

The Application of the British Criminal Law Towards Māori During the Early Colonial Period

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Introduction

Until very recently, New Zealand's criminal justice historiography has been largely neglected by historians, legal or otherwise.¹ This is somewhat surprising considering the debates in this area which have emerged in both Australia and England.² In particular, a fierce discourse developed in English legal historiography when in 1975, Douglas Hay argued provocatively that the "terror" of an extremely punitive criminal law in 18th century Britain helped to protect the property rights of the upper classes and through "discretion" in the laws' application, this system was validated in the eyes of the property-less.³ Importantly, Hay argued that the ability for English judges to exercise mercy towards offenders, and the discretion of propertied individuals to bring prosecutions in the first place, legitimised the criminal law system and consolidated the deferential position of the propertied class. Hay's argument was heavily contested, particularly by John H. Langbein, whose trenchant criticisms in 1983⁴ sparked a debate in English legal historiography which continues to this day.⁵

New Zealand's early colonial period presents a fascinating context in which to explore some of Hay's themes on criminal justice, as the colonial state sought to both impose and legitimise its authority on Māori. In this dissertation, I will draw from Hay's ideas and place them within New Zealand's "frontier" period from 1840 to 1860. Frontier histories essentially encompass "zones of contact and encounter" between Indigenous groups and Europeans.⁶ Vincent O'Malley succinctly summarises it as "a place where different cultures and peoples literally 'fronted' each other".⁷

The differences between 18th century Britain and New Zealand's 1840 "frontier" from which this dissertation will proceed are vast, and obviously one must be careful in any application of Hay's ideas. But certainly some of his points are informative when considering New Zealand's criminal justice history. By exploring the operation of the British criminal justice system

¹ Richard Boast "New Zealand Legal History and New Zealand Historians: A Non-meeting of minds" (2010) 9 *The Journal of New Zealand Studies* 23 at 27.

² *Ibid.*

³ Douglas Hay "Property, Authority and the Criminal Law" in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson and Cal Winslow (ed) *Albion's Fatal Tree: Crime and Society in 18th Century England* (Allen Lane, London, 1975) 17.

⁴ John H. Langbein "Albion's Fatal Flaws" (1983) 98 *Past & Present* 96.

⁵ Boast, above n 1, at 27.

⁶ Vincent O'Malley *Beyond the Imperial Frontier: The Contest for Colonial New Zealand* (Bridget Williams Books, Wellington, 2014) at 11.

⁷ *Ibid.*

towards Māori in the 1840s and 1850s, I hope to shed further light on the nature of British sovereignty and colonisation in those early years.

My research question is as follows:

How (if at all), and to what extent, was the British criminal law legitimised in the eyes of Māori in the first two decades following the Treaty of Waitangi (1840), and how did this legitimisation contribute to the overall colonial project of individualising an Indigenous people whose core philosophy centred on a collective identity?

Given that “[f]rontier zones could differ markedly from each other,”⁸ I have endeavoured to confine my conclusions only to those Māori who were engaging with the British justice system during the early colonial period.

The first three chapters will largely provide the context and analysis that is required before my research question can be substantively considered. Given that legal history bridges two academic disciplines, it is necessary to consider some of the methodological issues faced by legal historians. Chapter I presents views on how history, and in particular legal history should be pursued. Some of the wider themes which pervade New Zealand’s legal historiography will also be considered.

Unquestionably, the Māori worldview in 1840 was quite different from the one held by the British. Chapter II explores the concept of collective identity within Māori society and how this was expressed when punishment for wrong-doing was deemed necessary. I will contrast this with the operation of the British criminal law in that period, especially in relation to its liberal ideas of individuality.

Chapter III turns to the judicial and legislative regime which was established following British acquisition of sovereignty. In particular, it closely examines some of the early criminal cases involving Māori defendants which came before the Supreme Court (equivalent to the present-day High Court) during that period. These cases provide an insight into how judges established criminal jurisdiction over Māori. It also explores important legislation from that period including the Native Exemption Ordinance (1844) and the Resident Magistrates Ordinance (1846), as well as some of the difficulties the British faced in applying the criminal law towards Māori.

⁸ Ibid., at 13.

The final chapter turns squarely to my research question. It will be suggested that the British criminal law was legitimised in the eyes of a large number of Māori during these early colonial years. This was the result of three factors. First, the British applied the law in a manner which tended to portray its sanctity. Secondly, some Māori seemed to appreciate the benefits of the British criminal law and thus contributed to the laws' application becoming increasingly normative throughout Aotearoa. Lastly, Christian missionaries played an important role introducing Māori to new ideas of criminal responsibility. As a result of this legitimisation, I argue that the notion of individuality espoused in the British criminal system formed part of the wider colonial assault on the Māori collectivist philosophy.

Chapter I: Legal Historiography

*“The legal history is baked largely, if not entirely, in a late twentieth-century oven”*⁹ – Paul McHugh

Law and history have a fascinating relationship. Not only does law play an important part in any historical account, but history has informed the common law throughout its existence, and continues to do so. This chapter provides a brief theoretical and methodological insight into legal history. While these observations may seem unusual in a laws dissertation, I and other legal historians agree this is relevant to any historical account, whether legal or not. Moreover, it is an important component of this dissertation because it provides the context for understanding the primary research question explored in this work. I will also briefly examine some of the work from New Zealand’s pre-eminent legal historians whose research sheds much light on the nature of the British Empire during the 1840s.

Approaches to Historiography

There is a long standing tension within the historian community as to how the past should be approached. On the one hand, it is argued that historians should analyse the past independently of the values or standards of the society within which the historian is operating. In this sense, the historian should be a purely objective spectator. On the other hand, it is argued that this somewhat “mechanical” approach to history is not only impossible but unhelpful. Advocates for this view maintain that historians should use their position to gain a perspective on the past which was unavailable to contemporaries living at the time. Moreover, such an analysis can perhaps provide guidance to those in the present.

Several leading scholars have criticised an approach to history which analyses the past only in relation to the present. It is argued this can distort the context in which historical events took place. One of the strongest critics of such a mind-set was Michael Oakeshott, whose essay “The Activity of being an Historian” took aim at the “practical” approach to history:

The practical man reads the past backwards. He is interested in and recognizes only those past events which he can relate to present activities. He looks to the past in order to explain his present world, to justify it, or to make it a more habitable and a less mysterious place. . . . In short, he treats the past as he treats the present, and the statements

⁹ Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University Press, Oxford, 2005) at 25.

he is disposed to make about past actions and persons are of the same kind as those he is disposed to make about a contemporary situation in which he is involved.¹⁰

By contrast, Oakeshott promoted what he termed an “historical approach,” in which the past is viewed independently of its relation to the contemporary world. In this approach, the past is investigated for its own sake, rather than reading history from the point of view of the present.¹¹

Along the same lines, Sir Herbert Butterfield, in *The Whig Interpretation of History*, famously dismantled the ‘Whig historian’ who, according to Butterfield, “studies the past with reference to the present.”¹² This leads to the imposition of “a certain form upon the whole historical story, and to produce a scheme of general history which is bound to converge beautifully upon the present.”¹³ Such an approach misrepresents the past which is generally not as neat and tidy as the Whig historian tends to portray.

Finally, E.H. Carr has warned that “there is a danger in looking at a period in history with the view of solving a problem in the present, because the historian might fall into a purely pragmatic view of the facts and maintain that the criterion of a right interpretation is its suitability to some present purpose”.¹⁴ This point seems particularly apposite in relation to aboriginal history given that Indigenous peoples increasingly have access to judicial redress for past wrongs committed by colonial governments.

Thus, it is clear that historians need to be careful as to how they approach the past, as the approach can heavily frame the re-construction and its accuracy. The approach I intend to take in this dissertation is one which respects the context of the period I am analysing, while maintaining a certain degree of objectivity to ensure that the risk of a “practical” approach to history is reduced. But of course, total objectivity, viewed by some as aspirational, is impossible to attain.

¹⁰ Michael Oakeshott *Rationalism in Politics and other essays* (Methuen & Co Ltd, London, 1962) at 155.

¹¹ *Ibid.*, at 149. Oakeshott criticised any “practical” approach to history which he described as the “simplest and least sophisticated manner of understanding the world”.

¹² Herbert Butterfield *The Whig Interpretation of History* (G. Bell and Sons, Ltd, London, 1950) at 11.

¹³ *Ibid.*, at 12. Perhaps even more dangerous is what Butterfield, at 30, terms the historian’s “pathetic fallacy”. This is “the practice of abstracting things from their historical context and judging them apart from their context – estimating them and organising the historical story by a system of direct reference to the present”.

¹⁴ Edward Hallett Carr *What is History?* (Random House, Inc., New York, 1961) at 21.

Writing Legal History

Methodological Distinctions

Legal historians face potential difficulties ensuring their historical methodology does not become blurred with common law methodology. In stark contrast to the more objective and contextualised approach that historians tend to take, the common law is, as described by Robert Gordon, “overtly presentist”.¹⁵ Compounding that view, Paul McHugh states that the common law is essentially a “practical” approach to history, where the “past is there to be put into the present, meaning the imaginative reformulation of the past in terms of the instant problem” before the court.¹⁶ Indeed, in the legal arena of the courts, the common lawyer simply has the duty of advancing her client’s claim.¹⁷ It follows that the past will be arranged in a way which pushes an agenda, whether or not it is an objective analysis. By contrast, an academic legal historian should attempt to take a more dispassionate approach, weighing up different arguments before reaching a conclusion.

Aboriginal history frequently possesses a powerful and emotive element, heightening the risk of the legal historian becoming an advocate for Indigenous peoples. McHugh has expressed concerns that the distinctive roles of an historian and a common lawyer “have become confused in many modern-day attempts to describe the history of relations between the settler-states and aboriginal peoples”.¹⁸ Thus, he contends that increasingly the legal historian is turning into an advocate for Indigenous rights.¹⁹ In the context of aboriginal land settlements, McHugh has argued that historians, desiring to support contemporary aboriginal claims, have been anxious to find that the common law aboriginal title existed “as though it were an historical truth that applied as strongly in that past as this present”.²⁰ He has noted that many current premises of common law aboriginal title are drawn from historical patterns of Crown conduct, and these patterns are not necessarily found in all of the case law.²¹ The reliance on non-legal material

¹⁵ Robert Gordon “Foreword: The Arrival of Critical Historicism” (1997) 49 *Stanford Law Review* 1023 at 1025.

¹⁶ Paul McHugh “Common-Law Status of Colonies and Aboriginal Rights: How Lawyers and Historians Treat the Past” (1998) 21 *Saskatchewan Law Review* 393 at 401.

¹⁷ See: Richard Boast “Lawyers, Historians, Ethics and the Judicial Process” (1998) 28 *VUWLR* 87.

¹⁸ McHugh *Aboriginal Societies*, above n 9, at 20.

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 23.

²¹ McHugh “The Common Law Status of Colonies and Aboriginal Rights”, above n 16, at 429.

has meant that common lawyers increasingly require the aid of historians and such intermingling has led the latter to become preoccupied with a practical approach to the past.²²

This dissertation aims to analyse relations between the settler-states and aboriginal peoples in the criminal context, and the risks McHugh describes may therefore be reduced. Whilst contemporary Aboriginal land claims are often decided after a thorough and critical historical examination and analysis, claims of historical wrongdoing in the criminal context do not lend themselves to modern-day litigation, and adversarial historical accounts of the criminal past are not used in today's courts. In other words, the criminal past is relatively less "practical" than other areas of law. Still, McHugh's warnings are important to consider in any legal historical account of the colonial period.

Sources of evidence

Legal historians need to ensure they consult a wide range of sources and not confine their analysis to strictly legal materials such as cases and statutes. Gordon maintains that it is critical for the legal historian to consider the societal context in which the law was operating.²³ He distinguishes between the "internal" and "external" legal historian:

The internal legal historian says as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, or the doctrine of contributory negligence. The external historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the content of the law and its social effects, and he is usually looking for conclusions about those effects.²⁴

Mark Hickford exemplifies an "external legal historian" as he explores the nature of native title within a wider political and social context.²⁵ Hickford argues that native title in New Zealand's early colonial period should be examined through the eyes of "political constitutionalism",

²² *Ibid.*, Of course, in New Zealand, the Waitangi Tribunal's statutory purpose is to analyse the past in order to solve present day disputes. Richard Boast notes that the Tribunal is tasked with evaluating the actions of historical actors during the 1840s, such as Governor Grey, on Treaty "principles" which are articulated by a modern day tribunal. According to Boast, "Waitangi Tribunal history is present-minded or Whig history with a vengeance". See Boast "Lawyers, Historians, Ethics", above n 17, at 97.

²³ Robert Gordon "Recent Trends in Legal Historiography" (1976) 69 *Law Library Journal* 462 at 463.

²⁴ Robert Gordon "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography" (1975) 10 *Law & Society Review* 9 at 11.

²⁵ Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2012).

rather than an analysis on purely “juristic” sources. In his view, native title was shaped and contested in both the judicial and political arena. Thus, it is not enough to examine the nature of native title “within the walls of transposed courts and legalistic genres”.²⁶ Indeed, the “territorial claims of Europeans and Māori communities were made and constructed in a variety of non-curial processes”.²⁷ In this sense, the courts were not the only institution which engaged with native title.

Hickford demonstrates the risks of making judgements on the law solely on judicial pronouncements. In 1847, the then named New Zealand Supreme Court in *R v Symonds* held that native title could not be extinguished unless consent had been given by Indigenous peoples.²⁸ Hickford warns against relying on cases such as *Symonds* as authority for the idea that the doctrine of native title was subject to a broad consensus.²⁹ Rather, there was intense debate and negotiation among the English settler communities and Māori communities on the nature of native title.³⁰ However, if *Symonds* is read isolated from other events, it may be interpreted as having acted as an authoritative statement of the law for parties at the time.³¹ This example demonstrates the necessity to contextualise cases, particularly with respect to the period in which they are concerned.

Therefore, legal historians must pay regard to two important considerations. First, they must ensure that legal advocacy does not taint their legal history. Secondly, they must consult a wide range of sources, due to the fact that strictly juristic materials may not provide an accurate picture of the law at the time.

