

The Precedent is India: Crime, Legal Order and Governor Hobson's 1840 Proposal for the Modification of Criminal Law as applied to Māori

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This article considers the 1840 draft Act by Captain (later Governor) Hobson for the modification of criminal law as applied to Māori. Never enacted, Hobson's plan was the first in a series of Acts which used exceptional criminal laws as a mechanism for imposing legal order. More broadly, an examination of Hobson's also contributes to a growing literature which considers the key transitional period of the second and third decade of the nineteenth century, a period which witnesses the movement from a more pluralised empire to one in which a more recognisably 'modern' form of territorial sovereignty is emerging.

Introduction

Barely six weeks after the signing of the Treaty of Waitangi, Kihī was indicted for the murder of a white settler, the shepherd Patrick Rooney. Kihī was brought before a bench of magistrates in the church in Kororāreka (now Russell).¹ Whilst Kihī's indictment seemed a foregone conclusion – Lieutenant-Governor William Hobson writing to Governor Gipps of New South Wales that the “evidence against the man is very conclusive”² – Hobson was unsure how to further proceed with the matter. In April 1840 this single bench of magistrates constituted the entire British judicial machinery in New Zealand. More than the immediate problem of Kihī, however, Hobson was unsure as to whether the English criminal law and procedure should, or could, be applied to Māori without some significant modification. Three weeks later, in May 1840, he again, therefore, wrote to Gipps, this time enclosing a proposal for

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¹ *R v Kihī*, Bench of Magistrates, Kororāreka, April 1840, W Shortland JP, sitting with two other unnamed magistrates. The two other magistrates were likely Felton Mathew and Thomas Beckham as all three were appointed magistrates of the territory (of New South Wales) at the same time and appear frequently in subsequent records: *New South Wales Government Gazette*, 8 April 1840, 337. There is no one source for this case. The details can be pieced together from the following: Hobson to Gipps, April 21 1840, Archives New Zealand (hereafter ANZ), G36/1, 71; Return of the names of the prisoners now in the gaol at Russell, 9 Oct 1840, ANZ, IA1/4, 40/551; Kemp to Colonial Secretary, 22 September 1840, ANZ, IA1/3, 40/496; Hobson to Russell, 25 May 1840, GBPP 1841 XVII (311), 15; Bunbury to Hobson 6 May 1840, GBPP 1841 XVII (311), 100; *New Zealand Gazette and Wellington Spectator* June 13 1840, 2; Nancy Taylor (ed), *The Journal of Ensign Best* (Wellington: Government Printer, Wellington, 1966), 217-9 and Appendix 3, 405-8; Thompson *The Story of New Zealand* (London: J Murray, 1859), Vol II, 25; H Carelton, *The Life of Henry Williams* (Auckland: Wilsons & Horton, 1877), Vol 2, 21. Kihī is briefly mentioned in Alan Ward *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, (Toronto: University of Toronto Press, 1974), 47.

² Hobson to Gipps, *ibid.* As New Zealand had not separated from New South Wales, Hobson was still Lieutenant Governor.

the modification of English criminal law in its application to Māori and for the establishment of native courts. This plan, was, he contended not without precedent as “courts of a similar nature exist throughout India”.³

Hobson’s recourse to India as precedence is hardly unexpected. He had been stationed in the East Indies for some two years. In 1837 he presented a proposal for dealing with lawless British subjects and the limits of British extra-territorial jurisdiction in New Zealand. This proposal was based on the factory model (trading settlements under the territorial control of the British) he had observed in India.⁴ The proposal (which went through three iterations) was sufficiently influential at the Colonial Office to secure him the position of first Governor of New Zealand.⁵ Hobson’s initial 1837 factory proposal is reasonably well-known,⁶ although its later iterations and the important shifts between versions have not been as well attended to. In particular, those aspects relating to the application of criminal law in Aotearoa / New Zealand deserve more attention. Hobson modified his proposals over time in response to the increasing need to protect both Māori and settlers alike from the predations of lawless British subjects. What is of particular interest here is that component of the proposals which relates to the use of criminal law as an instrument of order. Tracing Hobson’s factory proposals (all made before the assertion of British sovereignty) through to his subsequent 1840 draft proposal for the modification of criminal law highlights the ways in which criminal law was a key component in the imposition of legal order, and, hence, post sovereignty, a mechanism of governance.

The insight that the criminal justice system was used by the dominant elites to consolidate their power and legitimacy is hardly new.⁷ Nor is the idea that the criminal law was an instrument of colonization. What is less explored is the ways in which ‘exceptional’ assimilatory thought led to the crafting in colonies of exceptional laws for parts of the population, in particular the indigenous population.⁸ Exceptional laws were just one of the myriad of British legal strategies introduced (and locally adapted) as a result of the extension of British sovereignty to New Zealand. Hobson’s

³ Enclosure, Hobson to Gipps, 7 May 1840, Colonial Secretary Inwards Letters New Zealand 1840, State Records New South Wales (hereafter SRNSW), NRS 905 [4/2540], unpaginated.

⁴ Hobson to Bourke, 8 August 1837, enclosure A in Bourke to Glenelg, 9 September 1837, GBPP 1837-1838 XL (122), 3.

⁵ Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland: University of Auckland Press, 1977), 126-7.

⁶ See Ian Wards *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832-1852* (Wellington: Government Printer, 1968), pp 20-21; Adams, *Fatal Necessity*, pp. 86-7; Ward *A Show of Justice*, 30-31; PG McHugh *The Aboriginal Rights of the Māori at Common Law* (PhD Dissertation, Cambridge University, 1987) ch 3.

⁷ Douglas Hay, Peter Linebaugh and EP Thompson (eds) *Albions Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975).

⁸ The exception is Damen Ward “A Means and Measure of Civilisation: Colonial Law and Indigenous Authorities in Australasia”, *History Compass* 1 (2003): 1-24. See also Saliha Belmessous *Assimilation and Empire in French and British Colonies, 1541-1954* (Oxford: Oxford University Press, 2013). Other authors have, of course, focused on assimilation and exception in other contexts and employing different methodologies. See, as diverse examples, Lorenzo Veracini *Settler Colonialism: A Theoretical Overview* (London: Palgrave McMillan, 2010); Damon Salesa *Racial Crossings: Race, Marriage, and the Victoria Empire* (Oxford: Oxford University Press, 2011); Patrick Wolfe *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Bloomsbury, 1999).

draft act was only the first of a series of proposals for exceptional criminal laws by New Zealand Governors in the 1840s. Unlike Hobson's draft, however, the plans of both of Hobson's immediate successors, FitzRoy and Grey, became law. Until now these aspects of Hobson's factory proposals have largely remained unexplored. Juxtaposing Hobson's factory proposals and draft act with later exceptional laws exposes the contingencies of the legal choices made in the late 1830s. Hobson's various proposals show by-ways not taken and remind us that other arrangements for legal order - with regard both to sovereignty and internal legal order - were not only possible, but contemplated. In so doing, this article both contributes to and complicates a growing body of literature which considers the key transitional period of the second and third decade of the nineteenth century, a period in which sees the movement from a more pluralised empire to one in which a more 'modern' version of territorial sovereignty is emerging.⁹

In Hobson's factory proposals, criminal law was largely protective. It provided a mechanism for the creation of a legal order which would protect Māori and settlers alike. Post-1840 this project remained. However, with the formal imposition of sovereignty criminal law needed to do more. If Māori were now British subjects, then they required not just protection but governance. According to Hobson "the assumption of her sovereignty by her Majesty precluded the possibility of allowing native justice to be executed as was done on a former occasion".¹⁰ Local courts were to be both an instrument of governance and mode of civilization. Despite the assumption of some officials in London that English law would necessarily remain limited in its application - that disputes between Māori would continue in many cases to be regulated by *tikanga* - for local officials that was neither politically nor practically acceptable. In the new colony of New Zealand English criminal law was the chosen instrument of legal order and governance. Although Hobson drew his inspiration from Indian precedent, in the end the courts in Hobson's *Draft Act* bore only slight resemblance to the courts of the East India Company operating in the *moffusil* outside Calcutta. This was far from the pluralistic court structure of the Indian Presidencies.

