

Spectre of Jurisdiction: Supreme Court of New South Wales and the British Subject in Aotearoa/New Zealand 1823-1841

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The construction of New Zealand as a colonial nation was not a conscious act or a single design but the result of cumulative actions (Moon 2006: 22). It started long before and continued well after the signing of the Treaty of Waitangi, and subsequent proclamations of sovereignty.¹ As Douzinas states:

a space, terrain or collection of people becomes community when this space gathers itself in common. By gathering in common, the terrain becomes a territory, the collection, collectivity or community, the space of relationships, society. A community comes forth as polis, empire or state by circumscribing itself in its interiority and demarking its proper [essential characteristics] from an outside (2007: 22).

This paper focuses on the period prior to the Treaty of Waitangi when the Supreme Court of New South Wales had jurisdiction over British subjects living in the 'Islands of New Zealand'.² It is acknowledged that there were many factors driving the colonial endeavour in New Zealand. However it was in this period that the raw materials of the colonial state were formed: namely, a people who became an imagined community, with an emerging sense of society or culture, occupying a bounded and mapped territory. One, perhaps unlikely, catalyst for this process was the unstable, partial and largely ineffectual jurisdiction of the New South Wales Supreme Court.

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Traditionally, the jurisdiction of the courts, and especially the criminal jurisdiction, is thought of as tied to place and it exercises its power on those people who are 'in place' and therefore fall within the physical jurisdiction.³ Mobile peoples, if they fell under the power of the courts, were dealt with as they passed through a jurisdiction; when they were in place/in country they were covered by the criminal jurisdiction (McSherry and Naylor 2004: 24-8). In this way the bounded territory gives form to legal space where a particular set of laws can apply. As mobile peoples move outside this bounded territory their prospective actions are no longer subject to the laws of the jurisdiction (Seuffert 2003: 187-8). For example, the jurisdiction of the courts of England was constrained by geographical boundaries. If a person entered England and committed a crime, English law applied and the English criminal court had jurisdiction. The spatial and temporal limits of jurisdiction not only demarcate a legal empire, they also embody a form of demarcation or naming of who and what can occupy its space (Drakopoulou 2007: 33).

For a period in the first half of the 19th century, prior to the signing of the Treaty of Waitangi, the jurisdiction of the Supreme Court of New South Wales was extended to include British subjects present in Aotearoa/New Zealand,⁴ without asserting physical jurisdiction over 'place.' In the official yearbook of the Commonwealth of Australia there is a short entry for 1814 for New South Wales that reads:

Australia, previously known as 'New Holland' received present name on recommendations of Flinders. Creation of Civil Courts. New Zealand proclaimed a dependency of New South Wales (Knibbs 1913).

This act of assertion was achieved by public proclamation by Macquarie, the Governor of New South Wales, when he declared that New Zealand would be a dependency of New South Wales. The assertion was probably questionable at law and was later refuted.⁵ Despite this unstable foundation and the fact that this status had little immediate effect, it did allow Macquarie to appoint a magistrate to New Zealand from time to time to deal with law and order. The first was Thomas Kendall who was appointed Justice of the Peace on 12

November 1814 in order to keep the King's peace and help preserve 'the quiet rule and government of His Majesty's people within and without the British Settlements at New Zealand' (Barton 1927: 30). Kendall found himself among a small mobile European population that had not previously submitted to any authority in New Zealand, other than that of Maori from time to time. In addition, his jurisdictional power was unclear and he operated without a court or means of enforcement; his impact on the non-Maori population was minimal (McNab 1914: 206).