New Zealand Legal Historiography

One of the broader themes of this dissertation is to gain an understanding of the ways the British used the law in its colonisation project to exert political control over Māori throughout Aotearoa. There is a lively contemporary New Zealand legal historian community, which also includes some Australian scholars, and it would be useful to briefly discuss here some of their

²⁶ *Ibid.*, at 2.

²⁷ *Ibid.*, at 12.

²⁸ *R v Symonds* (1847) NZPCC 387.

²⁹ Hickford, above n 25, at 22.

³⁰ *Ibid.*

³¹ *Ibid.* Paul McHugh has made a similar point. He warns legal historians from over-emphasising the significance of particular court decisions. Looking back, “legal moments become over-parted, imbued with significance well beyond their actual importance in their own time”. Indeed, McHugh writes that *Symonds* has been “elevated into the late twentieth-century historiography of common law aboriginal rights into canonic status.” See McHugh *Aboriginal Societies*, above n 9, at 26, 41.

contributions to New Zealand's legal historiography.³² Moreover, these historians provide the context of the 1840s in which changing notions of British sovereignty were taking place.

Paul McHugh, in his work *Aboriginal Societies and the Common Law* demonstrates how the common law approached Indigenous tribal authority within a broader framework of Crown sovereignty, and investigates the manner in which the common law recognised Aboriginal societies.³³ Particularly relevant to my dissertation, McHugh argues that from the second quarter of the 19th century onwards, imperial and colonial officials increasingly “denied aboriginal polities any distinct status and would not acknowledge any ‘rights’ associated with the tribe and its way of life...”.³⁴ In other words, for the English, “rights” for the indigenes pertained only to the individual.³⁵ Unlike any “Marshall-like notion of a subsisting and limited tribal sovereignty”, the Colonial Office felt that in New Zealand, “Crown sovereignty, once asserted, meant that English law was thoroughgoing, certainly in matters of criminal law”.³⁶

McHugh's analysis is important to this dissertation in two respects. First, it provides a general overview of the changing nature of British colonisation, from the seventeenth through to the late twentieth century, in regard to the degree of sovereignty the British Crown held in its territories. Secondly, McHugh's work emphasises that the British sought to disregard any recognition of the collective nature of Māori society.³⁷ Indeed, the Crown was intent on introducing to the colony an individualistic social and political framework.

In regard to the application of English law following the Treaty of Waitangi, Damen Ward has examined the discourse between the colonial officials who felt the criminal law should be strictly applied to Māori and those who considered modifications in its application were necessary.³⁸ These ideas will be teased out in greater detail below. For now, it is sufficient to say that there were many social and intellectual attitudes which shaped the British view of

³² Obviously I have not considered all of New Zealand's legal historians. The authors whose work I discuss, I consider to be the most helpful and relevant to my dissertation.

³³ McHugh *Aboriginal Societies*, above n 9.

³⁴ *Ibid.*, at 150.

³⁵ *Ibid.*

³⁶ *Ibid.*, at 169. The “Marshall-like notion of a subsisting and limited tribal sovereignty” was the doctrine put forward by the American Supreme Court under Marshall CJ in the cases of *Cherokee Nation Georgia* (1831) and *Worcester v Georgia* (1832). These cases “described the independent [Native American] tribes as nations, but as ‘domestic, dependent’ ones – separate but not apart, holding their own tribal sovereignty whilst also incorporated into the American”. See McHugh *Aboriginal Societies*, above n 9, at 127, 142-152.

³⁷ *Ibid.*, at 150. McHugh writes that “from the second quarter of the 19th century onwards, imperial and colonial officials denied aboriginal polities any distinct status and would not acknowledge any ‘rights’ associated with the tribe and its way of life.”

³⁸ Damen Ward “A Means of Measure and Civilisation: Colonial Authorities and Indigenous Law in Australasia” (2003) *History Compass* 1.

Indigenous legal systems and these attitudes did not have the coherency and clarity which may now be ascribed.³⁹ In this sense, Ward suggests that English policy in regard to the application of the criminal law was somewhat fluid and a difficult terrain with which the British had to grapple.

In his revisionist account of the *Wi Parata v Bishop of Wellington* decision, in which the then named Supreme Court infamously declared the Treaty of Waitangi “a simple nullity”, David V. Williams made some important considerations as to how the history of Māori and Pākehā relations should be approached. With the advent of the Waitangi Tribunal and its findings on historical wrongs committed by the Crown, Williams expresses some concern:

The danger is, though, that Māori always appear only as victims in this history. The forensic requirements of adversarial inquiries leave us with a starkly un-nuanced version of history – the Crown was bad; Māori were wronged. Māori rangatira of the past seldom appear as active participants in the ebbs and flows of historical circumstances that have affected them and their tribes. Rather, they are people who have been duped, cheated, marginalised and demeaned. Even if there is no blame attached to their victimhood, such narratives tend to obscure the fact that Māori were major and powerful players in the politics and economics of the first decades of colonial rule.⁴⁰

This is an important point that will inform the historical analysis for this dissertation. It seems that too often writers assume that Māori were mere passive recipients of a foreign culture. In fact, Māori frequently reacted fiercely against, or adapted to, imposed British measures.⁴¹

Australian-born Shaunnagh Dorsett is perhaps the first legal historian to seriously consider the early application of the British criminal law towards Māori.⁴² Dorsett recognised that during the period of the 1830s and 1840s, “more juridical (and absolute) forms of sovereignty began to dominate”.⁴³ In doing so, the fabric of the British Empire was undergoing a change from the

³⁹ *Ibid.*, at 7.

⁴⁰ David V. Williams *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, Auckland, 2011) at 7.

⁴¹ McHugh has made the point that in the face of “Anglo legalism” which “sought to dominate and transform aboriginal life from the late nineteenth century.... Aboriginal communities improvised, resisted (actively and passively), and adapted”. See McHugh *Aboriginal Societies*, above n 9, at 49.

⁴² Dorsett has been influential in the Lost Cases Project. This project is involved in the systematic revival of early New Zealand cases, which exist not in law reports, but in newspapers, manuscript collections, archives and judges notebooks.

⁴³ Shaunnagh Dorset “Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of ‘Barbarous’ Customs in New Zealand in the 1840s” (2009) 30 *The Journal of Legal History* 175 at 177.

“earlier plurality of the Empire”, to a period in which “plurality was slowly and unevenly beginning to give way to the new conceptions of sovereignty”, which would more fully emphasize the implementation of English law.⁴⁴ As well as examining some of the initial New Zealand Supreme Court decisions involving Māori, Dorsett’s work also considers the different proposals and methods which were being discussed by Governors Hobson, FitzRoy and Grey, in relation to subjecting Māori to British criminal law during the early colonial years.⁴⁵

The mid-19th century British Empire

During the early-middle period of the 19th century, the British Empire was undergoing significant changes in regard to how its colonies were managed. Lisa Ford’s *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836* describes how settler colonies began to consolidate more fully their jurisdiction over Indigenous peoples during this period.⁴⁶ In comparing the early settler states of Georgia and New South Wales, Ford demonstrates that up until 1836, the Australian colony had refused to exercise criminal jurisdiction over Aborigines.⁴⁷ However, in the *inter se* (between Aborigines) criminal trial of *R v Murrell* in 1836, the Supreme Court of New South Wales ushered in a new era of settler sovereignty “by incorporating Aborigines formally within the British jurisdiction”.⁴⁸ This new era of what Ford terms “perfect settler sovereignty” was based on the emerging idea that sovereignty encompassed jurisdictional authority over all peoples within a territory.⁴⁹

This then sets the stage for the period I will be examining. British sovereignty of Aotearoa occurred at a time where notions of settler sovereignty and jurisdiction were expanding and intensifying. Earlier colonial regimes, in which Indigenous customary law existed side by side with English law were now increasingly disregarded as settler governments “could no longer imagine plural sovereignty in their local contexts”.⁵⁰ Although this new policy certainly did

⁴⁴ Shaunnagh Dorsett “The Precedent is India: Crime, Legal Order and Governor Hobson’s 1840 Proposal for the Modification of Criminal Law as Applied to Māori” (2014) 1 *Journal of the Australian and New Zealand Law and History Society* 29 at 47.

⁴⁵ *Ibid.*

⁴⁶ Lisa Ford *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836* (Harvard University Press, Cambridge, 2010).

⁴⁷ *Ibid.*, at 196. Ford writes that “Colonial claims to power and authority over the far reaches of a largely unsettled continent rang hollow as Aborigines exercised tribal law, drank and brawled on the streets of major British settlements – all outside the purview of settler law”.

⁴⁸ *Ibid.*, at 196.

⁴⁹ *Ibid.*, at 2. Ford, at 203, does admit that *Murrell* did not necessarily change jurisdictional practice towards “crimes” committed by Aborigines, rather the case’s significance lies in “the way that it defined settler sovereignty by subordinating Indigenous people and their law”.

⁵⁰ *Ibid.*, at 188.

not play out in practice during the initial years of New Zealand colonisation, these changing notions of sovereignty would ultimately have destructive consequences for Māori Indigenous rights and customary law, including within the criminal context.

Chapter II – Māori and British Criminal Law Systems

*“A certain degree of individual flair was encouraged, but the rugged individualism often valued by the pioneer settler culture was frowned upon in traditional Māori culture”.*⁵¹ –

David Williams

It is now abundantly clear that Māori society pre-1840 had its own distinct legal system but it did not entirely conform to positivistic notions of law which were emerging in the West as the dominant legal form during this period. This chapter provides an insight into how Māori society regulated criminal behaviour and how it differed from the English criminal law introduced into Aotearoa in the 19th century.

I recognise the inherent limitations in attempting to analyse Māori ideas, with their oral roots, from within a written English framework. Still, as Alex Frame and Paul Meredith point out, “[t]ranslation is both possible and useful so long as it is recognised that some terms will have no exact equivalents and that in many cases only approximation can be achieved”.⁵²

Māori Worldview

Māori processes for addressing criminal behaviour were underpinned by collective ideas arising from their worldview. According to Ranganui Walker, most Māori believed that human development followed quite a distinct path. Emerging from Te Kore, the great void and emptiness, were the primordial parents of Ranginui and Papatuanuku whose six sons were Atua or Gods.⁵³ Atua Tanemahuta was responsible for bringing into existence the human form through his interactions with Hineahuone and Hinetiitama.⁵⁴ It was from here that Māori, as humans, descended. Given this interwoven process, Māori believed that humans derived an element of the strong *tapu* or sacredness possessed by their Godly and spiritual forbearers.⁵⁵ Indeed, “personal *tapu* was an extremely important attribute of an individual”.⁵⁶

⁵¹ David Williams, cited in The New Zealand Law Commission *Māori Custom and Values in New Zealand Law*, Study Paper 9 (The Law Commission, 2001) at 32.

⁵² Alex Frame and Paul Meredith “Performance and Māori Customary Legal Process” (2005) 114 *The Journal of the Polynesian Society* 135 at 139.

⁵³ Ranganui Walker *Ka Whawhai Tonu Matou (Struggle Without End)* (Penguin Books, Auckland, 1990) at 12. These sons were Tanemahuta, Tangaroa, Tawhirimatea, Tumatauenga, Haumiatiketike and Rongomatane.

⁵⁴ *Ibid.*, 14. Walker explains that Tane fashioned Hineahuone, the earth formed maid and cohabited with her to form humans.

⁵⁵ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Australia & New Zealand, 1991) at 128; Walker, above n 53, at 67.

⁵⁶ Walker, above n 53, at 5.

Underpinning this inherent *tapu* were four key human attributes: *tinana*, *wairua*, *mauri* and *hinengaro*. While the *tinana* represented the physical element of humans, the *wairua* was its spiritual corollary. Khylee Quince explains that the *wairua* “accompanies the physical body throughout its lifetime, protecting it, regulating its bodily functions and keeping it alive”.⁵⁷ The *tinana* and *wairua* are bonded together by *mauri*. For Sir Hirini Moko Mead, “*mauri* is the spark of life, the active component that indicates the person is alive”.⁵⁸ Finally, *hinengaro* represented humans’ creative and intellectual force.⁵⁹ It was these different aspects which bound together would form “a complete person who is a composite physical, spiritual, emotional and intellectual being, a ‘human’ being”.⁶⁰ *Tikanga* Māori maintained that a state of balance or wellbeing would be achieved if these different elements were in harmony.⁶¹ Thus, individual actions which disrupted this harmonious balance required societal resolution.

It is important to stress that Māori society was heavily based on the principle of *whanaungatanga* or kinship. In this sense, relationships were everywhere, whether that was between people, between people and the physical world or between people and the *atua*.⁶² The collective unit, bonded by these relationships, was more important than any individual. The Law Commission explains:

In traditional Māori society, the individual was important as a member of a collective. The individual identity was defined through that individual’s relationship with others. It follows that *tikanga* Māori emphasised the responsibility owed by the individual to the collective. No rights endured if the mutuality and reciprocity of responsibilities were not understood and fulfilled.⁶³

Tikanga Māori or customary law or both?

The initial law which governed Aotearoa, pre-European settlement, has been described as this country’s “first” law.⁶⁴ Within the scholarship, there seems to be a tension as to whether this

⁵⁷ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Melbourne, 2007) 256 at 257.

⁵⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 53.

⁵⁹ Quince, above n 57, at 258.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at 260.

⁶² The New Zealand Law Commission, above 51, at 30.

⁶³ *Ibid.*, at 31.

⁶⁴ Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (ed) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330 at 331. This was the system of governance that Kupe, and the waka that followed him, brought to the islands throughout eastern Polynesia.

“first” law should be described as customary law⁶⁵ or *tikanga* Māori,⁶⁶ or perhaps a hybrid of the two.⁶⁷

Of course, *tikanga* Māori encompasses a wide range of values and principles which may not all have had the character of law.⁶⁸ Moko Mead explains *tikanga* as follows:

Tikanga is the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or individual is able to do.⁶⁹

In this sense, *tikanga* perhaps reflects a wider cultural or anthropological view of law.⁷⁰ Regarding Māori customary law, renowned Māori jurist Eddie Durie describes it as “the values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct”.⁷¹

For the purposes of this dissertation, it is unnecessary to resolve the tension between these two concepts. Thus, in the following chapters, and consistent with the literature, I will use the terms interchangeably when describing Aotearoa’s “first” law.