Part I considers the indictment of Kihī. This indictment provided the immediate impetus for the suggestion of modifications to the criminal law for Māori. However, as Part II demonstrates, this proposal was in many ways a continuance of Hobson's earlier factory proposals. The proposals, and the shifts between iterations, particularly with respect to the criminal law, are considered in this Part. Part III looks in detail at Hobson's 1840 draft act for the modification of criminal law. It compares the

⁹ See, for example, Paul McHugh *Aboriginal Societies and the Common Law* (Oxford: Oxford University Press, 2004); Lauren Benton *A Search for Sovereignty: Law and Geography in European Empires 1400-1900* (Cambridge: Cambridge University Press, 2009); Lisa Ford *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788-1836* (Cambridge (MA): Harvard University Press, 2010); Damen Ward "Territory, Jurisdiction and Colonial Governance" *The Journal of Legal History* 33 (2012): 313-333; Damen Ward "Constructing British Authority in Australasia: Charles Cooper and the Legal Status of the Aborigines in the South Australian Supreme Court c. 1840-1860" *Journal of Imperial and Commonwealth History* 34 (2006): 483-504; Shaunnagh Dorsett "Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s" *Journal of Legal History* 30 (2009): 175-197.

¹⁰ Hobson to Gipps, 17 April 1840, ANZ, G 36/1, 71.

proposal to later exception laws which were enacted by subsequent Governors. Part IV offers some brief concluding comments.

I. Governing Māori: The Indictment of Kihi

On April 21, 1840, Hobson wrote to Governor Gipps from the Bay of Islands. He informed Gipps that a native, Kihi, had been brought before the bench of magistrates. It had not been easy to bring Kihi to trial. Hobson wrote that “a very large body of natives” had appeared, and the magistrate had called Major Bunbury and the military. However, wrote Hobson, on the arrival of the military they had “quietly dispersed, and gave up two native witnesses whose evidence they had before forcibly withheld”.¹¹ There are three extant eye-witness accounts of events at Kororāreka that April, those of Ensign Best, Dr John Johnson, and the Missionary Henry Williams.

Best tells us that a korero (talk) took place between the Māori and the Magistrates and local settlers. The British were intent that the trial should take place according to English law. Māori wanted Kihi returned.¹² According to Williams (whose sons employed Rooney), a local chief, Haratua, viewed Patrick Rooney as ‘his pākehā’. Rather, therefore, than coming to free Kihi, a visitor from Tauranga, Williams believed that Haratua intended to “despatch [Kihi] at once” for the murder of Rooney.¹³ In addition, the Magistrates wanted a Māori witness handed over. She was apparently the principle witness against Kihi.

The indictment was initially to take place on 20 April 1840 at the Church in Kororāreka. The church was the only place large enough, as a number of chiefs attended “who it was understood wished to see the British mode of investigating crime”.¹⁴ A moment of crisis occurred when Māori refused to allow the witness to enter the church without an armed escort. According to Dr Johnson he and others refused to allow armed persons to enter the church: “[w]e were all of one opinion, that is was a critical moment, and that it was our duty to maintain the integrity of the first British Court of justice held in New Zealand ...”.¹⁵ Eventually a compromise was reached: they would bring back the woman the next day. Several days later (on the 23rd), the indictment took place. Best tells us that in the end “... the Mauris were found very tractable for they had sense enough to see that resistance was useless and come to the following terms. That they should give up the woman Leave the man to be dealt with according to British law, and return quietly home”. A marginal note tells us further that “[the chiefs] were invited to attend [the indictment hearing] ... which they did & after the trial expressed themselves satisfied with British law & mode of procedure in such cases but added that they had not been before”.¹⁶ Johnson said the hearing was peaceable and “the evidence was interpreted to the chiefs and they expressed themselves satisfied, but hoped we would not hang but shoot him”.¹⁷

¹¹ Hobson to Gipps, April 21 1840, ANZ, G36/1, 71.

¹² *Journal of Ensign Best*, 218.

¹³ Carelton, *The Life of Henry Williams*, Vol 2, 21.

¹⁴ Dr John Johnson, *Diary Describing his Experiences at the Bay of Islands and Maori Life there*, entries 17 March to 28 April, Alexander Turnbull Library, Wellington, Micro-MS-0154. The relevant extract on Kihi’s trial is reproduced as Appendix 3 in *Journal of Ensign Best*.

¹⁵ Johnson, *Diary*, in *Journal of Ensign Best*, 406.

¹⁶ *Journal of Ensign Best*, 218. Spelling and punctuation as in the original.

¹⁷ Johnson, *Diary*, in *Journal of Ensign Best*, 407.

Hobson similarly later reported to Russell that the “natives” ... have “since become perfectly sensible of the justice of our proceedings and of their own folly in opposing us”.¹⁸

Thus, Kihī was indicted for murder. Hobson’s problem, therefore, was how to proceed to try him. At that time, New Zealand had not yet separated from New South Wales. In early 1840 the boundaries of New South Wales had been extended by Governor Gipps to include such territory in New Zealand as might be claimed by sovereignty, although the laws of New South Wales were not formally extended to New Zealand until June 1840 – after Kihī’s indictment.¹⁹ Kihī could not be tried locally. There was no local court of criminal jurisdiction and there would not be until the establishment of the Court of Petty Sessions, which did not sit until September 2, 1841 – some seventeen months later.²⁰ No Attorney-General had yet been appointed nor, given the lack of institutions, were there any lawyers who could defend. The appropriate court, therefore, was still the Supreme Court of New South Wales, some 2300km away across the Tasman Sea.²¹ Hobson sought an opinion as to trying Kihī from the law officers of New South Wales.

Despite the lack of institutions, and the inability generally of the British to enforce English law beyond the immediate settlements at Kororāreka, the formal assumption of sovereignty changed how the British thought about jurisdictional arrangements. At the time of Kihī’s indictment, the Treaty of Waitangi had not even been signed by iwi outside the immediate Northland area (although it was backed up by Proclamations asserting sovereignty in the same month as Hobson sent his proposal). Nevertheless, British justice could now be imposed and, where possible, Māori were to be subjected to common law. It is clear from the eye-witness accounts, and the reports of local newspapers, that the indictment was seen as an important moment in the establishment of British law. For the settler participants at Kororāreka, Kihī’s indictment symbolized a new era of legal order and a retreat of the lawlessness of the pre-sovereignty period. Not only had the indictment taken place, but, at least in the eyes of settler observers, the local chiefs had approved the ways of British law. As it was reported in one newspaper “in a very few minutes [it was] proved to our sable

¹⁸ Hobson to Russell, 25 May 1840, GBPP 1841 XVII (311), 15

¹⁹ Proclamation, 14 January 1840, *New South Wales Government Gazette*, 18 January 1840, 66. An Act to Declare that Her Majesty’s laws extend to New Zealand etc, 3 Vict. No. 29 (1840) (NSW). This was confirmed by first local ordinance passed: An Ordinance to declare that the laws of New South Wales so far as they can be made applicable shall extend to and be in force in Her Majesty’s Colony of New Zealand 1841 4 Vict No 1 (NZ). On the annexation of New Zealand see DV Williams “The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?” *Aust J of L & Soc* 2 (1985): 41-55. In 1858 it was declared that all laws of England in force on 14 January 1840 were deemed to have been in force in New Zealand on that day: *English Laws Act 1858* (NZ), s 1 and see DV Williams “The Pre-History of The English Laws Act 1858: *McLiver v Macky* (1856)” *VUWLR* 41 (2010): 361-380.