In addition to the appointment of Kendall, the Governor of New South Wales had sanctioned the Reverend Samuel Marsden to set up a mission station at the Bay of Islands. Despite New Zealand having been declared a dependency of New South Wales in 1814, and these rudimentary assertions of power, New South Wales could not effectively assert jurisdiction over the British subjects in New Zealand let alone all the peoples of Aotearoa/New Zealand. During this time the non-Maori population numbered no more than 2000 and consisted of a motley bunch of sealers, whalers, missionaries and traders, most of whom were mobile people who stayed for periods of time for economic gain. The Maori population, on the other hand, was probably at least 100,000 and outnumbered non-Maoris by something like 50:1 (Pool 1991: 42-58). As well as outnumbering non-Maoris, Maori operated under established stable political structures and commanded superior economic and military power (Elder 1932: 119). Although many Europeans were dependent on Maori for protection and survival,⁶ contact between them was not always amiable and early missionaries, for example, described their interaction as being by 'marked with great cruelty and injustice on the one part, great treachery and dishonesty on the other, and a revolting bloodthirstiness and strong spirit of revenge on both sides'.⁷

The realisation that unfettered jurisdiction could not be asserted was reflected in the 1814 proclamations by Governor Macquarie, which prohibited the removal of any Maori from New Zealand without express permission of the chief of the territory in which they resided. Perhaps more telling of this unease over jurisdiction was the

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additional requirement of declaring it unlawful for any person to disembark in New Zealand without permission of the chiefs, therefore acknowledging the limits of jurisdictional power (*Sydney Gazette* 12 November 1814: 1). A further requirement was that any permissions granted needed to be confirmed in writing by the resident magistrate.⁸

Governor Macquarie's proclamation of New Zealand's status as a dependency may have had only limited effect in asserting jurisdiction to deal with what was increasingly being seen as a lawless non-Maori population (*Sydney Monitor* 20 November 1837: 4; *Sydney Gazette* 28 November 1837: 2). However the proclamation did set the foundation for the creation of a legal space and, as Seuffert points out, the assertion of jurisdiction facilitated a process of colonisation by creating a space (or place) in which colonial law could operate (Seuffert 2007: 102). That space was created by an Act of the British Parliament on 19 July 1823, the *New South Wales Judicature Act* 1823. The Act did not confirm the contested dependency status of New Zealand but rather made specific provision to extend the jurisdictional power of the newly formed New South Wales Supreme Court over New Zealand:

And be it further enacted that the said supreme courts in New South Wales and Van Diemen's Land respectively shall and may inquire of hear and determine all treasons piracies felonies robberies murders conspiracies and other offences of what nature or kind so ever committed or that shall be committed upon the sea or in any haven river creek or place where the admiral or admirals have power authority or jurisdiction or committed or that shall be committed in the islands of New Zealand (*New South Wales Judicature Act* 1823 UK).⁹

This Act extended a primarily criminal jurisdiction of the Supreme Court of New South Wales over the British subjects in Aotearoa/New Zealand. At this time the Supreme Court of New South Wales and Van Diemen's Land was one court located in Sydney with one sitting judge.¹⁰ This meant that any trial would require the accused, witnesses and any evidence to be physically transported to Sydney with the costs incurred borne either by the parties or by the New South Wales colony. At times the court accepted these immense costs for 'they could not look upon

the expense in a case where it was so necessary'.¹¹ However, the colony was not always comfortable with the extraordinary costs involved in these cases and made its discomfort known (*see Lewis v Lambert*: 102). It also lacked the power to compel witnesses, or sometimes even the accused, to come to Sydney (*Sydney Herald* 3 August 1837: 2).

A further problem for the Court was that once the witnesses were in Sydney there was no way to force them to stay and, if there were procedural delays, it sometimes meant few or no witnesses were left to testify which resulted in more delays or the case being abandoned.¹² With all these problems the jurisdiction of the Supreme Court could only be partial and largely ineffectual. Yet it continued until New Zealand was proclaimed a colony separate from New South Wales.

The steps toward asserting jurisdiction in New Zealand were described as 'induced by no lust of territorial power, and thirst for conquest, but simply by a desire to protect the people from aggression, and at the same time to confer public sanction on the proceedings of the missionaries'.¹³ However this paper presents another reading of the establishment of jurisdiction of the Supreme Court of New South Wales over the mobile British subjects in New Zealand. It argues that the formation of a synthetic jurisdiction, which was a first step in the colonial endeavour, would help shape the minds of both the settler populations and the British colonial office. This would eventuate in the declaration of New Zealand as a colony separate from New South Wales and the founding of an organic jurisdiction with the establishment of the Supreme Court of New Zealand in December 1841 (NZLR 1938: 233).