How Disputes Arose

Māori did not distinguish between civil and criminal wrongs⁷² and thus, it is somewhat artificial to describe a Māori “criminal law”. Still, there was a sophisticated system of dispute resolution which was underpinned by the Maori worldview and societal structures.

It was the violation of *tapu* which was the crucial element to any crime.⁷³ Such violations could occur in two ways. First, through the unlawful use of a group’s resources or territory, and

⁶⁵ The New Zealand Law Commission, above 51, at 15; Eddie Durie used “Māori custom law” to describe Māori law pre-1840. See “F.W. Guest Memorial Lecture 1996: Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 OLR 449.

⁶⁶ Justice Joseph Williams described the “first” law as “*Tikanga* Māori”, see Williams “Harkness Henry Lecture. Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Review 1 at 2.

⁶⁷ Robert Joseph uses the term “*tikanga* Māori customary law”. See “Re-Creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) 74 Wai L Review 74 at 74.

⁶⁸ See Hirini Moko Mead, above n 58, for a comprehensive study of *Tikanga*.

⁶⁹ *Ibid.*, at 12.

⁷⁰ Natalie Rāmīrihia Coates “Me Mau Ngā Ringa Māori I Ngā Rākau A Te Pākehā? Should Māori Customary Law be Incorporated into Legislation?” (LLB (Hons) Dissertation, University of Otago, Dunedin, 2009) at 4.

⁷¹ Durie, above n 65, at 452.

⁷² Khylee Quince “Māori and the Criminal Justice System” in Julia Tolmie and Warren Brookbanks (ed) *Criminal Justice in New Zealand* (LexisNexis, Auckland, 2007) 333 at 339.

⁷³ *Ibid.*

secondly, through interference with an individual's *tapu*.⁷⁴ Both types of actions were recognised as a *hara* (crime) and caused an imbalance in society which was inconsistent with the normative world prescribed by *tikanga*.⁷⁵ In regards to personal crimes, the offending weakened the victim's *mauri* which in turn reduced the protection offered by the *wairua*.⁷⁶ Such a disruption to these composite elements meant that the victim was now in a state of imbalance. It followed that *utu* (recompense) was necessary to restore the original balance.⁷⁷

In short, the "basic formula" for offending was that there had been a breach of *tapu* through commission of a *hara* which affected someone's *mana*, disrupting their *tikanga* balance, and thus calling for *utu*.⁷⁸

Resolving Disputes

The literature on Māori dispute resolution suggests there was no entrenched procedure or process that was followed each time a wrong was committed. This is not to say that Māori legal processes were ad hoc, but rather they seem more fluid and context-based than the more formulaic British court system. I will describe, very generally, the way disputes tended to be resolved.

The guiding, and perhaps most important, principle throughout Māori dispute resolution was the institution of *utu*. At its most basic level *utu* simply meant equivalence or repayment.⁷⁹ Such repayment would restore the balance which had been upset by the offending.⁸⁰ The degree of *utu* required was determined by the circumstances and severity of each offence.⁸¹

Rangatira (chiefs) were crucial in settling disputes between both their own kin and in relation to disputes with other groups.⁸² The role of *rangatira* would vary. Thus, on certain occasions whole communities would gather to discuss a dispute while at other times only the direct participants to a dispute would gather with the *rangatira*. And some other times, it would just

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Quince "Māori Disputes," above n 57, at 260.

⁷⁷ Ibid., at 261.

⁷⁸ Ibid., at 268.

⁷⁹ Walker, above n 53, at 69.

⁸⁰ Quince "Māori Disputes", above n 57, at 262; E. T. Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325 at 329.

⁸¹ Walker, above n 53, at 69.

⁸² Quince "Māori Disputes", above n 57, at 266.

be *rangatira* who would meet to resolve a dispute.⁸³ In negotiating and reaching peaceful settlements, Quince explains that:

The lasting settlement of any dispute depended on a number of factors, including the extent to which actions and words were accepted as violations of the *mana* and *tapu* of a group by the ‘violator’, the ability of the parties to reach a peaceful settlement and adherence to any course of actions decided upon.⁸⁴

Although formal discussion was important, and often took place in meeting houses on the *marae*,⁸⁵ Alex Frame and Paul Meredith have emphasised the way legal disputes could also be resolved through performance in ceremonial occasions. In this sense, legal procedures could operate through song, dance, speech or chants.⁸⁶ Among the ceremonial examples that Frame and Meredith present, the *hakari* (talk feasts) seem to be most relevant in the criminal context.⁸⁷ *Hakari*, “far from being mere displays of food in abundance” were also the occasion for dance and gifts, as well as “exhaustive discussion” to resolve “all kinds of grievances and disputes”.⁸⁸ So, “[g]rievances were brought forward, rectified, and resolutions made around a *hakari*”.⁸⁹ Indeed, performance in this ceremony was a public statement that parties to a dispute had accepted the outcome and any settlements arrived at.⁹⁰

Another form of ceremonial dispute resolution was *Ka Tika to Mate* (symbolic violence) which was a dramatic performance and acted as a substitute for actual violence after a wrong.⁹¹ A common demonstration of symbolic violence was *murū*. Angela Ballara explains that a *taua murū* was the “hostile expedition to take payment for crimes by plundering or destroying property, so wiping out offences”.⁹² While this certainly had elements of aggression, the process of *murū* was ostensibly peaceful. Indeed, if a group knew that one of its members was at fault, and a *taua murū* had been announced based on agreement in advance, “the proper course of action was not only not to resist it, but to prepare for its coming if possible with gifts

⁸³ Ibid.

⁸⁴ Ibid., at 263.

⁸⁵ Ibid., at 267.

⁸⁶ Frame and Meredith, above n 52, at 140-141.

⁸⁷ Ibid., at 141-144. Ceremonial legal commitments made outside the criminal context include constitutional promises made through song, or *taonga* as a means of contract.

⁸⁸ Ibid., at 144.

⁸⁹ Ibid., at 145.

⁹⁰ Ibid., at 145.

⁹¹ Ibid., 146.

⁹² Angela Ballara *Taua: ‘Musket Wars’, ‘Land Wars’ or tikanga? Warfare in Māori society in the early nineteenth century* (Penguin Books, Auckland, 2003) at 103.

and feasts...”.⁹³ Of course, colonial officials and early missionaries often misinterpreted the Māori legal system as violent and disorderly.⁹⁴ According to Frame and Meredith, this is because they failed to understand the customary meanings behind the public performances.⁹⁵ Indeed, contrary to many colonial assumptions, Ballara notes that *taua muru* “was a ubiquitous Māori system for peaceful dispute resolution”.⁹⁶

Still, if peaceful settlements failed, perhaps due to the offending parties’ reluctance to admit that any wrong had been committed, then *taua* or war expeditions were carried out.⁹⁷ According to Ballara, “[w]ar was made to ‘*rapu utu*’, seek repayment, to restore something lost and to balance the action which caused it by an equivalent action”.⁹⁸

From all of these examples, it can be seen that administering justice tended to be a largely communal affair. Whereas the British courts operated (and still do) objectively, ostensibly independent from societal influences, the Māori system envisaged that all interested parties to a dispute should play a role in its resolution.

Collective Victimhood and Responsibility

Given the collective nature of Māori society, it should come as no surprise that any offence committed against an individual had wider ramifications for the respective *whanau* or *hapu*. This is because the breach of an individual’s *tapu* affected the victim’s ability to perform their family or community obligations. Quince explains that the “diminution of *mana* of a female victim in consequence of offending against her detrimentally affected her ability to fulfil her roles as mother, spouse, carer, food provider, nurturer”.⁹⁹ This collective impact meant that *whanau* and *hapu* were intricately involved in resolving disputes and restoring equilibrium. As Moana Jackson notes, “[t]he rights of individuals, or the hurts they may suffer when their rights were abused were indivisible from the welfare of the *whanau*, the *hapu*, the *iwi*”.¹⁰⁰

⁹³ *Ibid.*, at 108.

⁹⁴ Frame and Meredith, above n 52, at 151.

⁹⁵ *Ibid.*

⁹⁶ Ballara, above n 92, at 103.

⁹⁷ *Ibid.*, at 71. Ballara notes that contrary to contemporary observations that Māori society was savage, *taua* were not free-wheeling war parties. These “protagonists were not free to do as they liked, but were bound and circumscribed by a set of rules recognised by all”.

⁹⁸ *Ibid.*, at 82.

⁹⁹ Quince “Māori and the Criminal Justice System,” above n 72, at 341.

¹⁰⁰ Moana Jackson “Criminality and the Exclusion of Māori” in Neil Cameron and Simon France (ed) *Essays on Criminal Law in New Zealand: Towards Reform* (Victoria University of Wellington Law Review in conjunction with Victoria University Press, Wellington, 1990) 23 at 27. Jackson goes to say that “[e]ach had reciprocal obligations found in a shared genealogy, and a set of behavioural precedents established by common *tipuna*.”

Furthermore, it was often the case that communities would accept responsibility for the actions of the offender. Thus, following a transgression or *hara*, rather than solely the individual receiving punishment, the offender's *whanau* or even *hapu* could also be sanctioned.¹⁰¹ The idea of kinship, so fundamental in the Māori worldview, heavily shaped this principle of collective victimhood and responsibility. Justice Joseph Williams explains this:

The important point in terms of the *whanaungatanga* value is that wrongs were not seen as individual wrongs. They were seen as the responsibility of the perpetrator's wider kin group. And the more serious the wrong, the wider the kin net that became hooked into the compensation equation. Equally the victim was not just the individual involved but his or her kin group, the parameter for which was set by the status of the victim and the seriousness of the wrong. So *murū* was not a system of individual to individual compensation or correction as in tort, or even individual to community as in crime. It was an aspect of the *whanaungatanga* value: it operated kin group to kin group. No one was ever just an individual.¹⁰²

Māori often had little concern with ensuring that the individual responsible for an offence was the one who received punishment. Notions of individual repercussion were foreign to their society. If war was made in order to seek *utu*, then it was not always the case that the personal offender concerned would be punished.¹⁰³ Indeed, random groups might be attacked by a *taua*.¹⁰⁴ This reflects the fact that the vital component to any dispute resolution was the extraction of some form of *utu*.¹⁰⁵ As can be seen, Māori dispute resolution took a strongly collective approach, and this contrasted with the English system introduced in the 1840s.

English Criminal Law

The English criminal law was vastly different to the Māori system. Of particular relevance to this dissertation are the differences that the English law placed on individual responsibility for offences. As has been shown, individual responsibility for crimes was foreign to the Māori collective culture.

They were based too on the specific belief that all people had an inherent *tapu* that must not be abused, and on the general perception that society could only function if all things, physical and spiritual, were held in balance".

¹⁰¹ The Law Commission, above n 51, at 32.

¹⁰² Justice Joseph Williams, above n 66, at 5.

¹⁰³ Ballara, above n 92, at 82.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

Within the English criminal justice system, this individuality was fundamental. The doctrine of *mens rea* is perhaps the most important factor which emphasises the “responsibility” aspect of English criminal law.¹⁰⁶ Indeed, the subjective element to an offence is seen as the very basis of individual responsibility.¹⁰⁷ Jerome Hall has made it clear that while *mens rea* has undergone changes and modifications, its essential meaning “represented in the *intentional doing of a morally wrong act*, implying concomitant knowledge of material facts, has persisted for centuries”.¹⁰⁸ In 1843, the English Criminal Law Commissioners emphasised that “[i]f the prohibited acts be done, and be done with the intention by law essential to the offence, it is completed...”.¹⁰⁹ This point, written during the early stages of British colonialism of Aotearoa, highlights the importance of a guilty mind to English criminal law.

Thus, the criminal regimes which operated in England and Aotearoa had very different premises. The importance of an offender’s intention to commit a crime, which epitomises individual responsibility, did not have an equivalent in the Māori world.¹¹⁰ For Māori, intention was a rather unimportant concept when determining consequences for someone’s actions. John Patterson explains that “the wrong occurs within somebody’s sphere of accountability, within their sphere of *mana*, and so that individual or community accepts responsibility, even if the wrong was not caused by them”.¹¹¹

It is also the case that during the first half of the 19th century, Enlightenment ideas, which stressed individual rights and autonomy, were transforming the English criminal law. Alan Norrie explains that by the end of the 18th century, liberal legalism was taking hold across Europe. In England, “the language was one of individual self-interest under the prosaic influence of political economists like Smith and materialist philosophers like Hobbes and Hume”.¹¹² These themes were picked up on by reformers of the penal system who stressed the

¹⁰⁶ *Mens rea* has ancient roots in the English system. The maxim *actus reus non facit reum nisi mens sit rea* (an act does not make a defendant guilty without a guilty mind) first appeared in approximately 1115, in the legal treatise laid down during Henry I’s reign. See Jerome Hall *General Principles of Criminal Law* (2nd ed, The Bobbs-Merrill Company, Inc., New York, 1960) at 79.

¹⁰⁷ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd ed, Cambridge University Press, Cambridge, 2014) at 30.

¹⁰⁸ Hall, above n 106, at 83.

¹⁰⁹ Norrie, above n 107, at 45.

¹¹⁰ Quince “Māori and the Criminal Justice System,” above n 72, at 340. According to Quince, while the subjective element was not important in regards to someone being responsible for an offence, the degree of malice or recklessness was sometimes taken into account when *utu* was being considered.

¹¹¹ John Patterson “A Māori Concept of Collective Responsibility” in Graham Oddie and Roy W. Perret (ed) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 11 at 23.

¹¹² Norrie, above n 107, at 21.

“need for principles of individual responsibility and proportionate punishment”.¹¹³ These reformers maintained that “just as the market regulates individual economic actors, so the criminal law regulates social conduct as an adjunct to the market”.¹¹⁴

Therefore, when the British were exerting their dominance within Aotearoa, the movement for individual rights was heavily shaping their legal discourse, including within the criminal sphere. Moreover, the deep historical roots of *mens rea* in the British legal system demonstrates that relative to Māori law, English criminal law placed a far greater emphasis on individual responsibility as a crucial element to establishing criminal liability.