²⁰ *An Ordinance for Instituting and Regulating Courts of General and Quarter Sessions* (1841) 4 Vict. No. 4 (NZ).

²¹ Not until October 1840 did the New South Wales Legislative Council provide for the appointment of a Resident Judge of the New South Wales Supreme Court in New Zealand (*An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies*, 4 Vict. No. 22 (1840), s 4), but no judge was appointed as events overtook this measure. In November 1840 New Zealand was constituted a separate colony: Charter for Erecting the Colony of New Zealand, effective 16 November 1840

brethren, that English law ruled the land".²² That the indictment was only one step in a longer process clearly escaped many participants, while for others that Kihī had been indicted at all was an important moment in itself. What to do now was Hobson's problem. How was he to be tried? While Hobson waited for advice, Kihī was placed in leg irons and kept at the local gaol.²³

II. Hobson's Factory Proposals

Hobson was well aware of the practical difficulties of trying Kihī. In 1837, on his first visit to New Zealand, Hobson agreed to transport two men accused of robbery, as well as the witnesses to the crime, to Sydney for trial onboard his ship 'Rattlesnake'. James Golding and Edward Doyle were accused of robbing Mr Wright at his home in the Bay of Islands. They took twenty yards of calico, ten shirts, twenty pounds of gunpowder, and sundry other articles.²⁴ It seems the robbery was committed by four men. Three of them were identified by Mr and Mrs Wright, who determined to travel to Sydney in order that they might be prosecuted. Two, Golding and Doyle were apprehended after Busby, the British Resident, offered a £10 reward. Doyle was an escaped convict who had fled British jurisdiction. As a consequence of war breaking out in the north, Hobson was in New Zealand at the behest of Governor Bourke of New South Wales. Bourke asked Hobson for his opinion on 'the present state' of New Zealand and this exact problem of how to deal with lawless British subjects.²⁵ How was legal order to be imposed given the restrictions of British Imperial law and the practical difficulties caused by the distance between New South Wales and New Zealand? Hobson's answer was to create factories, similar to those in India, most likely Calcutta in particular.

Hobson's factory proposals are set against an escalating problem of lawlessness and violence by British subjects in New Zealand, particularly in the far North. In the 1830s the area around Kororāreka was a bustling melting pot of Māori, British traders and whalers and sailors of other nationalities (particularly French and American). Missionaries had arrived in 1814 and some British subjects had made New Zealand their home. There was even the occasional escaped convict, such as Mr Doyle. In 1832 Busby had been appointed the first British Resident in New Zealand. A Resident would demonstrate to malefactors that officials in New South Wales would deal with lawless conduct. Thus Busby's remit included repressing "the outrages which unhappily British Subjects are found so often to Perpetrate against the persons and

²² *New Zealand Gazette & Wellington Spectator*, 13 June 1840, 2.

²³ Return of the names of the prisoners now in the gaol at Russell, 9 Oct 1840, ANZ, IA1/4, 40/551.

²⁴ Busby (British Resident in New Zealand) to Deas Thompson (Colonial Secretary New South Wales), 3 July 1837, TNA, CO 209/2, fol Fol 354; Busby to Hobson, 1 July 1837, TNA, CO 209/2, fol 356. For the case against Doyle, see *R v Doyle*, Supreme Court of New South Wales, Dowling ACJ, 1 August and 1 September 1837, available at the Colonial Case Law Project: <http://www.law.mq.edu.au/research/colonial_case_law/nsw/site/scnsw_home/> (accessed 2 April 2014). Doyle was sentenced to death. See also Capital Convictions Database at <http://research.forbessociety.org.au/record/2015> (accessed 2 April 2014). Golding was never tried: Clerk of the Peace Depositions 1837, SRNSW, NRS 800 [9/6310].

²⁵ Bourke to Glenelg, 9 September 1837, GBPP 1837-8 XL (122), 8.

property of the Natives and the peace of Society in these regions”.²⁶ Despite this remit, he had no real authority – legal or otherwise – to actually effect such a task. Over the course of the 1830s there were a number of attempts, both by the British Resident, Busby, and the local traders and merchants, to create mechanisms for local order, but to little avail.²⁷ Thus, according to Hobson, writing in 1837, the “dissolute conduct of the lower orders of our countrymen” posed a significant threat to peace and order in the region.²⁸ The robbery of the Wrights was merely one example. While Britain was moving inexorably towards intervention, it was unclear what form that intervention should take. In 1837, the British authorities were not yet ready to assert sovereignty over the islands of Aotearoa.

Although the New South Wales Supreme Court had some extra-territorial jurisdiction prior to December 1840, it was very limited. The general principle applied, both by the Foreign Office and the Colonial Office, was that Britain had no constitutional capacity to erect local judicial power over British subjects in foreign territory without a previous grant of authority from the local sovereign.²⁹ Thus, the 1817 *Murders Abroad Act* made British subjects liable to trial on British soil for offences committed in “Otaheite, New Zealand, the Honduras and other places not within His Majesty’s dominions.”³⁰ This jurisdiction received further provision with respect to New Zealand through Imperial legislation of 1823 and 1828 enabling courts in New South Wales to try British subjects for serious offences committed in New Zealand.³¹ However, as McHugh notes, these Acts “were expressly founded upon a disavowal of any sovereignty over New Zealand and deliberately avoided erection of an *imperium* in the islands”.³² Rather, they made British subjects liable to trial for serious crimes upon their return (not always voluntary) to British soil. Hence Doyle was transported unwillingly, along with all witnesses, to New South Wales to stand trial for the robbery of the Wrights.

The approach taken with respect to New Zealand was consistent with established British practice. The matter of foreign or extra-territorial jurisdiction was particularly pressing for both the Colonial Office and the Foreign Office throughout the 1830s. From the perspective of the Foreign Office, limits to extra-territorial jurisdiction were particularly problematic where British subjects traded abroad – the most obvious

²⁶ Goderich (Secretary of State for War and the Colonies) to Governor Bourke, 2 May 1832, *Historical Records of Australia: Series I*, Vol 16, 662.

²⁷ See Wards *Shadow of the Land*, ch 1.

²⁸ Hobson to Bourke, 8 August 1937, enclosure A in Bourke to Glenelg, 9 September 1837, GBPP 1837-1838 XL (122) 4.

²⁹ For an excellent description of the problem and principles see PG McHugh ““A Pretty Gov[ernment]!”: The “Confederation of the United Tribes” and Britain’s Quest for Imperial Order in the New Zealand Islands during the 1830s” in *Legal Pluralism and Empires, 1500-1850*, Lauren Benton and Richard J Ross (eds) (New York: New York University Press, 2013), 233-258. See also McHugh, *Aboriginal Rights*, chs 2 and 3. See also Adams *Fatal Necessity*, ch, 2; Wayne Rumbles “Spectre of Jurisdiction: Supreme Court of New South Wales and the British Subject in Aotearoa/ New Zealand 1823-1841” *Law Text Culture* 15 (2011): 209-232; *In Re MacKay v David* [1832] NSWSupCt 52, in which the court denied jurisdiction to grant administration as creditor over a deceased estate where the plaintiff died in New Zealand.

³⁰ *Murders Abroad Act* (1817) 57 Geo III c. 58 (Imp).

³¹ Jurisdiction was given under (1823) 4 Geo IV c 96 (Imp) and (1828) 9 Geo IV c 83 (Imp).