Synthetic and Organic Jurisdiction

Jurisdiction creates a space for law to become manifest. This is not a mystical creation but a space where power and authority can be concentrated in order to speak in the name of the law, order the lives of those who are subject to the law and determine the treatment of those who step outside the jurisdictional order (Dorsett and McVeigh 2007: 3-4). Richard Ford provides a useful explication of understandings

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about jurisdictions by using a dialogical opposition of organic/authentic and synthetic/convenient jurisdiction (Ford 1999).

Organic jurisdictions emerge naturally out of circumstances that often combine economic and cultural foundations, appearing as an outgrowth of principles of law or natural facts. An organic jurisdiction contains a relationship between the territory and the people, where the people are seen as 'in place'. Such jurisdictions have a semblance of inevitability, a natural quality and are thought to define a cohesive entity with united and unique interests (Ford 1999: 859-60). The 19th century idea of the nation state is based in organic jurisdiction where the assumption is that a pre-political group naturally emerges as a matter of right under a sovereign jurisdiction. Whereas organic jurisdictions appear natural, synthetic jurisdictions are created for the convenience of the specific institutions they serve.

Synthetic jurisdictions do not define a pre-political group but are imposed on a group of people from outside. In this way the extension of the jurisdiction of the New South Wales Supreme Court was a synthetic jurisdiction imposed by the British Parliament upon a group of people (British subjects in Aotearoa/New Zealand) through the use of the New South Wales Supreme Court. New South Wales, a synthetic jurisdiction emerging in the British imaginary as an organic jurisdiction, was also seen as part of the larger British imperial jurisdiction and, therefore, could facilitate the imposition of British law on the British subject (Ford 1999: 865).¹⁴

In a synthetic jurisdiction the individual is the primary agent of political life and the territory, the 'Islands of New Zealand', serves strictly an instrumental purpose; in this way a British subject could be selected and authority applied. As Ford states, 'the synthetic jurisdiction is fungible. Its occupants are mobile, rootless rational profit maximisers' (1999: 861). This was clearly true of the group of sealers, whalers, traders, escaped convicts and even missionaries in Aotearoa/New Zealand during this period (Sinclair 1987: 54; Gill 1967; Lovell-Smith 2009; Cawthorn 2000: 3-9).

The case of *Lewis v Lambert* illustrates how a synthetic jurisdiction

encourages people to understand themselves as rational utility maximisers. Lewis signed on as an able seaman on the whaling ship, *Cape Packet*, bound for a 'whaling adventure in the South Seas' around the coast of Aotearoa/New Zealand (84). As was common, alcohol formed part of the whalers' remuneration and Lewis and others decided to save their 'grog' rations for Christmas Day. A drunken episode ensued where Lewis struck the Captain and, as a result, he and a number of other seamen were locked up. On their release they were denied their alcohol rations and so Lewis refused to work as he was not receiving his full remuneration. The captain of the *Cape Packet* sought redress from the British resident magistrate, James Busby, who was situated at the Bay of Islands (84). Busby, directed the captain and Lewis to the a naval ship, *Alligator*, which was in New Zealand waters for the 'protection of British Shipping and trade' and was heading back to Sydney (102).

After an initial refusal the captain of the *Alligator*, Lambert, agreed to transport Lewis back to Sydney in the brig, which took six weeks.¹⁵ On appearing in the Supreme Court, Lewis was charged with 'behaving in a violent, mutinous and disorderly manner dangerous to the peace of the crew and to the safety of the said vessel' (73). On the facts the law was clear, there was no cause of action against Lewis unless the captain of the *Cape Packet* took a civil claim himself and he was not before the court. The mutiny charge was discharged (85).¹⁶

Not satisfied with this, Lewis continued to exercise his agency as a rational profit maximiser and sought to recover his loss of earnings as well as other damages; he counter charged with a claim of trespass, assault and false imprisonment against the captain of the *Alligator*. After numerous petitions from Lewis's attorney the court gave a reluctant decision some six months after the trial (102).

The delay in giving the decision of the Court has not arisen out of any difficulty in the case, or doubt on the minds of the judges, but from reluctance to give a decision which may produce some degree of public mischief (103).