Amenability of Māori to English law

While the Treaty of Waitangi may have ceded sovereignty to the Crown, Māori were set on continuing their daily way of life with all its customs and procedures, without close British supervision or regulation. During the early period of the 1840s, a debate emerged regarding the application of British law towards Māori.¹¹⁵ This pervaded colonial discourse, and in many ways informed the application of the law throughout the 1840s.

Damen Ward has explained the debate as between “those who favoured ‘exceptionalist’ systems, which modified the application of English law to temper its impacts on Indigenous peoples, and those who favoured the ‘strict application’ of English law.”¹¹⁶ Despite their differences, both positions maintained that eventual assimilation of Māori within a British legal framework was the ultimate goal.¹¹⁷

Exceptionalists argued that it would be manifestly unjust to impose British law on a people whose culture, history and society differed so drastically. In regards to criminal jurisdiction over Māori, exceptional laws would set “provisos and exemptions” as far as procedure and penalties were concerned.¹¹⁸ Important colonial officials who subscribed to this view were the Attorney-General William Swainson and Chief Protector of Aborigines George Clarke.¹¹⁹ Indeed, from his Indian experience, Governor Hobson had ideas of a system of native courts

¹¹³ Ibid., at 24.

¹¹⁴ Ibid., at 25-26. McHugh *Aboriginal Societies*, above n 9, at 121, has also noted that “[t]he rights of man and the integrity of the individual represented one particularly dominant strand of Enlightenment consciousness”.

¹¹⁵ McHugh *Aboriginal Societies*, above n 9, at 168.

¹¹⁶ Damen Ward, above n 38, at 1.

¹¹⁷ Ibid., at 1.

¹¹⁸ Ibid., at 8.

¹¹⁹ In regards to William Swainson’s proposals, see McHugh *Aboriginal Societies*, above 9, at 169, and also Alan Ward *A Show of Justice: Racial “Amalgamation” in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1995) at 62. For details of George Clarke’s proposals, see Dorsett “The Precedent is India,” above n 44, at 47.

based on an exceptionalist philosophy.¹²⁰ Still, these ideas were always intended to be transitional. Thus, Ward explains:

Exceptionalism was *not* a proposal for full, institutional, pluralism, but for a particular, ostensibly temporary, structuring of the relationship between British law and indigenes in the interests of facilitating peaceful assimilation of Indigenous peoples.¹²¹

Some felt that ‘exceptional laws’ should run parallel to ‘declaratory laws’, which set out local customs the English courts would recognise. In this sense, exceptionalists felt that *tikanga* Māori should continue in its regulation of Māori affairs, so long as such laws did not breach ‘universal laws of humanity’.¹²² Exceptionalists took a pragmatic approach to the political and practical difficulties of simply applying British law to the Indigenous people.

Alternatively, there were those who were demonstrably opposed to both moderation of British law and recognition of Māori law. Perhaps representing the increasingly dominant strand of thought which emphasised Lisa Ford’s description of “perfect settler sovereignty,” were those who supported a ‘strict application’ policy where British law should be enforced *inter se* towards Māori. George Grey (future Governor of New Zealand 1845-53 and 1861-68) forcefully endorsed this position.¹²³ He feared that recognising “barbaric” customs would reinforce them, and undermine British attempts to “civilise” Māori.¹²⁴ The future Governor “stressed that enforcing English law *inter se* weakened the power of tribal elders over younger Aborigines, thus reducing the social barriers to Aborigines adopting European culture, law and religion”.¹²⁵ According to Alan Ward’s pioneering study in the 1970s, many settlers were firmly committed to this position.¹²⁶

The differences between these two camps were of degree only,¹²⁷ but the alternative views can be seen in the early application of the criminal law towards Māori by the legislature and judiciary, to which this dissertation will now turn.

¹²⁰ Dorsett, “The Precedent is India,” above n 44, at 40-41.

¹²¹ Damen Ward, above n 38, at 9. (emphasis in original)

¹²² *Ibid.*, at 8.

¹²³ *Ibid.*, at 11.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Alan Ward, above n 119, at 56.

¹²⁷ Damen Ward, above n 38, at 12.

Chapter III – Applying the British Criminal Law towards Māori

*“The amenability of Māori to British law was a matter of particular interest and discussion among New Zealand settlers. Court decisions were followed closely and reported in a detailed and (as far as can be ascertained) accurate manner”*¹²⁸ – Shaunnagh Dorsett

This chapter examines the application of the British criminal law towards Māori between 1842 and 1860. I consider the early foundational Supreme Court cases involving a Māori accused, before analysing some of the important legislation that was passed in this period. Finally, I examine some of the practical difficulties involved in exercising criminal jurisdiction over Māori. Although analysing cases before legislation is a somewhat unusual chronological ordering, I believe it will be more helpful for the reader as the early court decisions laid the ground work for the criminal laws’ application, which the legislation supplemented.

Getting Things Started¹²⁹

It will be helpful to briefly describe New Zealand’s judicial and legislative structure in its opening years of colonial rule. Although not yet a formal colony, the New South Wales (NSW) Supreme Court was given formal criminal jurisdiction over British subjects in New Zealand in 1823.¹³⁰ While this jurisdiction seems to have been first exercised in the 1827 case of *R v M’Dowall*, the court heard few cases from New Zealand.¹³¹

Following the acquisition of sovereignty in 1840, New Zealand was initially governed as part of the colony of NSW but became a formal colony through “Letters Patent 16 November 1840” (known as the Royal Charter).¹³² The charter set up a Legislative Council which quickly established a judiciary.¹³³

¹²⁸ Dorsett “Sworn on the Dirt of Graves”, above n 43, at 177.

¹²⁹ I have borrowed this phrase from the title of Shaunnagh Dorsett’s article: “How do things get started? Legal Transplants and Domestication: An Example from Colonial New Zealand” (2014) 12 NZJPIL 103.

¹³⁰ New South Wales Act 1823 (UK) 4 Geo IV c 96; Jeremy Finn “Colonial Government, Colonial Courts and the New Zealand Experience” in Peter Spiller, Jeremy Finn and Richard Boast (ed) *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) 53 at 72.

¹³¹ *Ibid.*, According to Finn, in *M’Dowall*, “the defendant was found guilty of murdering a fellow sailor on a ship loading timber in New Zealand”.

¹³² Peter Spiller “The Courts and the Judiciary” in Peter Spiller, Jeremy Finn and Richard Boast (ed) *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) 187 at 187.

¹³³ *Ibid.* The Legislative Council was made up of the Governor, three other officials and three justices of the peace.

A series of lower courts were established in 1841, including the Police Magistrates' Court, the Courts of Request and the Courts of Sessions.¹³⁴ A County Court was also set up but this was abolished in mid-1844.¹³⁵ All of these lower courts were subordinate to the Supreme Court first created in 1841.¹³⁶ Initially stationed in Auckland, the court expanded to Wellington in 1844, with responsibility also for Nelson.¹³⁷ My dissertation will focus primarily on this court as it was the most authoritative and heard the most important cases.

Method

My research for this dissertation has greatly benefited from the Lost Cases Project. This Project has uncovered and collected New Zealand's early cases from the Supreme Court, which rather than appearing in law reports, were primarily reported in newspapers at the time. I have also used Papers Past to explore the newspapers between 1842 and 1860 which were reporting case law.¹³⁸ This further research, beyond the Lost Cases database, has been crucial in that I have located further information, commentary and lower court cases.

Supreme Court (1842-1860)

Following formal British sovereignty, "Māori were both accused in, and initiators of criminal matters, as well as of civil actions, in the police magistrates' courts, the county court and the Supreme Court against Pākehā (non-Māori) and each other".¹³⁹ This dissertation focuses on Māori criminal defendants.

¹³⁴ Police Magistrates Ordinance 1841 5 Vict No 4; Court of Requests Ordinance 1841 5 Vict No 6; Sessions Court Ordinance 1841 5 Vict No 1.

¹³⁵ County Courts Ordinance 1841 5 Vict No 2.

¹³⁶ Supreme Court Ordinance 1841 5 Vict No 1. Although, this initial Supreme Court Ordinance was disallowed by the Colonial Office and repealed and replaced with an amended and amplified version in 1844: Supreme Court Ordinance 1844 7 Vict No 1. See Spiller, above n 132, at 203.

¹³⁷ Spiller, above n 132, at 204.

¹³⁸ The newspapers I have researched are: *New Zealand Gazette and Wellington Spectator* (Wellington, 1839-1844); *Nelson Examiner and New Zealand Chronicle* (Nelson, 1842-1874); *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 1844-1865); *New Zealander* (Auckland, 1845-1866).

¹³⁹ Dorsett "Sworn on the Dirt of Graves", above n 43, at 177.

Offence Charged	Total	<i>Inter se</i>	Pākehā	Guilty
Stealing	17	2	15	11
Murder	5	3	2	2
Property damage	4	0	4	2
Receiving stolen goods	1	0	1	0
Perjury	2	N/A	N/A	0
Forgery	1	N/A	N/A	0
Shooting with intent	1	0	1	1
Arson	1	1	0	Unknown
Assault	4	2	2	4
Total	36	8	25	20

Table 1: Statistical overview of charges against Māori for crimes *inter se* and against Pākehā, heard in the Supreme Court between 1842 and 1860.

As outlined in the above Table that I developed, my research suggests that in total, 36 criminal charges were brought against Māori in the Supreme Court between 1842 and 1860. Sometimes multiple charges were laid against one person in the same case¹⁴⁰ or one case heard charges against two people.¹⁴¹ For the sake of simplicity, I have counted each charge against each individual separately and I have only counted cases that went to trial.¹⁴² Moreover, I have not included the forgery or perjury charges within *inter se* or Pākehā classifications.¹⁴³ Of these 36 charges, a guilty verdict was reached on 20 occasions.

From very early on, British courts heard cases in regard to criminal offences committed by Māori towards settlers. Indeed, at the first sitting of the Supreme Court in 1842, a Māori man,

¹⁴⁰ *R v Panapa Huru Te Rangi* Supreme Court Wellington, 31 March 1853 per Stephen CJ reported in the *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 2 April 1853) at 3.

¹⁴¹ *R v Kumete and Wiremu* Supreme Court Wellington, 27 March 1846 per Chapman J reported in the *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 4 April 1846) at 2.

¹⁴² So, the case of *R v Rangihaiata*, which involved an application for a bench warrant to hold the accused on bail is not included. See: *R v Rangihaiata* Supreme Court Wellington, 28 January 1843 per Martin CJ, reported in the *New Zealand Gazette and Wellington Spectator* (Wellington 8 March 1843) at 2

¹⁴³ The two perjury cases: *R v Hoi* Supreme Court Wellington, 1 March 1859 per Johnston J, reported in the *Wellington Independent* (Wellington 2 March 1859) at 3; *R v Nahona Te Honika* Supreme Court Wellington, 1 March 1859 per Johnston J, reported in the *Wellington Independent* (Wellington 2 March 1859) at 3. The forgery case: *R v Peneamine* Supreme Court Wellington, 1 March 1854 per Stephen CJ, reported in the *Wellington Independent* (Wellington 4 March 1854) at 3.

Maketu, was found guilty of murdering a Pākehā family of 5 in Northland.¹⁴⁴ He was subsequently sentenced to death and executed in Auckland on 7 March 1842.¹⁴⁵ During the trial, the Chiefs of Ngā Puhi, who had brought Maketu in and gave evidence against him, declared that they would “strongly protest against this murderer, Maketu, being brought back to the Bay of Islands”.¹⁴⁶ Defence counsel argued that although Maketu had confessed, it was unreliable and that the jury should take into account his ignorance of English law.¹⁴⁷ Still, the jury found him guilty.

Martin CJ seemingly had no hesitation in declaring the court’s jurisdiction:

The charges brought against you have been found to be true, and so the last thing left for this Judges Panel to do is to discuss the extent of the law in terms of the this [sic] terrible crime you have committed *this is also the law of England, who still reigns over the people of this land, no matter whether some are Pākehā and some are Māori, if the blood of an innocent person is deliberately spilt by someone, this panel will hand out the harshest sentence possible under the law.*¹⁴⁸

Thus, in the first case involving a Māori defendant, this court engaged in little discussion regarding its jurisdiction to punish Māori under the criminal law. Indeed, the Chief Justice made a sweeping statement regarding Māori amenability under British law. The Northland Chiefs’ refusal to allow Maketu’s return to the Bay of Islands very likely had a bearing on this. The local newspaper reported that “there were many Māori and Pākehā there, gathered in the courthouse” who wanted to “listen as it was such a big case”.¹⁴⁹ One can imagine Māori being intrigued by the operations of the British justice system.

But the Chief Justice’s apparent conviction in applying British law to Māori seemed to disappear in the 1843 case of *Rangihaiata*.¹⁵⁰ This case involved the Crown Prosecutor who sought a Bench Warrant against Rangihaiata for the purpose of holding him to bail, on account of the latter being charged with property damage. In refusing the Crown Prosecutor’s request, Martin CJ held that issuing the warrant would be the equivalent to settling “the legal position,

¹⁴⁴ *R v Maketu* Supreme Court Auckland, 1 March 1842 per Martin CJ, reported in the *New Zealand Herald and Auckland Gazette* (Auckland 5 March 1842) at 2. Dorsett “Sworn on the Dirt of Graves”, above n 43, at 177, has noted that this trial is “one of the best-known early cases involving Māori”.