³² McHugh, *Pluralism*, 238.

examples being China and the Levant (the Ottoman Empire). From the perspective of the Colonial Office the lack of jurisdiction was problematic because of their recognition in the eighteenth and into the nineteenth century of a number of ‘native sovereigns’. The result was that where colonies were adjacent to the territories of such sovereigns they could not control unruly British subjects within those territories. The most difficult areas at this time, other than New Zealand, were the Cape border with Kaffraria (as it was known), a number of Pacific Islands (including Fiji and Tahiti) and Madras (bordered with the Princely State of Hyderabad, ruled by the Nazim, a hereditary position). The acceptance, therefore, by the British that the Māori were to be considered sovereigns and owners of the soil complicated their attempts to deal with the problems of settlers in New Zealand.³³ That this jurisdiction could only be exercised over subjects on their return to New South Wales had been confirmed in March 1832 by the New South Wales Supreme Court. In *Ex Parte McKey* the court held that it did not have the power to issue a *capias ad respondendum* (writ for arrest) against a person in New Zealand. In other words, its writ did not run in New Zealand, although it had Admiralty jurisdiction to try territory criminal offences committed by British Subjects in New Zealand.³⁴

The matter of foreign jurisdiction, both within and without the Empire, was ultimately not ‘solved’ until the enactment of the *Foreign Jurisdiction Act* in 1843.³⁵ Even had it been enacted some years earlier, it is doubtful that it would have materially changed matters in New Zealand. The Act based the Britain’s extraterritorial powers over subjects on “Treaties, Capitulation, Grant, Usage, Sufferance, and other lawful means” (s 1). In effect, these were all the bases on which Britain already sought to extend jurisdiction without the Dominions. They were seen as modes by which a foreign sovereign could give a grant of authority to the British Crown, or at least could be interpreted as such. The Act clarified their validity as a basis for British action (preamble, s 1). Whether Britain could have asserted any jurisdiction within Aotearoa through reliance on any of these is unclear, and the continual failure across the 1830s of the Colonial Office to do so suggests that they also had doubts. In any case, Hobson was clearly aware of the limits of Britain’s position. Hobson’s initial 1837 proposal suggested that the British establish factories, confined within certain limits, on the plan of European trading posts in India and, particularly, in Calcutta. A factory was an area over which the British had territorial control (and possibly) sovereignty (a Presidency in Indian terms), with additional areas of influence known as the *moffusil*. “If these were established ... as the occupation by British subjects

³³ The question of who exactly was sovereign was the subject of various opinion. The British Resident, Busby, for example, insisted that sovereignty was collective (vested in the United Tribes of New Zealand): Article 2 of the 1835 Declaration of Independence stated that “All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the Hereditary Chiefs and Heads of Tribes in their collective capacity”: TNA, CO209/1, fol 265. Others believed that sovereignty was tribal.

³⁴ *R v Ex Parte McKey; in re Nelson* (1832) NSW Sel Cases (Dowling) 255; [1832] NSWSupC 11 (Supreme Court of New South Wales).

³⁵ *Foreign Jurisdiction Act* 6 & 7 Vict. c 94 (1843). The Act was amended and re-enacted a number of times across the nineteenth century. The Act was based on a report on the problems of jurisdiction in the Levant by a young lawyer, James Hope (later Hope-Scott). For the report see TNA, FO97/497. For an excellent discussion of the origins of the Act see CR Pennell “The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty” *Historical Research* 83 (2010): 465-485.

proceeds”, he stated, “a sufficient restraint could be constitutionally restrained on the licentious whites, without exciting the jealousy of the New Zealanders, or any other power”. Such factories were to be on land purchased and brought within British jurisdiction as dependencies of New South Wales. British jurisdiction should be shored up by means of a treaty entered into with the Māori chiefs for the recognition of the factories and the protection of British subjects and property. British subjects should register themselves and property at the factories, and prisons should be built at each.³⁶ Hobson did not refer to this as an acquisition of sovereignty, referring rather to purchasing the land. Constitutionally a treaty with the Māori could give sufficient basis for British jurisdiction without an actual assertion of sovereignty over the areas in which the factories were established, thereby getting around the limitations under British Imperial law of extra-territorial jurisdiction.

Detail was light in this first proposal, both with respect to the legal form of the factories, and with regard both to the detail of how law and order was to be maintained and the relationship between British laws and *tikanga*. Hobson suggested that the head of each factory should be both a magistrate and an accredited agent and consul with the United Chiefs of New Zealand. Hobson recognised that the proposal would need to be underpinned by an Act of British parliament, particularly in order to give the New South Wales Supreme Court jurisdiction over British subjects “more perfectly than at present”.

Whatever Hobson intended with his proposal, the Secretary of State for War and the Colonies, Glenelg, endorsed both it and a limited acquisition of sovereignty: “all that is required is to obtain from the Chiefs a free concession of the rights of sovereignty over one or two of these settled districts”.³⁷ These areas would be under the dependency of New South Wales. Further, according to Glenelg, within these area courts could be established to try crimes by British subjects committed within New Zealand. This simple model was, Glenelg thought, all that was essential for the moment.³⁸ Not everyone was in favour of the proposal. Busby, the British Resident, wrote to the Colonial Secretary of New South Wales that Hobson’s proposal was “impracticable, but ... if practicable would fail to meet the exigencies of the case”. He noted Hobson had not been as many weeks as he had years in the country.³⁹ Busby was probably right about Hobson’s plan. British subjects in New Zealand were already spreading out beyond the coast. It seems doubtful that they could have been corralled within factory settlements. In any case, Hobson himself realised that matters were moving on, and in January 1839 he produced another, more detailed, version of his proposal.

As noted at the outset, that Hobson should look to the East Indies for inspiration was hardly unexpected. Prior to his appointment as Lieutenant-Governor of New Zealand, Hobson had been Captain of ‘HM Rattlesnake’. On the ‘Rattlesnake’ Hobson spent

³⁶ Hobson to Bourke, 8 August 1837, enclosure A in Bourke to Glenelg, 9 September 1837, GBPP 1837-1838 (122), 10-11.

³⁷ Memo Glenelg 4 May 1838, TNA, CO 209/3 fol 374.

³⁸ Memo Glenelg 4 May 1838, TNA, CO 209/3 fol 375.

³⁹ Busby to Colonial Secretary (NSW), 30 November 1838, TNA, CO209/3, fol 76. Busby had earlier sent his own suggestions to the Colonial Office, based on the protectorate of the Ionian Islands administered by Great Britain under the Treaty of Paris: Busby to Colonial Secretary (NSW), 16 June 1837, TNA, CO209/2, fol 44ff.

two periods in the East Indies – 1835 to early 1836 and late 1837 - with a deployment to Tasmania, New South Wales and New Zealand in between.⁴⁰ A factory was, in the context of the East Indies, initially a trading post or a commercial settlement. It was literally a small area in which the offices and warehouse were located. The first of the East India Company factories was in Surat, and was established with the permission of the local Moghul Governor. Eventually a *firman* was granted to the Company - to trade, live according to their own laws and religion without interference; but in the case of disputes with the local inhabitants, these were to be adjudicated by local Moghul authorities.⁴¹ Other factories were established. In time, Surat became of less importance, and three main factories or ‘Presidencies’ (as a Governor or President of the Company was the administrative head) were established: Bombay; Calcutta; and Madras. They started as trading stations and became, as the Company acquired political functions, the centres of power. Territorial acquisitions were organised around the Presidency Towns (as they became known), the territory beyond the towns being known as the Mofussil.⁴²

In the 1770s and 1780s Britain had moved to exert some firmer control over the East India Company and its possessions. A 1757 opinion by the Law Officers on the division of plunder taken by the East India Company (the famous ‘Pratt-Yorke opinion’) had determined that the “property of the soil [had] vested in the Company by the *Indian* grants, subject only to Your Majesty’s right of Sovereignty over the settlements, as *English* settlements, and over the inhabitants, as *English* subjects.⁴³ Rather therefore than simply taking the Company’s property, the Crown took control of the Company, bringing it effectively within the ambit of the British state. The 1773 *Regulating Act* and Pitt’s *India Act* of 1784 were designed to give Britain greater control over the management of the Company by first supervising, and then taking control of, the Company.⁴⁴ These measures were accompanied by an ‘overhaul’ of the judicial system, creating in effect a dual system: Crown courts and company courts. In 1774 a Supreme Court with civil and criminal jurisdiction was created.⁴⁵ It had jurisdiction over all company servants, subjects and residents, both British and native, within the Presidency of Calcutta, as well as British subjects within the adjacent districts of Bihar and Orissa. This was, therefore, no territorial jurisdiction, as

⁴⁰ See Guy Scholefield *Captain William Hobson. First Governor of New Zealand* (London: Oxford University Press, 1934), ch 5.

