes, commonly employed reactively, rather than shaping the actions of imperial administrators.[4] One of the key mechanisms through which policy initiatives, including new institutions, were implemented was local ordinance. Oversight of colonial legislation was,

2 *Report from the Select Committee on Aborigines (British Settlements); with the minutes of evidence, appendix and index*, GBPP 1837 VII (425); and on rapid colonisation see James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939*, Oxford University Press, Oxford, 2009.

3 Damen Ward, 'Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and *Lloyd's* Case (1844)', *Victoria University of Wellington Law Review*, vol. 41, 2010, pp. 381–402, at p. 388.

4 Zoë Laidlaw, *Colonial Connections, 1815–1845: Patronage, the Information Revolution and Colonial Government*, Manchester University Press, Manchester, 2005, p. 5.

then, one concrete way in which imperial officials tracked local initiatives and constrained innovation. Local ordinances were passed by the Governor who sat with a Legislative Council (one appointed by the Governor himself). As Damen Ward notes, in general, legislation was to come into effect once passed by these institutions. However, Governors' instructions required that ordinances that affected the Governor's prerogative, or a number of listed subject areas, were to be reserved for Crown approval. In practice, this constituted a significant restriction on the Governors' powers.[5] Legislation, then, could be, and was, disallowed if it was 'repugnant' to the laws of England. The question of what was 'repugnant' was, conveniently, one of those unclear, ambiguous, constitutional principles.[6]

Nevertheless, these broad and often unclear constitutional principles left relatively open spaces within which local officials were able to craft policy based on local exigency. While cognisant of broader imperial concerns, those concerns had to be balanced with competing local imperatives, such as the need for the imposition of law and order in a new colony. As will be seen, the balance taken between these concerns shifted across the Crown colony period between gubernatorial regimes. British practice tended towards the reproduction of British institutions in its colonies. In part, these were seen as the 'birthright' of British subjects. In part, it was simply British hubris: British institutions were best.[7] Across the 1820s and 1830s a series of inquiries had been held into the administrative and legal systems of various colonies. The result had been the partial redrawing of institutions across the Empire and the heightening of imperial control.[8] As examples, new charters were issued for superior courts, some limits were placed on gubernatorial prerogative powers, and the role of middle-level officials, such as

5 Charter for erecting the Colony of New Zealand, enclosed in Lord John Russell to Governor Hobson, 9 Dec. 1840, GBPP 1841 XVII (311), p. 24; also available at ANZ, AGCO 8341, IA1/9/5/6; Ward 'Legislation, Repugnancy and the Disallowance of Colonial Laws', p. 386.

6 On oversight see D.B. Swinfen, *Imperial Control of Colonial Legislation, 1813–1855: A Study of British Policy towards Colonial Legislative Powers*, Oxford University Press, Oxford, 1970. On the complex matter of 'repugnancy' see Ward, ibid.

7 Laidlaw, *Colonial Connections*, p. 7.

8 On the heightening of imperial control and the role of law in this process in the period generally see Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850,* Harvard University Press, Cambridge, Massachusetts, 2016.

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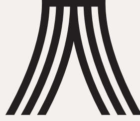

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