¹⁴⁵ *New Zealand Herald and Auckland Gazette* (Auckland 5 March 1842) at 2.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* (Emphasis added)

¹⁴⁹ *Ibid.*

¹⁵⁰ *R v Rangihaiata*, above n 142, at 2.

and liabilities” of “a large portion of [the] native population”.¹⁵¹ The Chief Justice was reluctant to make a ruling that would be the equivalent to declaring Māori amenable under British criminal law.¹⁵²

Understandably, the *New Zealand Gazette and Wellington Spectator* newspaper complained of the inconsistent approach of Martin CJ who had sentenced Maketu to death one year earlier.¹⁵³ It was explained that up until *Rangihaiata*, “the Natives had been considered as amenable to the British law and in some cases punished; some have been tried and convicted in our County Court and punished”.¹⁵⁴ Accordingly, the editor concluded that “the Natives are *not* amenable to British law”.¹⁵⁵

Any uncertainty however was seemingly short lived. Later that year, Martin CJ sentenced a Māori man, Henry, to three months imprisonment.¹⁵⁶ The accused had been found guilty of stealing three half-crowns from a Wellington storekeeper named Mr Joseph.

Common to all these early court decisions involving Māori defendants was that the victim was Pākehā. Before the trials of *Rangitapiripiri* and *Ratea*, no substantive *inter se* criminal case had come before the Supreme Court.¹⁵⁷ In 1847, Rangitapiripiri was charged with the murder of Kopereme by drowning him in a river.¹⁵⁸ Although acquitted, “with no apparent hesitation, Chapman J held the accused subject to British law”.¹⁵⁹ As in *Maketu*, Rangitapiripiri was brought in by his own people in the Manawatu.¹⁶⁰ So, British criminal jurisdiction still seemed highly reliant on Māori compliance.

Interestingly, Chapman J held that “the general rule, when a country came into the power of another, by cession or conquest, was, that the laws of the ceded country were in force among

¹⁵¹ *New Zealand Gazette and Wellington Spectator* (Wellington 8 March 1843) at 2.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* (Emphasis in original)

¹⁵⁶ *R v Henry* Supreme Court Wellington, 7 October 1843 per Martin CJ, reported in the *New Zealand Gazette and Wellington Spectator* (Wellington, 25 October 1843) at 3.

¹⁵⁷ Technically, the Supreme Court’s first decision of *Maketu* was *inter se* as one of the victims killed was a half-Māori servant. But the court approached the case as if it were a Pākehā family. There was also the case of *R v E Poti* Supreme Court Wellington, 7 October 1842 per Martin CJ, reported in *New Zealand Gazette and Wellington Spectator* (Wellington, 19 October 1842) at 3. E Poti was acquitted of stealing a gun and some potatoes from another Māori man. The gun was found to be jointly owned by E Poti and thus the jury found him Not Guilty.

¹⁵⁸ *R v Rangitapiripiri* Supreme Court Wellington, 1 December 1847 per Chapman J reported in the *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 4 December 1847) at 2-3.

¹⁵⁹ Dorset “Sworn on the Dirt of Graves”, above n 43, at 175.

¹⁶⁰ *New Zealand Spectator and Cook’s Strait Guardian* (Wellington 14 October 1847) at 3.

the natives of that country, unless they were contrary to humanity or the Christian religion”.¹⁶¹ This statement clearly left room for Māori customs to continue to operate in matters *inter se*, alongside British law. Dorsett has argued that Chapman J was making the decision through “the framework of imperial law and the juristic language of the common law itself”.¹⁶² Through this framework, where Māori customs were not “contrary to humanity”, the courts would not intervene and Māori would continue to be “governed by their laws”.¹⁶³

In *Ratea*, heard in 1849, the accused was charged with shooting and killing another Māori man, Parata Wanga, some six years earlier in March 1843.¹⁶⁴ The jury found him not guilty which newspapers ascribed, somewhat despairingly, to a legal technicality.¹⁶⁵ Similar to *Rangitapiripiri*, Chapman J noted that “in smaller matters of custom the Court would not interfere, but would suffice the native laws to prevail among themselves; but in so grave an offence as that of murder, those laws would cease the moment the superior power came into sovereignty”.¹⁶⁶

Dorsett has pointed out Chapman’s dictum in *Ratea* and *Rangitapiripiri* regarding Māori customs was inconsistent with an earlier *inter se* case of *E Poti*, heard by Martin CJ, which involved stealing.¹⁶⁷ Martin CJ unhesitatingly applied British law to *E Poti*, despite the fact that under Chapman’s view, “stealing would presumably have been a ‘small matter of custom’ left to native law”.¹⁶⁸ Interestingly, in the 1851 decision of *Te Ahuru*, an *inter se* stealing case, Chapman J himself applied British law, seemingly without considering whether such cases of theft should be regulated by Indigenous customs.¹⁶⁹

Several points can be made in regard to these early foundational Supreme Court decisions involving Māori. First, the initial court decisions established British criminal jurisdiction over Māori offences committed against settlers. In regards to *inter se* cases, the courts’ decisions

¹⁶¹ *New Zealand Spectator and Cook’s Strait Guardian* (Wellington 4 December 1847) at 3.

¹⁶² Dorsett “Sworn on the Dirt of Graves”, above n 43, at 193. Through this framework, “Māori laws and customs had survived both the acquisition of sovereignty by the British Crown, as well as, at least between Māori, the subsequent importation of British law”.

¹⁶³ *Ibid.*

¹⁶⁴ *R v Ratea* Supreme Court Wellington, 3 September 1849 per Chapman J, reported in the *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 5 September 1849) at 3.

¹⁶⁵ *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 5 September 1849) at 2. Essentially, in the indictment, the Attorney-General referred to one shot from *Ratea* who had apparently fired two shots at the victim. Because the indictment only referred to one shot, the Attorney-General argued that the first shot had killed the victim, but this did not convince the jury.

¹⁶⁶ *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 5 September 1849) at 2.

¹⁶⁷ Dorsett “Sworn on the Dirt of Graves”, above n 43, at 191.

¹⁶⁸ *Ibid.*

¹⁶⁹ *R v Te Ahuru* Supreme Court Wellington, 1 September 1851 per Chapman J, reported in the *Wellington Independent* (Wellington, 3 September 1851) at 3.

may appear more complex than they actually were. The decisions made it clear that Māori actions *inter se* which constituted an offence under British law and were “contrary to humanity”, were subject to British criminal jurisdiction. In this sense, native customs had no jurisdiction. Moreover, while Chapman seemed to leave a place for Indigenous customs, not “contrary to humanity”, to govern Māori society, his own decisions involving stealing, as well as Martin’s, did not seem to apply consistent reasoning. Whatever the reasoning behind these Supreme Court decisions, the effect on Māori society was significant. This will be explored in my final chapter.

Legislative Regime

Despite the early Supreme Court decisions, events such as the Wairau affair illustrated that British jurisdiction over Māori was far from firmly settled.¹⁷⁰ Legislation, including the Native Exemption Ordinance (1844) and the Resident Magistrates Courts Ordinance (1846) was passed to both ameliorate uncertainties surrounding Māori amenability to British law, and to give Māori more confidence in the new legal system.

The Native Exemption Ordinance 1844

The Native Exemption Ordinance reflected the “exceptionalist” strand of thought and thus introduced procedural modifications of the criminal law as applied to the Indigenous people, particularly in regard to prison sentences which were “highly unpopular with Māori”.¹⁷¹

In relation to criminal offences *inter se*, no British arrest warrant could be served on the offender unless an information, or indictment, had been laid by two chiefs of the victim’s tribe. The warrant would then be delivered to the chiefs of the offender’s tribe for execution.¹⁷² Thus, for *inter se* crimes, “European interference was made dependent on Māori request”.¹⁷³ Where a Māori offence involved a Pākehā victim, outside of a settlement or town, an arrest warrant

¹⁷⁰ The Wairau affair added confusion to the question of Māori amenability to British law. This involved a dispute between Ngati Toa Chiefs Te Rauparaha and Te Rangihaeata and the New Zealand Company in which the latter insisted on claiming their assumed land purchase in the Wairau Valley. After Te Rauparaha agreed to appear before a Sub-Protector and Land Claims Commissioner but refused arrest, an over-zealous Captain Arthur Wakefield and his men charged forward. A fight erupted in which twenty-two Europeans and four Māori were killed. See Steve Watters “The Wairau Incident” (20 December 2012) New Zealand History *Nga korero a ipurangi o Aotearoa* <<http://www.nzhistory.net.nz/war/wairau-incident/violence-erupts>>.

¹⁷¹ Dorsett “Case Note: *R v E Hipu*” (2010) 41 VUWLR 89 at 91.

¹⁷² Native Exemption Ordinance 1844 7 Vict No 18, clause 1.

¹⁷³ Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland University Press, Auckland, 1977) at 224.

would have to go through the chiefs of the offender's tribe.¹⁷⁴ Chiefs were incentivised to execute warrants as they would be financially compensated.¹⁷⁵

Perhaps the most controversial aspect of the law (in the eyes of the settlers) was its incorporation of *utu*. Such incorporation reflected immense Māori scepticism as to the purposes of imprisonment as punishment for crimes.¹⁷⁶ Indeed, jail terms seemed to do little to rehabilitate a victim and address any *tikanga* imbalances. Clause 9 thus provided that any Māori offender convicted of theft or receiving stolen goods would be punished not through jail, but by payment to the court of an amount four times the value of the goods stolen or received.¹⁷⁷ Finally, in cases not involving rape or murder, the Ordinance allowed a Māori accused to remain at large after having paid a £20 deposit to the court.¹⁷⁸ This deposit would be paid to the victim if the accused then failed to show at their trial.

The Supreme Court only applied clause 9 in one case, *R v E Hipu*.¹⁷⁹ In this case, E Hipu was charged with both stealing a piece of print from a Pākehā storeowner, and for escaping custody.¹⁸⁰ After being found guilty of stealing the piece of print, Chapman J, applying cl. 9 of the Ordinance, sentenced E Hipu “to pay £8, or four times the value of the goods stolen”.¹⁸¹ Moreover, much to the dismay of jury members, Chapman J dropped the charge for escaping custody. That the escape carried a jail sentence, whilst stealing fell under the Ordinance, is likely to have weighed on the court's mind.¹⁸²

However, curiously, the Supreme Court's application of the 1844 Ordinance towards Māori disappeared in future cases. In 1846, Hakaraia was found guilty of stealing a Pākehā's shirt from a ship that he boarded.¹⁸³ Without any mention of the Native Exemption Ordinance, Martin CJ sentenced Hakaraia to twelve months imprisonment with hard labour. In relation to

¹⁷⁴ Clause 2.

¹⁷⁵ Clause 4; As Peter Adams, above n 173, at 224, remarks, “the chiefs were supposed to apprehend the Māori criminal in return for payment, a clause which took no account of tribal loyalty”.

¹⁷⁶ Alan Ward, above n 119, at 65.

¹⁷⁷ Clause 9.

¹⁷⁸ Clause 6-8.

¹⁷⁹ *R v E Hipu* Supreme Court Wellington, 1 December 1845 per Chapman J reported in the *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3

¹⁸⁰ *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3. As Dorsett, “Case Note”, above n 171, at 94, explains, E Hipu had already come before the Police Magistrate a year earlier to account for his theft. However, being unable to pay the deposit he was committed to jail until trial. On his way to jail, he was rescued by more than twenty fellow Māori. He was captured one year later through negotiations with local Māori.

¹⁸¹ *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3.

¹⁸² Dorsett “Case Note”, above n 171, at 95.

¹⁸³ *R v Hakaraia* Supreme Court Auckland, 2 March 1846 per Martin CJ reported in the *New Zealander* (Auckland, 7 March 1846) at 3.

this decision, the editor of the *New Zealand Spectator and Cook's Strait Guardian* noted that the Ordinance “will be repealed at the ensuing session of the Legislative Council, since (as in the case of this native), *its enactments have already become a dead letter.*”¹⁸⁴ Later that year in another case, Kumete, “as part of a group of armed Māori,” was found guilty of stealing.¹⁸⁵ Chapman J, again without reference to the Native Exemption Ordinance, sentenced Kumete to ten years transportation.¹⁸⁶

The newspapers of the time reveal little as to why the Native Exemption Ordinance was not applied in these cases. I will offer some potential explanations. First, it may have been that the offenders did not have the means of paying the fine and thus were sentenced to jail. However, surely the Supreme Court would have explained this in its decisions. Perhaps a more convincing theory is that Governor Grey (who replaced FitzRoy in 1845) requested that the courts stop applying the Ordinance, which had been so unpopular with the settlers and had been part of the reason for appointing a new Governor.

The Resident Magistrate Courts Ordinance 1846

The Native Exemption Ordinance was replaced in 1846 with a Resident Magistrates Ordinance.¹⁸⁷ Although Governor Grey heavily criticised his predecessor's Ordinance, he drew heavily upon it for his own legislative regime. According to Dorsett, the new Ordinance was “the main vehicle through which Grey intended to ‘induce’ Māori to take up British law and to ‘train’ them for eventual participation in the broader legal system”.¹⁸⁸

The new law established Resident Magistrate Courts throughout the country, in which Magistrates had summary criminal and civil jurisdiction in disputes both between Māori and Pākehā, as well as *inter se*. In relation to civil matters *inter se*, the Resident Magistrates Court would constitute itself as a Court of Arbitration, where the Resident Magistrate would sit with two, Māori, “native assessors”.¹⁸⁹ No decision could be laid down unless there was agreement between all three members in the Court of Arbitration. Although the Ordinance intended Courts

¹⁸⁴ *New Zealand Spectator and Cook's Strait Guardian* (Wellington 28 March 1846) at 3. (Emphasis added)

¹⁸⁵ *R v Kumete and Wiremu*, above n 141, at 3.

¹⁸⁶ *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 4 April 1846) at 4.

¹⁸⁷ Resident Magistrates Courts Ordinance 1846 10 Vict No 16.

¹⁸⁸ Dorsett “How do things get started,” above n 129, at 116. In this article, Dorsett gives a detailed examination of the history behind the Resident Magistrates Ordinance and in particular its application in Māori civil cases.