⁴¹ Foster *English Factories in India (1618-1621)* (Oxford: Clarendon Press, 1906-1927), vol 8, 38.

⁴² MP Jain *Outlines of Indian Legal and Constitutional History* (6ed, LexisNexis Butterworths Wadhwa, Dehli, 2009) at 9-10. The scholarly literature on the East India Company, if not their jurisdictional arrangements, is voluminous. See in particular PJ Marshall *Bengal, The British Beachhead: East India 1740-1828* (Cambridge: Cambridge University Press, 1987); CA Bayly *Indian Society and the Making of the British Empire* (Cambridge: Cambridge University Press, 1988).

⁴³ His Majesty's Advocate, Attorney, and Solicitor Generals Report, August 16, 1757, GBPP 1757-1773 XXVI, 7 (emphasis in the original). The Pratt-Yorke opinion was later used in arguments as to whether settlers could purchase land directly from Indigenous peoples in North America, and was referred to by Marshall CJ in *Johnson v M'Intosh* (1823). On the use of the opinion in North America generally see Stuart Banner *How the Indians Lost their Land: Law and Power on the Frontier* (Cambridge, Mass: Harvard University Press, 2005).

⁴⁴ *The Regulating Act* (1773) 13 Geo III c 63; *The East India Company Act* (1784) 24 Geo. III c 25.

⁴⁵ *Charter of Justice* March 26, 1774. This can be found in John Shaw *Charters Relating to the East India Company from 1600 to 1761* (Madras: Government Press, 1887).

commonly came to later characterize British colonial jurisdiction after the mid-nineteenth century, but one based on status. For example in *Mandeville v de Costa* (1802) the court held that a foreigner resident within a presidency could not be considered a British subject so as to bring him within the Court's jurisdiction. As the court noted, the position of foreigners had not been fully considered in drafting the Charters. Rather, the Charters had been to place the towns and places of the factories and places allied with them under the protection of British justice.⁴⁶ Underpinning the Calcutta model, therefore, was the purchase of land from the local sovereigns to the company (and Britain), with the establishment of British courts exercising jurisdiction based primarily on status.

The extent to which Hobson drew on the Calcutta model is particularly evident in the second iteration of his proposal. Hobson's second version was both grander and more detailed than his first proposal. He was also more insistent as to the need for some intervention, writing to Glenelg: "I am more than ever impressed with the absolute necessity of Her Majesty's Government adopting speedily some measure of protection, both for the Aborigines and for the British Subjects resorting to that Country".⁴⁷ The mechanism of that protection was to be British law.⁴⁸ Hobson's proposal remained one based on a factory model (it was the only measure "short of the actual assumption of sovereignty" that would afford protection), but suggested a larger area, the limits of which could be extended as circumstances required.⁴⁹ This time, however, Hobson recommended the extension of criminal law, at least as regards British subjects, throughout New Zealand. Hobson suggested that this could be affected by an Act of Parliament.⁵⁰ Whether or not Hobson recognised that in order to do this an agreement would have to be entered into with the local sovereigns is unclear, although his first iteration suggests that he did. According to Hobson's second iteration a superintendent was to be appointed for New Zealand, with assistants located at each factory. All of them should be appointed Magistrates. The jurisdiction of the superintendent should be universal throughout New Zealand as regards British subjects. Assistants' jurisdiction should be confined to the factories and the districts adjacent (like Bihar and Orissa). Summary power to punish for minor offences could be given these magistrates. The superintendent was to assign limits to magistrates' powers but warrants would be able to be executed throughout New Zealand.⁵¹ Matters of 'life and death' could be sent to Sydney, or a Supreme Court judge could be put on circuit in New Zealand. Or, alternately, a court of quarter sessions composed of the superintendent of the factory as chairman and a couple of Magistrates could be held from time to time in each factory. They could be authorized to banish or transport criminals for a fixed period.⁵² Protection of settlers would be

⁴⁶ *Mandeville v de Costa* (1802) 1 *Strange* 140 (Plea side), at p 141. It also took little to become a resident: see *Moodeliar v Sashacellar Moodeliar* (1803) 1 *Strange* 146 (Plea side) ((a residency of a few months in Madras for health reasons sufficed to become a resident), although a few weeks in the Presidency on public business did not: *Boojung Row v Chittoo Row* (1806) 1 *Strange* 181 (Plea side).

⁴⁷ Hobson to Glenelg, 21 January 1839, TNA, CO 209/4, fol 87.

⁴⁸ Fol 92.

⁴⁹ Fol 88.

⁵⁰ Fol 89.

⁵¹ Fol 90.

⁵² Fol 89.

enhanced by requiring them to enroll in the militia.⁵³ While such a proposal would have enhanced capacity to regulate the behaviour of subjects within the factory, it would have relied to some extent on Māori to apprehend wrong-doers outside immediate settlements. It also left untouched the immediate problem that crimes (other than minor offences) could only be tried in Sydney, requiring the accused and witnesses to travel to Sydney.

By December Hobson was again revisiting his proposal. Just as he had been aware in January 1839 that his initial proposal had been overtaken by waves of immigration, necessitating the extension of criminal law throughout New Zealand,⁵⁴ in December he further reiterated that the lawless settlers – many of the “most depraved character” and the increase in immigration which was inevitable as a result of the New Zealand Company necessitated intervention to avert the evils which would otherwise befall both Aborigines and settlers unless there were sufficient laws and institutions.⁵⁵ This was, of course, exactly the jurisdictional problem of the Calcutta factory model which had become apparent in *Mandeville v de Costa*. While Hobson’s second iteration had still been a proposal based on factories, he had foreshadowed that the full assumption of sovereignty may soon be necessary. It would be impossible, he wrote, to protect the settlers and natives from foreigners outside the factories without this additional step.⁵⁶ The criminal law should apply to all. Thus, by December Hobson had moved to this final position, that sovereignty should be acquired. The British Government should “extend to that highly gifted land the blessings of civilization and liberty and the protection of English laws; by assuming the sovereignty of the whole country and transplanting to it the nucleus of a moral and industrious population”.⁵⁷ Nothing less would be sufficient to secure law and order.

III. Modifying Criminal Law: Hobson’s Draft Proposal

On the assertion of sovereignty the stage was set for the formal extension of criminal law across New Zealand. While Hobson was unsure how to proceed in the particular matter of Kihī, his concerns were broader. Despite his limited experience in New Zealand he had come quickly to the conclusion that English criminal law – and its penalties – could not be imposed on Māori without significant modification. He pointed particularly to the crime of robbery. According to Hobson, Māori were insufficiently civilized to partake fully in English law. They frequently did not understand English, and were ignorant of English laws generally. Thus, on 7 May 1840 Hobson wrote again to Gipps, this time enclosing his proposal for the modification of criminal law, and asking that it be submitted to the Law Officers and then placed before the New South Wales Legislative Council.⁵⁸

Hobson did not receive a response concerning his draft proposal until November of the same year. None of the merits of the scheme were addressed in the short reply.

⁵³ Fol 90.

⁵⁴ Fol 92.

⁵⁵ Hobson to Gipps, 24 December 1839, ANZ, ACHK 16591, G36/1, 2.

⁵⁶ Hobson to Glenelg, 21 January 1839, TNA, CO 209/4, fol 93.