The case was problematic for the Supreme Court because it had no choice but to rule in favour of Lewis even though it could have had an

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impact on commercial and shipping interests in the colony and also Europe (94). In its distaste with Lewis,¹⁷ however, it awarded nominal damages of one farthing only which would not have covered Lewis's costs associated with the trial (*Australian* 25 September 1835: 2).

As Ford points out, these distinctions between organic and synthetic jurisdictions are not a description of an objective reality, or even fixed, but operate as a guide to our perceptions and actions, or as epistemological filters (Ford 1999: 862). Therefore a synthetic jurisdiction once established can over time be transformed into an organic jurisdiction.

Spectre of Jurisdiction

During this period Maori were viewed by the Supreme Court of New South Wales and the Colonial Office as the peoples of these islands and akin to an independent nation with its own jurisdiction.¹⁸ The Colonial Office and court judgments tended to gloss over the complex interconnectedness and differences between iwi and hapu groups, however, and described Maori as an amorphous whole (Walter et al 2006: 274-90). The Colonial Office recognised its tenuous jurisdiction in Aotearoa/New Zealand and questioned the legality of any magistrate's authority. In a dispatch to the Governor of New South Wales, Viscount Goderich, the Colonial Secretary, noted:

If the natives of New Zealand had ... any established system of Jurisprudence among them, however rude, their own Courts would claim and be entitled to the cognizance of all crimes committed within their territory.¹⁹

The court also acknowledged that its jurisdiction did not extend to Maori and characterised Maori as having their own rules and customs and even legitimate rules of warfare with which the jurisdiction of the Supreme Court could not interfere.²⁰ This set up a dual jurisdictional space; at the centre of this space was a large unknowable Maori jurisdiction which Kendall saw as ordered, settled and containing a pattern of legal rules.²¹ Maori themselves seemed to have a clear sense of these jurisdictional distinctions, bringing Europeans who had offended

their tikanga or committed a hara to the magistrate to be dealt with under British rules (Elder: 1932: 119).

The dual jurisdictions of Maori and the Supreme Court of New South Wales created uncertainty, however, and helped create a real and imagined 'jurisdictional no-man's land', 'a place where 'bad characters may [reside in]', where uncertainty may render them safe from interference (Dorsett 2007: 140). This no-man's land and the associated uncertainty created an ongoing justification for the extension of jurisdiction.

To some extent jurisdictional 'coverture'²² was chosen especially for voluntary mobile peoples because most if not all of the non-Maori population moved with ease from one jurisdictional space to another (Ford 1999: 844-5; *Sydney Herald* 3 August 1837).²³ However it would be untrue to say that jurisdictional 'coverture' was freely chosen and this was evident in Aotearoa/New Zealand. Even if the court deemed the accused a British subject, it may or may not choose to assert its jurisdiction (*Sydney Herald* 5 March 1832: 3). In this way the jurisdiction of the New South Wales Supreme Court could be seen as a haunting whose presence could be felt (and sometimes violently so), but it was hard to define or even know when the spectre of jurisdiction would arise (Hutchings 2001: 20-1). Haunting causes unease as one cannot determine the interaction and cannot see the cause of one's unease, but organised and systemic structures that are unseen and removed make their impact felt in everyday life (Gordon 1997: 19, 135).

While the Supreme Court of New South Wales was reluctant to expand its jurisdiction and would interpret the jurisdictional clause narrowly at times to exclude certain offences (*MacKay v David, R v M'Dowall*), in other cases it would expand its jurisdiction and even amend the charges to facilitate conviction (*R v Doyle, R v Hackett, Foley, Donoghue, Kanes and Sweeny*). While this variable permeability of the jurisdiction increased what Gordon referred to as unease, it also helped increase awareness of the presence of the jurisdiction of the New South Wales Supreme Court.