¹⁸⁹ Clause 19; *Ibid*.

of Arbitration to apply only in Māori civil *inter se* cases, Alan Ward's work suggests that "native assessors" may have also had a role in Māori criminal matters.¹⁹⁰

The criminal provisions of the new law made no distinction between Māori crimes *inter se* and offences committed against Pākehā. For Māori, who confessed to larceny or receiving stolen goods, the Magistrate had discretion to sentence the offender for any period, not exceeding two years.¹⁹¹ But the Ordinance continued to allow Māori, convicted (presumably without confessing) of theft or receiving stolen goods to avoid imprisonment through payment to the court of four times the property's value.¹⁹² Whereas the Native Exemption Ordinance *utu* provisions applied to the Supreme Court, analogous provisions in the Magistrates Ordinance were confined to the Resident Magistrate's Court. Finally, arrest warrants, or committals to prison, for Māori offenders no longer needed to go through local chiefs. Rather, the Resident Magistrate would make these orders.¹⁹³

My examination of nationwide newspapers during the period between 1846 and 1860 reveals the Magistrate Court in action.¹⁹⁴ I will briefly consider two cases which largely reflects how other cases which I discovered were also dealt with. One of the earliest (if not the first) Resident Magistrate decisions involving Māori was the *inter se* trial of Korakorau, who "voluntarily confessed that he stole the money (£1.16) from the chest of Poa Poa: and he was sentenced by the Court to two month's imprisonment".¹⁹⁵ In another case where the Magistrate applied the *utu* provision (clause 10), a Māori man, Kouru, was found guilty of stealing "a quantity of shot and an umbrella" from a Pākehā, Mr Chisholm.¹⁹⁶ Kouru was "sentenced to pay four times the value of the property stolen – which he immediately did – and was discharged".¹⁹⁷

Both the 1844 and 1846 Ordinance had significant impacts on Māori society, particularly in regard to legitimising British law and this will be detailed more fully in Chapter IV.

¹⁹⁰ Alan Ward, above n 119, at 77.

¹⁹¹ Clause 9.

¹⁹² Clauses 10-11.

¹⁹³ Clause 7.

¹⁹⁴ It should be noted however that not all Resident Magistrate decisions were published in the newspapers. Statistics in the *New Zealander* (Auckland, 12 February 1848) at 3, reveal that in Auckland, between November 1846 and December 1847, the Resident Magistrates Court heard 1083 criminal cases and 154 civil cases. In the criminal context, 86 cases involved Māori/European, and of these, Māori were the defendants on 34 occasions. There were only 3 *inter se* cases. Certainly, not of all of these cases were reported in newspapers.

¹⁹⁵ *New Zealander* (Auckland, 23 January 1847) at 3. For other, similar, cases, see: *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 18 August 1849) at 2; *New Zealander* (Auckland, 11 September 1847) at 3.

¹⁹⁶ *New Zealander* (Auckland, 20 February 1847) at 3.

¹⁹⁷ *Ibid.* For other, similar, cases, see: *New Zealander* (Auckland, 29 June 1850) at 2; *New Zealander* (Auckland, 16 April 1851) at 2.

Difficulties in Applying British Law

Of course, it would be wrong to get the impression that applying British criminal law towards Māori occurred in an environment where latter simply accepted British jurisdiction or authority. Indeed, it was not always a simple or uncontested procedure. This reflects the fact that in the two decades following the Treaty of Waitangi, British sovereignty in Aotearoa was “nominal” and certainly did not equate to “actual control”.¹⁹⁸

The *E Hipu* case, described above, is reflective of British authorities struggling to apply the law towards Māori. Having been sentenced to jail for stealing, E Hipu was “rescued by upwards of twenty natives” upon being transported to gaol.¹⁹⁹ An 1843 County Court decision showed Māori resistance to British law. E Waho “was suspected of having stolen a gown and cape, two night gowns, one waistcoat, and two silk handkerchiefs, the property of Emma Stutfield”.²⁰⁰ E Waho refused to be taken to the police station and after deployed troops captured him, he escaped, before being captured again.²⁰¹ The *New Zealand Gazette and Wellington Spectator* reported that reactions to the arrest made it “evident that the Natives totally repudiate the Queen’s authority”.²⁰² Having been found guilty, it was reported that E Waho’s sentence (two months imprisonment, with hard labour) was “received with loud hisses” from Māori in the courtroom.²⁰³

Moreover, in Auckland in 1851, a Māori man, Ngawiki, was taken into custody for stealing a shirt from a Pākehā shop.²⁰⁴ A number of the Ngati Poa tribe came to the police station to hear from the accused his side of the story.²⁰⁵ However, the police thought they were trying to rescue him. A scuffle took place and a “principal chief of Ngatipoas [sic] was knocked down and beaten, and afterwards lodged in the lock-up” before being freed an hour later by the Police Magistrate.²⁰⁶ Having been released, this Chief rallied his people who arrived in Auckland in six canoes, seeking *utu*.²⁰⁷ The threat was defused after local Ngati Whatua and Waikato tribes had made it clear that they would support the Pākehā, and with Grey’s deployment of troops,

¹⁹⁸ James Belich *Making Peoples: A History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Auckland, 1996) at 181.

¹⁹⁹ Dorestt “Case Note”, above n 171, at 94.

²⁰⁰ *New Zealand Gazette and Wellington Spectator* (Wellington 2 December 1843) at 2.

²⁰¹ *Ibid.*

²⁰² *New Zealand Gazette and Wellington Spectator* (Wellington 9 December 1843) at 3.

²⁰³ *New Zealand Gazette and Wellington Spectator* (Wellington 19 December 1843) at 3.

²⁰⁴ *New Zealander* (Auckland 16 April 1851) at 2.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Alan Ward, above n 119, at 82.

the canoes left.²⁰⁸ In regards to Ngawiki, he was sentenced to three months imprisonment, with hard labour.²⁰⁹

Although Ngati Poa did not pursue any *utu* for the perceived disrespect shown to their chief, the incident illustrates that British authority and the application of British law was certainly not a straightforward matter. Indeed, regardless of judicial pronouncements declaring British criminal jurisdiction over Māori, the fact was that Māori, particularly in the Bay of Islands, were still heavily contesting the sovereignty that the Crown purported to exercise.²¹⁰

²⁰⁸ Ibid.

²⁰⁹ *New Zealander* (Auckland 16 April 1851) at 2.

²¹⁰ On a more macro-scale, British authority was militarily challenged by Māori in what James Belich terms “The Warring Forties”. These wars were fought between Māori tribes, including Ngati Toa and Nga Puhi, and the ever strengthening colonial state. See Belich, above n 198, at 204-212. For a more comprehensive account of these wars, see James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Penguin Books, Auckland, 1986), especially Part One and Part Two.

Chapter IV: Legitimising the British Criminal Law and Individualising Māori

*“You will see that whilst the evildoer may well fear the power of the Law, the man who is innocent of crime is assured of protection by the same law.”*²¹¹ – Martin CJ to Māori defendant Hakaraia in *R v Hakaraia* (1846)

Drawing together the themes I have discussed, this chapter argues that the legitimisation of the British criminal law in Aotearoa contributed to the colonial administration’s goal of “individualising” Māori society so as to break down its tribal basis.

Legitimising the British Criminal Law

The argument presented here has several strands. First, the way in which the British applied the criminal law towards Māori was part of an attempt to “legitimise” it in Indigenous eyes. Secondly, Māori themselves participated in this legitimisation. Lastly, the work of Christian missionaries who, operating somewhat parallel to the formal justice system, had an important legitimising role. I will propose that it was through these processes that the criminal law became increasingly normative in Māori eyes.

British Application of the Law

i) Judicial Mercy

The ability for Supreme Court judges, as well as colonial authorities more generally, to exercise mercy on Māori defendants could be regarded as one way that the criminal law was legitimised.²¹² Supreme Court cases between the period 1842 and 1860, demonstrate that a degree of mercy was regularly shown towards Māori. My research indicates that of the 20 Māori convictions during this period, some form of clemency was shown on 9 occasions. Moreover, in *Ratea*, the court held that mercy would have been shown if a guilty verdict had been reached. It is necessary to explain what I mean by mercy. Of the 9 occasions just

²¹¹ *R v Hakaraia*, above n 183, at 3.

²¹² In this section, I am adopting some of the ideas contained within Douglas Hay’s seminal essay, “Property, Authority, and the Criminal Law”, above n 3. To remind readers, Hay argued that rather than controlling crime, the purpose of criminal law system in 17th and 18th century Britain was for the propertied class to maintain their power over the lower classes. Hay maintained that the ability of judges to exercise mercy in sentencing offenders “became part of the explicit justification of the law to the poor”. Mercy shown to those convicted was a way of legitimising the “Bloody Code”. According to Hay, at 49, “[i]t allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity”.

identified, in 4 instances, the court, taking account of the Māori ethnicity, either reduced sentences or gave no sentence at all.²¹³ This shall be elaborated on below.

In 5 other convictions, 4 Māori offenders (Panapa was convicted of two charges) either had their original sentence of transportation to Van Dieman's Land (Tasmania) changed to imprisonment in New Zealand,²¹⁴ and/or had their crimes pardoned.²¹⁵ According to Robert Burnett, whose work seems to be the only detailed historical study of penal transportation in New Zealand, transportation ranked in most severity scales "next to the death sentence."²¹⁶ But Māori offenders, at least in Supreme Court proceedings, seem to have been largely spared from it.²¹⁷ And those who were sentenced to Van Dieman's Land did not actually spend time there. Te Ahuru was returned to New Zealand straight away while Panapa (found guilty of stealing as well as shooting with an intent to kill), after being sentenced to transportation, almost immediately had his sentence commuted to imprisonment.²¹⁸ There is little information on the last Māori offender, Tera Waru, who was sentenced to transportation, only for this to be altered to imprisonment in New Zealand.²¹⁹

Moreover, both Panapa and Te Ahuru, as well as another Māori offender Kumete, having been convicted of their respective crimes, were all later pardoned.²²⁰ As it became apparent that Kumete's alibi should not have been dismissed so easily, he was pardoned one month after being sentenced to transportation.²²¹ Te Ahuru actually served no imprisonment as he was allowed to become a permanent member of the crew on the ship which brought him back to

²¹³ *R v Hakaraia*, above n 183, at 3; *R v E Hipu*, above n 179, at 3; *R v Tairua* Supreme Court Nelson, 17 January 1860 per Johnston J, reported in the *Nelson Examiner and New Zealand Chronicle* (Nelson, 21 January 1860) at 3; *R v Kupa* Supreme Court Nelson, 10 August 1858 per Gresson J, reported in the *Nelson Examiner and New Zealand Chronicle* (Nelson, 14 August 1858) at 3.

²¹⁴ *R v Te Ahuru*, above n 169; *R v Panapa Huru Te Rangi*, above n 140; *R v Tera Waru* Supreme Court Auckland, 2 June 1854 per Martin CJ, reported in the *Daily Southern Cross* (Auckland, 9 June 1854) at 4.

²¹⁵ *R v Te Ahuru*, above n 169; *R v Panapa Huru Te Rangi*, above n 140; *R v Kumete and Wiremu*, above n 141.

²¹⁶ Robert Burnett "Penal Transportation: An Episode in New Zealand History *Issue 9 of Occasional Papers in Criminology* (Victoria University of Wellington, Institution of Criminology, Wellington, 1978) at 1.

²¹⁷ Māori could be sent to Van Dieman's Land through other means. Following hostilities between Māori and the colonial state in 1846 in the Hutt Valley region, five Māori were sent to Van Dieman's Land. However, because Governor Grey had declared martial law over the region in which these Māori were captured, the men were subject to court martial proceedings, rather than the Supreme Court's jurisdiction. For a more detailed history surrounding the sending of these five Māori to Van Dieman's Land, see Kristyn Harman *Aboriginal Convicts: Australian, Khoisan and Māori Exiles* (University of New South Wales Press Ltd, New South Wales, 2012) at 206-240.

²¹⁸ Burnett, above n 216, at 34, 37.

²¹⁹ *R v Tera Waru*, above n 214.

²²⁰ *R v Te Ahuru*, above n 169; *R v Panapa Huru Te Rangi*, above n 140; *R v Kumete and Wiremu*, above n 141.

²²¹ Burnett, above n 216, at 24; *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 25 April 1846) at 2.

New Zealand, until being pardoned in 1855.²²² Finally, Panapa (convicted in 1853), having petitioned the authorities several times, was also pardoned in May 1857.²²³

Space prevents a full analysis of all of the decisions in which merciful sentiments informed judicial reasoning and thus I will only consider two: *Hakaraia* and *Ratea*. In *Hakaraia*, where the defendant was convicted of stealing a shirt from a Pākehā man, but acquitted from another theft charge, Martin CJ promoted the fairness of British law:

It will be well for you and your people to reflect on the proceedings of this Court in this case. Herein you may see that whilst the law of England is strict and just to punish offences like yours; however small [sic] may be the value of the property taken, yet no punishment falls on the accused unless his guilt has been clearly and publicly proved. You will see that whilst the evildoer may well fear the power of the Law, the man who is innocent of crime is assured of protection by the same law.²²⁴

The Chief Justice explained that the facts of the case rendered *Hakaraia* to a “severer punishment” than what would be given. It was held:

The sentence now to be passed will be a merciful one. I earnestly hope it will be sufficient as a warning, and example to others, and that it will cause you to abstain from crime for the rest of your days. The sentence of the court is, that you, *Hakaraia*, be imprisoned in the House of Correction at Auckland, for the term of Twelve Calendar Months, and that you be kept to hard labour.²²⁵

While one could perhaps be forgiven for thinking that this sentence was somewhat harsh considering *Hakaraia* stole a shirt, it was aggravated by the aggressive manner in which the theft occurred. Guy Lennard, in his biography of Sir William Martin, maintains that by the standards of that century, the sentence “was almost nominal”.²²⁶ According to Lennard, “Martin was actuated not so much by the idea of adequate punishment but rather by a desire to make it known to the natives the benefits to the community of British justice”.²²⁷ Importantly, the sentence was “translated to the prisoner”, and presumably those in the court.²²⁸ Moreover,

²²² *Ibid.*, at 34.

²²³ *Ibid.*, at 37.

²²⁴ *R v Hakaraia*, above n 183, at 3.

²²⁵ *Ibid.*

²²⁶ Guy Lennard *Sir William Martin: The Life of the first Chief Justice of New Zealand* (Whitcombe and Tombs Limited, Christchurch, 1961) at 24.

²²⁷ *R v Hakaraia*, above n 183, at 3.