⁵⁷ Hobson to Gipps, 24 December 1839, ANZ, ACHK 16591, G36/1, 1. These words are identical to those used in the final paragraph of his second iteration.

⁵⁸ Enclosure, Hobson to Gipps, 7 May 1840, Colonial Secretary Inwards Letters New Zealand 1840, State Records New South Wales SRNSW, NRS 905 [4/2540], unpaginated.

Rather, Gipps passed on that the New South Wales Solicitor-General, Plunkett, thought it “so difficult” a subject that it could not be sufficiently “matured” to be brought to the Legislative Council before the “land question be ...disposed of”. Such an “unusual” bill would need to be sent to the home government, and would need to be determined “by reference to the habits and feelings of the natives and the general circumstances of New Zealand which are not well understood”.⁵⁹ The proposed bill was never heard of again and slipped out of sight, buried in the New South Wales archives. In a number of respects, however, it presaged later ‘exceptional’ legislation. More importantly, perhaps, it provides a snapshot of how one colonial official saw the relationship between Crown and Māori at a period when sovereignty was only just being asserted and was still some time from consolidation.

Hobson proposed a system of native courts. Just as his factory proposals had originated in his experiences in India, so did his proposal for native courts. Given the problems he outlined with imposing English law unmodified, he suggested that the majority of crimes should not be tried by the Supreme Court, but by native courts. This proposal had three strands. First, in all *inter se* cases (ie cases between Māori) not amounting to a felony, or those touching on property, matters would be heard before the Protectors of Aborigines in their respective districts. The jurisdiction of the Protectors as regards the aborigines should be summary (ie with no jury) and without appeal. Neither counsel nor solicitors were to be allowed to appear.

In 1837 one of the recommendations of the British House of Commons Select Committee on Aborigines had been the appointment of Protectors of Aborigines for the Australian Colonies.⁶⁰ A Protector of Aborigines had been almost immediately suggested for New South Wales,⁶¹ and Robinson was appointed the first Protector in the Port Phillip region in 1839. Once the decision had been made to acquire sovereignty over New Zealand, one of the British Government’s first actions was to appoint George Clarke Chief Protector for New Zealand.⁶² The Select Committee envisaged that, with respect to the criminal law, protectors should “promote the prosecution of crimes committed against their [Aborigines’] persons or property”. Where the crime was committed by an Aborigine they were to “undertake and superintend their defence”.⁶³ They were also to be appointed Magistrates. Unsurprisingly, Russell’s instructions to Hobson with regard to the role of the Protectors was substantially modeled on the Select Committee’s recommendations. Writing to Hobson late in 1840, Russell stated that the Protectors should watch over execution of laws with regard to Māori and that laws should be framed to give the protectors every ability to do so. What was needed was “a Magisterial authority, more

⁵⁹ Gipps to Hobson, 22 December 1840, SRNSW, NRS 4530 [4/1651] p 37-8. At this time, Plunkett was overworked, so much so that some feared for his health, and the letter was written shortly before he took a leave of absence: see Tony Earls *Plunkett’s Legacy: An Irishman’s Contribution to the Rule of Law in New South Wales* (Melbourne: Australian Scholarly Publishing, 2009) 115-117.

⁶⁰ *Report from the Select Committee on Aborigines (British Settlements); with the minutes of evidence, appendix and index*, GBPP 1837 VII (425), 83-84.

⁶¹ Glenelg to Gipps, 31 Jan 1838, GBPP 1839 XXXIV (526), 4.

⁶² On the Protectorate in New Zealand generally see Alan Lester, Fae Dussart, *Colonization and the Origins of Humanitarian Governance: Protecting Aborigines Across the Nineteenth-Century Empire*, (Cambridge: Cambridge University Press, 2014), ch 5.

⁶³ *Select Committee on Aborigines*, 84.

prompt than that of our Justices of the Peace, and less fettered with technical forms and strict legal responsibilities...”.⁶⁴ This special magisterial authority did not eventuate, although Clarke and some of the regional sub-protectors were appointed magistrates.

Second, all cases of felony, except murder and matters of property, were to be reserved for the “proper” criminal courts, but were to be heard summarily by two magistrates, aided by protectors. The penalties of transportation and long periods of imprisonment were to be abolished. A scale of fines and/or short periods of imprisonment, according in so far as possible with the customs and traditions of the Māori, were to be substituted at the discretion of the protectors and magistrates. A simple declaration was to replace the oath. Finally, matters between Europeans and the Māori should be directed to the regular courts (Supreme Court or Court of Claims respectively) but modeling proceedings and formalities on the proceedings taken under the native courts as far as regards the aborigines.⁶⁵ In this case, the Protectors should act as counsel for Māori.

Hobson’s proposals were, as he admitted, based on the parallel system of courts which he had observed in Calcutta. There were, of course, significant differences between India and New Zealand. To what extent Hobson really appreciated these is unclear. Nevertheless, his proposal, at least at first blush, echoes the broad outlines of jurisdiction in the Calcutta Presidency and the surrounding Mofussil. There were, however, also significant differences. As noted above, the English Courts in the Presidencies dispensed justice according to English law, asserting jurisdiction over British subjects and residents, while in the Mofussil Company criminal courts applied a modified Islamic criminal law to indigenous inhabitants, leaving foreigners largely outside British control. In 1790 Cornwallis moved to strengthen British control and oversight of local criminal courts. He did not seek as such to overturn Bengal-Islamic criminal law, but the substantive law and procedure was overlaid and modified by company regulations in an attempt to increase the superintendence of Company in Calcutta and to bring that law closer to expectations of British justice (for example the removal of what were considered ‘inhuman’ punishments, such as maiming or the outlawing of *sati*). Local courts were subordinated to Company control. The criminal courts, the *Nizamat Adalat*, were staffed by British magistrates, who determined cases with the help of *Mufti* and *Qazis* who were trained to interpret and administer *sharia* law. ‘Mohammedan’ criminal law was still applied as the Company say criminal justice outside the Presidency as not within their proper sphere of responsibility. By the time of Hobson’s arrival in Calcutta British subjects in the Mofussil had been placed under the jurisdiction of superior civil and criminal courts, staffed by British. After 1832 in Bengal those not professing the Mohammedan faith could claim exemption from the provisions of the Mohammedan code for offences cognizable

⁶⁴ Russell to Hobson, 9 December 1840, GBPP 1841 XVII (311), 28.

⁶⁵ In this period the Court of Claims referred to the Godfrey/Richmond Commission, which investigated the circumstances in which land was acquired by British subjects from Māori prior to the Treaty of Waitangi. See *New Zealand Land Claims Act* 4 Vict. No. 7 (1840) (NSW), replaced by *Land Claims Ordinance* 4 Vic. No. 2 (1841) (NZ).

under general company regulations. Where that law applied the courts remained assisted in their interpretation of the law interpreted by experts.⁶⁶

Although Hobson's draft disappeared, over the course of the 1840s many of these suggested changes came to pass, although there is no evidence that any of Hobson's successors were aware of his proposal. Hobson's proposal is an interesting example of the kinds of 'exceptional' laws that characterized assimilationist thought in the period. Influenced by the 'London Humanitarians', in particular the Buxton Committee and the Aborigines' Protection Society, various proposals were made, not just for New Zealand, for procedural modification of the criminal (and later civil) law.⁶⁷ Hobson's proposal, therefore, sits firmly within a line of proposals for exceptional laws, both for New Zealand and more broadly.⁶⁸ As Damen Ward has pointed out, 'assimilationist' thought in Empire at this time took a number of different forms, or had several 'strands'.⁶⁹ Some favoured exceptionalism. An exceptional law was one which "set provisos and exemptions from English criminal law, particularly in terms of procedure and penalties such as hanging."⁷⁰ Further modifications might include the use of native courts, 'native assessors' or mixed juries. Changes to the rules on sworn testimony might also be considered 'exceptional' laws. Modification of English law was considered necessary because Māori had not yet internalized those norms on which civilized legal codes depended. Further, their lack of understanding of British law put them at too great a disadvantage vis-à-vis the settlers.⁷¹ Nevertheless, such schemes were predicated on the basis that they were transitional, eventually indigenous groups would be accustomed to English law, and attain a level of civilisation which rendered such measures unnecessary.