The spectral nature of this jurisdiction was understood by some of

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the convicted, and this was highlighted in the case of *R v Doyle*. Doyle was charged with attempted murder and aggravated robbery from the dwelling house of Mr John Wright (a British subject) in the Bay of Islands (*Australian* 4 August 1837: 2). Doyle pleaded not guilty but also attempted an argument that went to the very nature of this incomplete jurisdiction. Doyle argued that the Court's jurisdiction rightly extended only to the British subject. His defence narrative continued that because he was born in New Bedford, America, he was not a British subject. If the Court was not satisfied that he was a British subject then the spectral nature of its jurisdiction meant he must pass through (*Sydney Herald* 6 November 1837: 6). This would have effectively meant the Court could not prosecute the case as they would not have jurisdiction over an American. It appears the court ignored Doyle's extraterritorial claims of citizenship or imbued Doyle with British subject status due to his being 'late of Sydney', thereby silencing his chosen narrative even though it seems his sojourn had been only transitory. Doyle was sentenced to death (*Sydney Herald* 6 November 1837:6).

R v Doyle emphasises the spectral nature of the New South Wales Supreme Court's jurisdiction. Doyle's plausible jurisdictional arguments should have exorcised or at least tested the jurisdiction of the New South Wales Supreme Court but it ignored this challenge and applied its jurisdiction anyway.

Creating a Sense of Community

A precursor to the creation of an organic jurisdiction is the sense of community, the pre-political group that will naturally form the subjects of the organic jurisdiction. The colonial project was a challenge to these representations because the colonial settlers were transplanted from a foreign nation state with no natural convergence of people, culture and territory. This was especially true in the early part of the 19th century in Aotearoa/New Zealand where the non-Maori were mobile, both within and outside the bounded territory, and therefore not particularly tied to the place. In Aotearoa/New Zealand there was an existing people, Maori, who naturally brought together the convergence of people,

culture and territory, although they were diverse peoples, or *iwi*, who were textually united by indirect reference in the phrase 'Islands of New Zealand' in the 1823 legislation.

Non-Maori peoples in Aotearoa/New Zealand during the 1820-40s were diverse and, although the most significant groups were the Americans, French and British, they included Portuguese, Dutch, Canadian, German and Danish (Belich 2007: 137-9). Crews on many of the whaling ships were also often multicultural and multinational (including Maori) (Cawthorn 2000: 3-6). As Doyle's case suggests, however, the assertion of jurisdiction of the New South Wales Supreme Court emphasised homogenous aspects of the non-Maori community and, by ignoring the diversity within it, allowed the differences to become invisible.

The synthetic jurisdiction of the New South Wales Supreme Court could only embrace the British subject or, as Doyle demonstrates, those who were deemed to be British subjects, in effect actual or judicially imagined British subjects. In this way the jurisdiction operated to create an imagined homogenous British community that would be the focus of the media, New South Wales Supreme Court and officials of the British Colonial Office. The creation of a sense of distinctiveness and relative homogeneity supported the foundation ideology of the nation state and would eventually support the transition from synthetic to organic jurisdiction (Ford 1999: 853, 859-60).

A synthetic jurisdiction, especially when created to administer a restrictive law (in this case criminal and partial civil jurisdiction), helps create a sense of community. The sense of community is then strengthened as the law touches the lives of: the victims of an offence who are able to avail themselves of the courts; individuals desiring to regularise economic exchange with the back-up of the law: and those who are convicted. In Aotearoa/New Zealand the creation of British community was also facilitated by the reporting of cases in newspapers in which the main content was advertising, court news or official announcements.

Because there were no law reports for the Supreme Court,

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newspapers operated as the official record and Supreme Court cases were reported in *The Australian*, *The Sydney Gazette*, *The Sydney Herald* as well as other newspapers that were widely available (if not immediately) in New Zealand (Rice 1992: 130; Coupland 1892: 76-7; Pybus 1954: 63-4). Every case was reported because the Supreme Court of New South Wales alone had jurisdiction in New Zealand, even in those cases where it refused to assert its jurisdiction (*R v M'Dowall, Ex parte McKey*). This contributed to an impression that the frequency, authority and power of the jurisdiction were far greater than the reality.²⁴

The media provided a shared understanding, even between geographically isolated people, by providing a place for social interaction. Not only were the British living in New Zealand consumers of the media, they were also active contributors to it through letters.²⁵ This created an even stronger iterative and self-confirming process which helped form and strengthen the imagined community of British living in New Zealand even though they numbered less than 2000 British inhabitants living in pockets around Aotearoa/New Zealand. The New Zealand contributors to the papers were almost always British, the Supreme Court cases arising from New Zealand only focused on the British subject, and the stories and official notices focused on British interests or threats to those interests. In this way the constructions of the world sustained patterns of social interaction and excluded others, further consolidating the imagined British community (Burr 1995: 2-5).