²²⁸ *Ibid.*

in the *New Zealander* newspaper, Hakaraia's sentence was published in Māori as it was felt that "the natives by the wide circulation of our Journal, will be informed of the punishment awarded to the prisoner, and that it may tend to prevent further repetition of similar outrages".²²⁹ Thus, the "merciful" sentence would also be given wide circulation.

The significance of *Ratea* lies in the newspaper discussion which followed the case. Having been acquitted, Chapman J noted that even if the accused had been found guilty of murder, because the offence was committed six years ago, when the "natives were at that time uninstructed in, and ignorant of, the nature of our [British] laws", he would feel "very indisposed to capital punishment" as a sentence.²³⁰ Again, the court's decision was articulated to Māori through interpreters. Local newspapers lamented the missed opportunity for judges to display benevolence. The editor in the *New Zealand Spectator and Cook's Strait Guardian* noted that "if Ratea had been found guilty, we think the Government would have acted wisely in granting his pardon, for our institutions and laws will best commend themselves to the natives when in their administration mercy seasons justice".²³¹ Similarly, the *New Zealander* maintained that if Ratea had been found guilty and then pardoned, "the effect might in every way have been salutary, impressing the natives first with respect for the administrative system of justice which had detected the criminal and fixed upon him liability to all the penal consequences of his crime, and, then, admiration of the constitutional prerogative of mercy inherent in the Ruling Power."²³² This indicates, perhaps, a widely held belief, that judicial mercy shown to Māori was seen as an effective means of legitimising the criminal law.

ii) Exceptional Legislation

Legislation was another means by which the criminal law was made more palatable to Māori. As has already been shown, the Native Exemption Ordinance and the Resident Magistrate Ordinance both incorporated elements of *utu* into the law. Both constituted a means of gradually acculturating Māori to British justice. For Māori, merely punishing the criminal was "a vindictive and largely pointless proceeding".²³³ They felt that there should be compensation for victims and his or her kin, which took the form of *utu*. Alan Ward explains that such misgivings were articulated by Auckland Chiefs at a meeting with Governor FitzRoy.²³⁴

²²⁹ *New Zealander* (Auckland, 7 March 1846) at 3.

²³⁰ *R v Ratea*, above n 164, at 3.

²³¹ *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 5 September 1849) at 2.

²³² *New Zealander* (Auckland, 29 September 1849) at 2.

²³³ Alan Ward, above n 119, at 65.

²³⁴ *Ibid.*

Having included *utu* concepts into the Native Exemption Ordinance, George Clarke, Protector for the Aborigines, reported in 1845 that the incorporation of *utu* had given “very general satisfaction to the intelligent chiefs”.²³⁵ The Native Exemption Ordinance was only in force for two years, and in that time, only one Supreme Court case applied its provisions.²³⁶ Still, *utu* provisions were also included in the Resident Magistrates Ordinance, which was in force for much longer. Of course, the Supreme Court did not use *utu* provisions after the new 1846 Ordinance.

Regarding FitzRoy’s original 1844 law, Alan Ward feels that the Governor “has not been given due credit for the positive aspect of this measure, the incorporation in it of the Māori principle of *utu*, or compensation for injured parties, instead of mere punishment of offenders”.²³⁷ Indeed, Ward argues that “this was a genuine attempt to make English law more acceptable to Māori by incorporating a useful point of custom”.²³⁸ Perhaps Ward’s estimation is correct. Still, the inclusion of *utu*, as a transitory measure, was ultimately designed to give Māori faith in the British justice system.

iii) Māori presence on the bench

Finally, the criminal law was legitimised through giving Māori a role in its application. In regard to the 1844 Ordinance, this took the form of Māori Chiefs being responsible for apprehending offenders.²³⁹ These Chiefs were paid to do so, which according to Alan Ward, amounted “to little more than a cheap enticement to sell one of their own race to an alien justice system”.²⁴⁰ My research has been unable to uncover information on the extent to which chiefs actually did apprehend Māori offenders.

With the arrival of Governor Grey two further important developments occurred. First, he established the Armed Police Force. According to Richard Hill, “[t]he envisaged force, part of its function being to act as the state’s major agency for socialising the Māori into behaviour

²³⁵ Dorsett “Case Note” above n 171, at 92.

²³⁶ *R v E Hipu*, above n 179.

²³⁷ Alan Ward, above n 119, at 67.

²³⁸ *Ibid.*

²³⁹ My research has found little information on the extent to which Māori Chiefs actually did apprehend offenders.

²⁴⁰ Alan Ward, above n 119, at 67. Of course, one of the main reasons that Chiefs were given a role in apprehending Māori offenders was British recognition that their means of administering justice to Māori was practically limited, given the resources available to the Governor, and the degree of power that Māori still retained in these early years of colonisation. See Belich *Making Peoples*, above n 198, at 191.

more amenable to European norms of order, would incorporate selected Māori personnel”.²⁴¹ Grey felt that by employing Māori policemen, especially chiefs, Māori would be more willing to accept and defer to the Police Force’s authority.²⁴²

Grey’s second innovation was the establishment of a Court of Arbitration system, through the Resident Magistrates Ordinance, which gave a significant role to Māori in the administration of justice. While the Ordinance envisaged that Native Assessors would only be used in civil *inter se* cases, they seemed to also play a role in criminal affairs. Thus, Alan Ward explains that the Assessors and Magistrate all concurred in sending Te Ahuru to Wellington for a criminal trial in 1851.²⁴³ The newspaper reports of Resident Magistrate decisions do indicate however, that Assessors were primarily used for civil *inter se* matters. This dissertation is principally concerned with the application of the criminal law. However, it would be remiss to ignore the legitimising effect of the Courts of Arbitration. Alan Ward explains that “[t]he role of the Assessors was of critical importance to the system. Their working role with the Resident Magistrate helped identify him as part of the local community, particularly where he involved himself sympathetically with the people and treated his Assessors as responsible lieutenants”.²⁴⁴ Perhaps more importantly, “the taking of disputes before the court did not appear to the local Māori as an appeal *outside* their group”.²⁴⁵ In this sense, it can be argued that the use of the Assessors in civil affairs, with their collaboration and coordination with Resident Magistrates, would certainly have legitimised the position of Magistrates who generally heard *inter se* Māori criminal offences alone.

iv) Some initial conclusions

Before moving on, several points must be made. It is difficult to know whether there was any general judicial policy directed towards implementing more merciful punishments for Māori offenders. At least in *Hakaraia*, Martin CJ seems to have been interested in giving Māori a favourable view of the criminal law. But other “merciful” sentences may have been none other than genuine judicial attempts to be fair in imposing a new law on a people with their own customs and procedures. Moreover, and perhaps representing the “strict application”

²⁴¹ Richard Hill *The History of Policing in New Zealand*. Volume I. *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867. Part One* (Historical Publications Branch, Department of Internal Affairs, Wellington, 1986) at 238.

²⁴² *Ibid.*

²⁴³ Alan Ward, above n 119, at 77. Te Ahuru was convicted in the Supreme Court in Wellington. See *R v Te Ahuru*, above n 169.

²⁴⁴ Alan Ward, above n 119, at 77.

²⁴⁵ *Ibid.* (emphasis in original)

viewpoint, there were plenty of other occasions where Māori offenders received the full punishment of the law.²⁴⁶ In regards to the pardoning of some Māori offenders, and the absence of imposing transportation on others, one cannot simply say that these decisions were motivated by a colonial conspiracy to “legitimise” the law in Māori eyes. Certainly, the primary reason for Te Ahuru’s return to New Zealand was that the Lieutenant-Governor of Van Dieman’s Land had been instructed by the British government to keep white and “coloured” prisoners apart.²⁴⁷

But in many instances, there were wider, assimilatory motives at play. This of course reflects the strand of exceptionalist philosophy “which saw British authority as dependant, at least initially, on judicious modification of English law and on deeply symbolic exercises of Crown discretion in enforcement”.²⁴⁸ In this sense, I contend that the British government’s late-1851 decision to halt the further transportation of Māori to Van Dieman’s Land, some two years before the same order was applied to settlers generally, was partly motivated by such policy concerns.²⁴⁹ More overtly, the incorporation of *utu* and giving Māori a place on the bench, were policies driven by a wider desire to assimilate Māori into a new judicial system.²⁵⁰ Of course, viewed with a contemporary lens, these policies appear cynical and misguided. But it must be remembered that officials at the time did truly believe they were doing Māori people a favour.²⁵¹ Regardless of the wider motives of judges or legislative officials, it is likely their actions had a similar consequence in legitimising the British criminal law.

Still, it is difficult, perhaps impossible, to fully ascertain the extent to which these judicial and legislative actions did legitimise the criminal law in Māori eyes. Certainly, legislative recognition of *utu*, as well as the position of Native Assessors seemed to have a validating effect. But the effect of the “merciful” decisions by judges and the Governor are more ambiguous. In relation to the judicial mercy displayed in cases such as *Hakaraia*, *Tairua* and *Ratea*, several questions, beyond the scope of this dissertation, require deeper examination. First, given that there may have only been a small number of Māori in the public gallery to hear these decisions, the extent to which Māori actually read the newspapers that published the

²⁴⁶ In *Maketu*, above n 144, the defendant was executed, as was the case in *R v Mararo* Supreme Court Wellington, 13 April 1840 per Chapman J, reported in the *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 14 April 1849) at 2.

²⁴⁷ Burnett, above n 216, at 34.

²⁴⁸ Damen Ward, above 38, at 12.

²⁴⁹ Burnett, above n 216, at 34.

²⁵⁰ Damen Ward, above n 38, at 9; Dorsett “How do things get started,” above n 129, at 115.

²⁵¹ Stuart Banner *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, 2007) at 96.

Supreme Court cases needs to be examined more closely. Lennard suggests that Martin’s “merciful sentence” in *Hakaraia*, which was published in *Te Reo*, “would have obtained wide currency among the Māori people”.²⁵² But such claims require substantiation. Anyhow, publications in *Te Reo* seemed to be the exception and so Māori would have needed to be able to read English to appreciate any “mercy” that judges might have shown. Secondly, the newspapers reporting these early decisions (1842-60) were published in the major settlements – Auckland and Wellington – and it is unlikely such newspapers would have travelled too far into the still large areas of New Zealand which were under Māori control.

Whether the limiting of transportation as a punishment for Māori, as well as the pardoning of some offenders had any legitimising effect on Māori is also open to debate. Governor Grey, at least, thought so. He seemed alive to the impact that his decisions might have on the wider Indigenous population. In relation to *Te Ahuru*, Grey complained that his return might “persuade other Māoris that they need not expect to receive the punishments ordinarily meted out to European offenders”.²⁵³ And when *Panapa* was sentenced to transportation in 1853, contrary to British government orders that vetoed any further Māori transportation, Grey ensured that his inevitable decision to prevent the transportation “look like an act of grace”.²⁵⁴ That no Māori offender, after being convicted in the Supreme Court, actually served time in Van Dieman’s Land cannot have gone unnoticed in Māori eyes, especially considering the regularity with which Europeans were sentenced to transportation.²⁵⁵

In all of this, it needs to be remembered that there was only a small number of criminal cases involving Māori defendants which came before the Supreme Court, in these early years. In this sense, Paul McHugh’s warnings of inflating the importance of past decisions is particularly pertinent.²⁵⁶ Perhaps, all one can really do is to tentatively contend that judicial mercy and the culturally “inclusive” legislation did have some role in showing, to at least some Māori, the humane side of the British justice system and the sometime benevolence of judges.

Māori Legitimation

It would be misguided to simply assert that British actions alone legitimised its rule. To do so would “disempower” Māori who were powerful players, sometimes more powerful than the

²⁵² Lennard, above n 226, at 24.

²⁵³ Burnett, above n 216, at 26.

²⁵⁴ *Ibid.*, at 37.

²⁵⁵ For example, in both 1849 and 1850, the Supreme Court sentenced ten European prisoners to transportation. See Burnett, above n 216, at 31.

²⁵⁶ McHugh *Aboriginal Societies*, above n 9, at 26.

British, in these early colonial years. As Hickford suggests, it is facile to “see the myriad interactions between Māori politics and imperial politics through the binary lenses of coercion and resistance”.²⁵⁷ Certainly, there were times where, acting on their own accord, Māori further strengthened and solidified the British criminal law.

The most important means by which this occurred was through Māori bringing their own people to face the British courts.²⁵⁸ British resources were limited in such a way that the courts often relied on Māori bringing their grievances to trial.²⁵⁹ Indeed, the defendants in *Maketu*, *E Hipu* and *Rangitapiripiri* appeared before the courts not by “the might of British justice... but by negotiation with local Māori”.²⁶⁰ *Rangitapiripiri* is particularly significant because it was an *inter se* case where according to the *New Zealand Spectator and Cook’s Strait Guardian*, “[t]he prisoner was the first to suggest that he should be brought to Wellington to be tried. If the native had had any wish to go away he could have gone”.²⁶¹ Thus, according to Chapman J in *Rangitapiripiri*, Māori “by bringing the prisoner to be tried here of their own free will and consent confessed the superiority of our [British] laws, and showed a strong desire on their part to be governed by them”.²⁶²

Moreover, Māori regularly participated in prosecution evidence.²⁶³ In the *Mararo* murder case, Hill outlines that “key prosecution evidence was provided by Māori policeman K Mania, while local tribes-people cooperated with the authorities and accepted the guilt and execution of the accused”.²⁶⁴ In *Tairua*, two Māori witnesses, Parimona and Mattiu both gave evidence saying that they had witnessed Tairua commit the alleged crime.²⁶⁵ In *Watene*, the accused was charged with the murder of his Māori wife, Kahiwa.²⁶⁶ He was found not guilty, by reason of insanity.²⁶⁷ During the trial, several Māori witnesses gave evidence which supported the

²⁵⁷ Hickford, above n 25, at 39.

²⁵⁸ In this sense, any analogy with 18th century England (the context of Hay’s article, above n 3) somewhat breaks down. In England, the propertied class had discretion to bring prosecutions against offenders, whereas Māori who came before the early colonial courts often did so out of their own free will.