⁶⁶ For works BB Misra *The Judicial Administration of the East India Company in Bengal 1765-1782*, (Dehli: Motilal Banarsiddas, 1961); Chittaranjan Sinha *The Indian Civil Judiciary in the Making 1800-1833* (New Dehli: Munshiram Manoharlal, 1971); William Morley *The Administration of Justice in British India* (London: Williams and Norgate, 1858); Jain, *Outlines*; Philip J Stern, *The Company State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011).

⁶⁷ On the London Humanitarians, the work of the Buxton Committee and the Aborigines' Protection Society see, for example, Lester & Dussart, *Colonisation*; Charles Swisland *The Aborigines Protection Society, 1837-1909, Slavery and Abolition: A Journal of Slave and Post-Slave Studies* 21 (2000): 265-280; Tony Ballantyne "Humanitarian Narratives: Knowledge and the Politics of Mission and Empire" *Social Sciences and Missions*, 24 (2011) 233-264; Alan Lester "Thomas Foxwell Buxton and the Networks of British Humanitarianism" in *Burden or Benefit: Imperial Benevolence and Its Legacies*, Helen Gilbert, Chris Tiffin (eds) (Bloomington: Indian University Press, 2008), 31-48

⁶⁸ A discussion of all of these is clearly beyond the scope of this article. Examples might include Robert Torrens *Plan for Establishing an Independent Native Government under British Protection*, 1838, TNA, CO209/3, fol 297; Stanley Motte's *Outline of a System of Legislation for Securing Protection for the Aboriginal Inhabitants of all Countries Colonised by Great Britain*, London, 1840, found at TNA, CO209/8, fol 426; proposals by the Rev Hawtrey, "Exceptional Laws", published as Appendix A in George Wakefield *The British Colonization of New Zealand* (London: JW Parker, 1837); George Clarke (Chief Protector) also suggested native courts (addressed briefly below fn 82). Some of these are discussed briefly in Ward "Means and Measure" and Ward *Show of Justice*.

⁶⁹ See Ward "Means and Measure".

⁷⁰ Ward "Means and Measure", 9.

⁷¹ Ward "Means and Measure", 8.

For present purposes, however, it should be noted that while Hobson's proposal disappeared from sight, many of Hobson's concerns were addressed by legislation in the following years. In 1844 Hobson's successor, FitzRoy, enacted the *Native Exemption Ordinance*. This ordinance was designed to modify certain aspects of criminal law with respect to Māori. Much less far reaching than Hobson's proposals, it nevertheless made a number of the same modifications suggested in 1840. First, specific procedural provisions were enacted for the committal of Maori in criminal cases. In the case of *inter se* cases, a warrant for arrest could not be made until an information was laid by two Chiefs of the tribe. Only the chiefs could execute the warrant. In cases involving a Māori offender and Europeans, and taking place beyond the town limits, warrants were similarly to be directed to the Chiefs.⁷² These provisions were, however, not entirely about recognizing that Māori should not be subject to criminal law unmodified, as a recognition that the British had little practical ability to actually enforce criminal law. While the criminal law might extend across the entirety of the new colony in a formal sense, beyond the limits of the major towns the government was virtually powerless and English law held little or no sway. Notably, s 2 of the Ordinance specifically provided that where Māori were accused of committing a crime against a settler "the law may be enforced against the offender with the least possible risk of interrupting the peace of the community". In March 1843, for example, the Crown issued a warrant for arrest for murder against Ratea, alias Kai Karero. He was indicted for the murder of Parata Wanga. Yet he remained at large until 1849.⁷³ While in his *Adventure in New Zealand*, Edward Jerningham Wakefield alleged that 'no very strenuous efforts were made by the authorities to execute the warrants issued against him [Ratea], or even to discover the place of his retreat', the authorities in fact had no real way of safely bringing him to justice.⁷⁴

Second, FitzRoy's Ordinance also dealt with the Hobson's problem of having to imprison Kihī prior to trial. Rather than left in gaol, as had been Kihī, a 'deposit' to guarantee appearance was set, other than in rape or murder.⁷⁵ The Ordinance itself proclaimed that this provision was enacted because "our mode of enforcing [the criminal law is] ... in some cases repugnant to the natural habits of the said population". This provision only seems to have formalized the courts' practice at the time. In some cases, courts had in any case been granting Māori bail.⁷⁶ In practice this often seemed to be £20 and the practice was the source of considerable unhappiness amongst settlers who alleged that Māori simply saw this as a £20 fine.⁷⁷

⁷² *Native Exemption Ordinance* (1844) 7 Vict. No. 18 (NZ), s 1, 2.

⁷³ See *New Zealand Colonist and Port Nicholson Advertiser*, 20 March 1843, 2. *The Queen v Native*, Chapman 'Notebook', entry for Mon. 3 Sept. 1849, 205–219; reported in the *New Zealand Spectator and Cook's Strait Guardian*, 5 Sept. 1849, 2–3; and in substantially identical terms in the *Wellington Independent*, 12 Sept. 1849, 3; 5 Sept. 1849, 2.

⁷⁴ Edward Jerningham Wakefield, *Adventure in New Zealand* (London: J Murrar, 1845), 332.

⁷⁵ *Native Exemption Ordinance*, s 6. For the Attorney General on the mechanics of serving a warrant under this section see Swainson opinion on serving warrants past the town limits: ANZ, ACGO 8333, IA 1/49, 46/670. See also the *Fines for Assaults Ordinance* 8 Vict. No. 7 (1845) (NZ).

⁷⁶ *R v Te Mania*, 8 January 1844, Police Court, Auckland, reported in *Auckland Chronicle* 10 January 1844, p 2.

⁷⁷ *New Zealand Gazette and Cook's Strait Guardian* 26 July 1845, 2.

Third, FitzRoy's Ordinance replaced imprisonment for theft (the most common crime by Māori) with the important practice of allowing for penalties that more approximated the traditional approach of utu (reciprocity).⁷⁸ It had been clear to Governor FitzRoy that the practice of imposing terms of imprisonment for stealing offences was highly unpopular with Maori, a position that was also strongly advocated by George Clarke, the Chief Protector of Aborigines.⁷⁹ A number of incidents, including the Wairau affair, as well as the snatching of Te Mania from the court room when sentenced to three months imprisonment for stealing, convinced FitzRoy that some amendments were needed to English law, a matter that had been clear to Hobson from the beginning.⁸⁰ Under the ordinance this fine was four times the value of the goods. FitzRoy's rationale was said to be that:

“The Natives [do] not regard imprisonment as we [do], deprivation of personal liberty often ended in the death of the savage; and regarding them in a transitional state, he [FitzRoy] thought imprisonment would tend to retard their improvement.”⁸¹

Thus, for example, convicted of stealing a “piece of print” (meaning cloth), E Hipu was ordered to pay a fine of £8, rather than the usual punishment for theft of imprisonment with hard labour. The cloth had been valued at £2.⁸² Such measures were, however, unpopular with the settlers, who thought FitzRoy generally too lenient towards Māori. The *Native Exemption Ordinance* was one of the measures which led to agitation for FitzRoy's removal. Yet in 1846, the new Governor, Grey, repealed the Act and enacted substantially similar legislation, this time to the general acclaim of the settlers.

The *Resident Magistrates' Ordinance* was a broader Act than FitzRoy's *Native Exemption Ordinance*, creating a Resident Magistrates Court as the lowest level in the court hierarchy, with jurisdiction over both Māori and Pākehā in respect of minor civil and criminal matters.⁸³ It did, however, contain procedural modifications applicable to the issuing of warrants for the apprehension of Māori outside the town limits. The Ordinance also adopted and continued FitzRoy's approach of determining criminal matters in a summary way and of specific penalties for particular crimes.⁸⁴

All three draft and actual Ordinances demonstrate different approaches to exceptional laws. And all three are generally assimilatory in nature to some extent, although they

⁷⁸ *Native Exemption Ordinance*, s. 9.

⁷⁹ *Report from the Select Committee on New Zealand; with the minutes of evidence*, GBPP 1844 XIII (556), 348.

⁸⁰ *R v Te Mania*, 20 February 1844, Whitaker J, County Court, Auckland, reported in *Auckland Chronicle*, 22 February 1844, 4.

⁸¹ Legislative Council Minutes, Tuesday 9 July, printed in the *Daily Southern Cross*, 13 July 1844, 3.

⁸² *R. v E Hipu*, 1 Dec. 1845, Supreme Court, Wellington, Chapman J, notebook entitled ‘Criminal trials No. 1’, 1844–45, HL MS-0411/009, 101–107.

⁸³ On civil matters see Shaunnagh Dorsett “How do Things Get Started? Legal Transplants and Domestication: An Example from Colonial New Zealand”, forthcoming *New Zealand Journal of Public and International Law* 12 (2014).

⁸⁴ *Resident Magistrates Court Ordinance* 10 Vict. No. 16 (1846) (NZ), Part III.

differed as to their stance on assimilation.⁸⁵ Notably, however, all three rejected any recognition of *tikanga*. Regardless of their actual capacity to enforce English law beyond the townships, all three programs for modification insisted that Māori be subject to English criminal law where possible, albeit with the significant procedural modifications outline above. Hobson's proposed 'native courts' were only 'native courts' in the sense of a specific jurisdiction over Māori. As can be seen from Hobson's proposal, they were not staffed by Māori, not even as assessors. Nor was custom to be given any credence. The local laws, even modified, were not, unlike in Calcutta, to be applied. Of course in this period the Company courts in the *mofussil* still operated under the sovereignty of the Mughul. However, the formal assumption of sovereignty over all of New Zealand did not automatically mean that English criminal law applied in all circumstances. Hobson was told not to tolerate custom which contravened the "universal laws of humanity". The usual examples were cannibalism, human sacrifice and infanticide. In fact, the Colonial Office assumed that *tikanga* remained the relevant law applicable to Māori in most circumstances and they continued to do so for much of the 1840s, although the exact circumstances in which English law applied to Māori remained unclear.⁸⁶

For all three Governors, inducing Māori to accept English law was an essential step in the process of civilizing Māori and fitting them to take part in governance. Exceptional laws might create legal order in two ways: most obviously through the direct imposition of those laws on Māori; but also through the gradual process of civilization and assimilation. Hobson's views of the benefit of English law have been noted above. As early as the first iteration of his proposal Hobson had noted that he had not seen a group with greater capacity for improvement. For Grey, in 1846, his Resident Magistrates' Courts were the main vehicle through which he intended to 'induce' Māori to take up British law and to 'train' them for eventual participation in the broader legal system.⁸⁷

Despite its genesis in the Calcutta model, it was not Hobson's proposal which was the more closely modeled on that jurisdiction, but that of George Clarke, the Chief Protector. Shortland, the Acting Governor of the time, found the proposal sufficiently interesting to request further particulars. Whether Hobson ever spoke to the Chief Protector, George Clarke, of his proposal for native courts will likely never be known. However, Clarke's proposal went significantly beyond those of Hobson. Clarke was of the opinion that British law was simply inapplicable to the circumstances of Māori, contrary to the Treaty of Waitangi and, in any case, its application caused great hardship.⁸⁸ After some years of mediating disputes, Clarke himself became convinced of the need for a system of native courts which would hear both disputes *inter se* and disputes between Māori and Pākehā according to "native usage".⁸⁹ Where matters

⁸⁵ It is not possible here to carefully trace the different strands of assimilatory thought. See however Ward, "Means and Measure".

⁸⁶ For a consideration of this see Dorsett "Sworn on the Dirt of Graves".

⁸⁷ Governor Grey to Gladstone (Secretary of State for War and the Colonies), 14 November 1846, ANZ, G 25/2, p 263. On this institution see Dorsett "How do Things Get Started?".

⁸⁸ Clarke reiterated this proposal more than once. For one version see Clarke to Shortland (Acting Governor of New Zealand), 31 July 1843, enclosure in Shortland to Stanley, GBPP (556), 346.

⁸⁹ Clarke to Shortland, 31 July 1843, GBPP (556) 348.

were *inter se* the courts would be presided over by Protectors, aided by local chiefs.⁹⁰ Where Pākehā were also involved the protectors would be aided by Magistrates. Mixed juries could be empanelled. Other than those customs “repugnant to humanity”, Māori customs should be legalized and compiled. This model then was much closer to the Calcutta model from which Hobson derived his initial inspiration: local courts, applying local law, in which magistrates were aided by specialized assessors. Clarke’s goal, however, was not assimilatory. Nor did it rest on an assumption that Māori could be civilized and ‘improved’ through participation in the British legal system. Rather, it was underpinned by a desire to recognize and foster traditional Māori authority. For those reasons alone it was destined not to be implemented.

IV. Concluding Comments

As noted at the outset, Hobson’s factory proposal and his subsequent draft act for the modification of criminal law were made at what was an important period of transition in the conceptualization of sovereignty. In the first half of the nineteenth century sovereignty had not yet taken on its tight connection to territory and status was still a common, if not the most common, mode of asserting jurisdiction. For the Colonial Office, the acquisition of sovereignty over New Zealand was most immediately a means of enforcing legal order over the expanding population of British subjects. It was not intended to end plurality. Nevertheless, the first three Governors turned to the common law, and particularly the criminal law, for a mechanism to govern Māori, albeit with significant procedural modification. This marked the most significant difference between Hobson’s model and that of its progenitor; one the creature of the earlier plurality of the Empire, the other of a later time period in which that plurality was slowly and unevenly beginning to give way to the new conceptions of sovereignty which were emerging, particularly in the settler colonies. In 1840 this process of recasting authority in the Empire still had some way to go. Hobson’s Draft Act may be one small moment in this transition, but it is a moment which is illustrative of the broader legal changes which were sweeping the Empire generally, and which became characteristic of settler colonies in particular.

What then of Kihī? Hobson did not receive a reply with respect to Kihī until some seven months later in December 1840, and when it arrived it was of little help. Plunkett, the Attorney General, simply noted that no depositions had been forwarded to him, and therefore he could not form any opinion on the case. He thought perhaps that as the depositions had not been forwarded Kihī had not been indicted. In any case, Plunkett regretted the delay and trusted no inconvenience had occurred.⁹¹ While Hobson had suffered little ‘inconvenience’, not so Kihī. Throughout the time Hobson awaited the answer Kihī remained in goal, shackled in leg irons. His general condition deteriorated in September and October. But presumably he could not be let out. Any bail application would need to be heard by the Supreme Court in Sydney and he was,

⁹⁰ Shortland to Stanley (Secretary of State for War and the Colonies), 30 October 1843, GBPP (556), 340. This is not far from the actually introduced for civil matters by Grey in 1846. See Dorsett “How to Things Get Started?”.

⁹¹ Gipps to Hobson, SRNSW, NRS 4530 [4/1651], 38.

after all, a symbol of the superiority of British legal order. Kihi died in gaol of dysentery before Plunkett's response arrived.⁹²

⁹² Return of the names of the prisoners now in the gaol at Russell, 9 Oct 1840, ANZ, IA1/4, 40/551; AS Thomson *The Story of New Zealand* (London: Spottiswoode, 1859), vol 2, 25.