²⁵⁹ According to James Belich *Making Peoples*, above n 198, at 181, “[i]n terms of state resources, increased intervention in 1840 was still very limited. Hobson estimated that establishing the colony would cost a mere £4,005, and his armed forces consisted of a dozen drunken police constables and a small warship. It was not until 1846 that his successors’ military and financial resources became significant, and not until 1860 that they became really substantial”.

²⁶⁰ Dorsett “Case Note” above n 171, at 94.

²⁶¹ *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 4 December 1847) at 2.

²⁶² *R v Rangitapiripiri*, above n 158, at 2.

²⁶³ For example, see *Maketu*, above n 144,

²⁶⁴ *R v Mararo*, above n 246; Hill, above n 241, at 216.

²⁶⁵ *R v Tairua*, above n 213.

²⁶⁶ *R v Watene* Supreme Court Nelson, 11 August 1858 per Gresson J, reported in the *Nelson Examiner and New Zealand Chronicle* (Nelson, 14 August 1858) at 2-3.

²⁶⁷ *Ibid.*

finding that Watene was not of a right mind.²⁶⁸ By participating and cooperating in these trials, Māori were lending support to the British judicial institution.

Not only did Māori participate in trials, but on several occasions, those involved in a case expressed praise for the system. According to Hill, following the *Maketu* case, “[m]any Māoris were reportedly impressed that although Maketu had confessed to the murders all the formalities of proof were complied with”.²⁶⁹ At the conclusion of the *Mararo* murder trial, where the accused was sentenced to death, one newspaper recorded that Māori “cannot fail to be struck with the anxious care that has been exhibited throughout the proceedings to execute strict and impartial justice”.²⁷⁰ Indeed, Māori “believe[d] that Mararo [had] been most justly punished”.²⁷¹ Following Watene’s acquittal from a murder charge, Emanu, the Māori chief of Whakapuaka reportedly advanced within the bar and addressing the judge (through an interpreter) gave strong praise:

I wish to say that I quite approve of what has been done with the prisoner Watene, tried in this Court for the murder of his wife, my sister Kahiwa. Had we been still living under Māori customs, the prisoner would have forfeited his life. This is the first occasion on which a woman related to the chief has been killed. Had such a crime been committed formerly, a great many, or probably most of the tribe to which the prisoner belongs, would have been slain.²⁷²

The Role of Missionaries

It is important to consider the role of Christian missionaries who introduced Māori to new concepts and ideas on law. The emergence of missionaries began in the Bay of Islands in 1814, but by 1840, this movement was “gaining strength over large parts of the North Island”.²⁷³ Ballara notes however, that conversion was truncated in the south.²⁷⁴ Although a large majority of Maori were still unconverted to Christianity by the 1840s,²⁷⁵ it was the ideas that missionaries propagated which is important. *Muru*, as a means of achieving *utu*, was

²⁶⁸ Ibid.

²⁶⁹ Hill, above n 241, at 215.

²⁷⁰ *New Zealand Spectator and Cook’s Strait Guardian* (Wellington, 21 April 1849) at 2.

²⁷¹ Ibid.

²⁷² *Nelson Examiner and New Zealand Chronicle* (Nelson, 11 August 1858) at 2.

²⁷³ Ballara, above n 92, at 424. Samuel Marsden (the Chaplain of New South Wales) made his first visit to the Bay of Islands in 1814 and went about establishing a Church Missionary Society in the new land.

²⁷⁴ Ibid., at 425.

²⁷⁵ Ibid., at 424; Belich *Making Peoples*, above n 198, at 217. Belich explains that those who did convert to Christianity would often exercise their religion in flexible ways.

condemned as missionaries promoted “individual choice, responsibility and guilt, and taught that ‘evil’ acts shamed the individual”.²⁷⁶

Indeed, missionaries in the Bay of Islands began to develop, among the mission Māori, the custom *kōti* (courts) to decide disputes.²⁷⁷ Acting as both moderator and judge, missionaries would issue fines or banishments, which would resolve disputes without recourse to *taua muru*.²⁷⁸ These early courts could even extend beyond missions, to Māori/European disputes and “gave Māori their first experience of a system approximating an alternative system of justice”.²⁷⁹

Another important dispute resolution institution that Māori adopted from missionaries was *komiti* (committees). Māori sought to infuse this European import with “Indigenous influences and institutions”.²⁸⁰ *Komiti* were used to dispense justice but also as a discussion forum for “chiefs on important matters concerning land and politics”.²⁸¹ At first, Christian chiefs experimented with *komiti*, under the supervision of missionaries.²⁸² However, “by the mid-1840s, many *komiti* had become quite independent of the missionaries” and “even spread to some non-Christian communities”.²⁸³ These early *komiti* tended to recognise “[i]ndividual rather than collective responsibility for wrongdoing” which was a “revolutionary idea” for Māori.²⁸⁴ Thus, parallel to the British justice system, ideas of individual justice were making their way into Māori communities through the work of Christian missionaries.

Taking stock

The analysis presented here attempts to illustrate how the British criminal law, through actions of both Māori and the British, was legitimised in Aotearoa during the first eighteen years of colonisation. Certain qualifications are, of course, required. As has already been mentioned, further research is needed to more thoroughly ascertain the legitimising consequences of British actions.

²⁷⁶ Ballara, above n 92, at 423.

²⁷⁷ Ibid., at 436.

²⁷⁸ Ibid.

²⁷⁹ Ibid., at 437.

²⁸⁰ Vincent O’Malley “Reinventing Tribal Mechanisms of Governance: The Emergence of Māori Runanga and Komiti in New Zealand before 1900” (2009) 56 *Ethnohistory* 69 at 73.

²⁸¹ Ballara, above n 92, at 441.

²⁸² O’Malley “Reinventing Tribal Mechanisms,” above n 280, at 75.

²⁸³ Ibid.

²⁸⁴ Ballara, above n 92, at 440.

And one must be careful to not read too heavily into the “legitimising” practices of Māori themselves. As with many other British customs, Māori tended to exercise much discretion and selectivity in their use of colonial courts.²⁸⁵ Thus, if Māori did use British courts, it is unlikely that they “intended to abdicate [their] right to deal with all future intra-tribal disputes in the process”.²⁸⁶ Rather, the issue before the court may have been one which was contested in the group and “the British courts provided an independent arbiter”.²⁸⁷ What’s more, there was no central Māori authority that articulated the views of all Indigenous people. So, in his admiration of British justice, Emanu of Whakapuaka was certainly not speaking for Northern or Central tribes in the North Island.

It is also the case that in these early years, huge tracts of the country were still under Māori control, living by Māori customs and uninterested in adopting British ways. Belich records that “even in the late 1860s, when the power balance had shifted considerably in favour of Pākehā, a great many Māori did not consider themselves obliged to obey Pākehā law when it did not suit”.²⁸⁸ But if even these Māori were not formally engaging with the British system, some were still being exposed to, and adopting, British legal ideas through the work of missionaries. Thus, Mark Hickford’s reminder to look beyond strictly legal materials is important when considering how the criminal law was being legitimised.

Overall, the effect of colonial state measures, including judicial mercy, incorporation of *utu* and Māori judicial roles, and the ostensibly enthusiastic attitude of certain groups of Māori to the British criminal law, as well as a strong missionary presence, seemed to give this criminal law an increasing amount of legitimacy, and thus authority, in the eyes of some Māori in some parts of the country.

The Cultural Invasion²⁸⁹

The significance of legitimisation of the British criminal law in Aotearoa lies in its contribution to the multi-faceted cultural attack on the Māori worldview by the British. Moana Jackson has argued that colonisation is “a story of the imposition of a philosophical construct as much as it

²⁸⁵ Belich *Making Peoples*, above n 198, at 224; Alan Ward, above n 119, at 83, notes that “[t]he considerable success of the Resident Magistrate system in some districts has been noted, but so also has the continued selectivity with which the Māori treated it”. Thus “objections to troops, police and gaols remained strong”.

²⁸⁶ Ford, above n 46, at 198. Ford makes this statement in regards to Aborigines using the New South Wales Supreme Court, but it seems equally applicable in the Māori context.

²⁸⁷ *Ibid.*

²⁸⁸ Belich *Making Peoples*, above n 198, at 224.

²⁸⁹ I have borrowed this term from Ani Mikaere *Colonising Myths – Māori Realities He Rukuruku Whakaaro* (Huia, Wellington, 2011) at 205.

is a tale of economic and military oppression.”²⁹⁰ In this sense, “the coercive reality of colonization flows directly from its philosophical ideas”.²⁹¹

This dissertation suggests that the effects of a legitimised British criminal law contributed to the ultimate British colonial project to “capture and redefine the very processes of Māori thought”.²⁹² In regard to the early criminal courts, Māori, to some degree at least, “began to accept the efficacy of Pākehā institutions”.²⁹³ In doing so, it came at the expense of their own law and philosophy. Ani Mikaere explains that every time Māori “acquiesce in the consolidation of Crown law, no matter how culturally sensitive that law may appear”, the “acquiescence comes at the expense of Māori law”.²⁹⁴ In statements such as those made by Chief Emanu of Whakapuaka or in the participation in criminal trials, some Māori seemingly “bought into the idea that the [British] worldview” was “superior” to their own.²⁹⁵

Individualising Māori society was a major facet of colonial policy. Mikaere argues that the British regarded Māori “collectivism as beastly communal...[that] had to be destroyed and replaced with individualism”.²⁹⁶ Certainly the British sought to replace Māori communal ownership of land with individualised titles. Stuart Banner explains that the British “were heirs to a tradition which associated communal ownership with primitive peoples and individual property rights with civilisation”.²⁹⁷ Thus, the colonial administration felt that land tenure reform, by which Māori land ownership would be converted to British titles, “would simultaneously break down traditional Māori political structures and better integrate Māori individuals and the colonial government”.²⁹⁸ In the context of land ownership, it is reasonably straightforward to identify how the property reforms would serve to individualise Māori society.

However, the criminal context is not so tangible. Without any detail, McHugh remarks that the aim of the criminal law was to instil in Māori “Western notions of individual responsibility and culpability”.²⁹⁹ It is important to consider the ways in which this may have occurred. Certainly,

²⁹⁰ Moana Jackson “The Treaty and the Word: Colonization of Māori Philosophy” in Graham Oddie and Roy W. Perret (ed) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1 at 2.

²⁹¹ *Ibid.*

²⁹² *Ibid.*, at 4.

²⁹³ *Ibid.*

²⁹⁴ Mikaere *Colonising Myths*, above n 289, at 279.

²⁹⁵ *Ibid.*, at 260.

²⁹⁶ *Ibid.*, at 206.

²⁹⁷ Stuart Banner, above n 251, at 56.

²⁹⁸ *Ibid.*, at 91.

²⁹⁹ McHugh *Aboriginal Societies*, above n 9, at 50.

in the early Supreme Court judgements, little urgency is apparent in explicitly explaining to Māori defendants ideas of *mens rea* and individuality. My research indicates that only in *Watene* did the court make it very clear that British law put an emphasis on individual responsibility. Speaking to the court, Johnson J held that “[a]ccording to English law, no man is held responsible for acts committed by him when in a state of insanity”.³⁰⁰ Interestingly, it was this case which prompted the Māori chief Emanu to lavishly praise British law. Perhaps more was said about individual responsibility in the numerous Resident Magistrate decisions. Still, regardless of explicit statements from judges, it can be argued that the judicial system would have *implicitly* imbued notions of individual responsibility in Māori.

There are several obvious features of the British court system which de-emphasize collective notions. First, as John Patterson explains, “the defendant in a trial has to stand alone, separated from his or her family”.³⁰¹ For a Māori offender, this removes them at an important time from their family who are prevented from “fulfilling [their] customary support role”.³⁰² Secondly, facing a single and “foreign” judge was at odds with the Māori collective philosophy. According to Moana Jackson:

In a Māori setting, offenders were never alienated from the victim of their actions or the authority which decided their fate. Their actions were the shared responsibility of a *whanau* or *iwi*, and the consequences and judgement of them was similarly shared. Justice could not be dispensed by someone removed from the community ties and input of the offender and victim: it relied for its efficacy on that input and the kinship obligations implicit within it.³⁰³

Having justice dispensed by an impartial outsider was thoroughly inconsistent with the public and community aspect to Māori processes, described in Chapter II. Perhaps most fundamentally, contrary to the British system in which the sentence or punishment is delivered to an individual, somewhat epitomised by imprisonment, for Māori, “[t]he system imposed responsibility for wrongdoing on the family of an offender, not just the individual, and so strengthened the sense of reciprocal group obligations”.³⁰⁴

³⁰⁰ *R v Watene*, above n 266, at 3.

³⁰¹ Patterson, above n 111, at 12.

³⁰² *Ibid.*

³⁰³ Moana Jackson *The Māori and the Criminal Justice System, a New Perspective: He Whaipanga Hou* (Department of Justice, Wellington, 1988) at 132.

³⁰⁴ *Ibid.*, 43.

Conclusion

In the course of my researching material for this dissertation, the more subtle constitutive effects of law on society have been made more readily apparent. Robert Gordon has perceptively noted that “the power exerted by a legal regime consists less in the force that it can bring against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live”.³⁰⁵

I believe this aptly captures the processes at work during the early application of the British criminal law towards Māori. The power of this criminal law consisted less in its imposition of punitive sentences on Māori than in its capacity to persuade them to adopt a new worldview. But to quote from Douglas Hay’s study, “how can we prove that it worked?”³⁰⁶

Admittedly, it is very difficult to accurately quantify the extent to which the judicial practices, described above, instilled in Māori notions of individual responsibility, or the cost on their collectivistic philosophy. Moreover, Māori commentators and writers bring far greater knowledge on this subject than I do. However, it is difficult to imagine that within certain “frontier zones,” the individualised system of British justice did not make a firm impression on Māori who were subjected to the law or witnessed it in operation. Together with other state measures and the work of missionaries, one can conclude that this system, which became increasingly legitimised in Māori eyes, contributed to the gradual erosion of the Indigenous collectivist worldview.

³⁰⁵ Robert Gordon “Critical Legal Histories” (1984) 36 Stanford Law Review 57 at 109.

³⁰⁶ Hay, above n 3, at 54.

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