One repeated threat described in the papers was the lawless uncivilised European who was not only a danger to the emerging British community but also to Maori.²⁶ The media helped construct the sense that both were at risk from certain criminal behaviours and lawlessness and this was seen as justifying an increase in legalisation and enforcement procedures more akin to those in Britain. This led to the appointment of James Busby as British Resident and the establishment of a police cell in Kerikeri in 1832. The appointment was justified with a view to 'protecting British commerce' and to 'repress the outrages, which unhappily British Subjects are found so often to perpetrate against the persons and property of the Natives and the

peace of Society in those Regions'.²⁷ Maori were not constructed as a threat to this emerging community but rather as fellow victims of the lawless ruffian and escaped convicts (*R v Doyle*, *R v Flanagan*, *R v Walton et al*). The reiterated stories in the media created a spectre-like other that fascinated and revolted non-Maori and gave an uneasy sense that these were reflections of oneself 'derailed and gone terribly wrong' (Hutchings 2001: 54).

The unease created by this jurisdictional haunting and spectre of the lawless European was a powerful consolidating source, and this was not lost on the officials or the Colonial Office. In December 1837, following the conviction and execution of Edward Doyle, a notice was placed in the *Colonist* to address any belief that difficulty in prosecution and conviction would 'ensure immunity':

His Excellency trust that this example will afford a salutary warning to all persons who may be disposed to commit similar acts, and by convincing them that, however remote, they are not beyond the reach of justice, will render such outrages less frequent in the future (*Colonist* 14 December 1837: 6)

In this way Doyle was used as an example of the lawless European that posed a continual threat, against which the community could bond in opposition, and justify calls for increased colonial protection.

This sense of community grew, so that by the late 1830s the mobile peoples were being joined by more permanent settlers (Owens 1981). Even though the assertion of jurisdiction in many ways was a concentrating of a colonial driving force from England through the jurisdiction of the New South Wales colony,²⁸ the reporting of the cases in the various New South Wales newspapers strengthened the spectre of jurisdiction. The continual reporting of the cases created the semblance of corporal substance to the jurisdiction of the New South Wales Supreme Court for both the colonists in New South Wales, and the mobile non-Maori in Aotearoa/New Zealand. This cross-territorial sense of imagined community was further strengthened by the regular ships travelling between Sydney and Aotearoa/New Zealand, transporting news and people.²⁹

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The concept of a British community in Aotearoa/New Zealand was not confined to non-Maori. In October 1831 a gathering of 13 regional chiefs and their missionary advisors was held in Kerikeri, with the purpose of composing a letter to the King of England. William Yeats of the Committee of Missionaries sent the original letter and his translation and gloss to England which appeared to ask the Imperial Government for protection from the French and ‘troublesome’ settlers or escapees (Henare 2007: 117). However Henare’s discussion of the original Maori text has a quite different emphasis, requesting Britain to be an ally against foreign aggression and, importantly, recognising the jurisdictional community by requesting that Britain deal with transgressions quickly or else Maori jurisdiction would righteously be applied. The Maori version of the letter recognises the presence of other groups in Aotearoa/New Zealand but consciously selects the British community to ‘be friend and ally’ (Henare 2007: 117).

The spectral nature of the New South Wales Supreme Court and the media were both forces in the creation of the pre-political British community necessary for the formation of organic jurisdiction (Ford 1999: 860).

Mapping the ‘Islands of New Zealand’

The transformation or development of synthetic jurisdiction into organic jurisdiction requires more than the pre-political community — the community needs to be in place with a circumscribed territory. By 1823, New Zealand already had a long history as a ‘place’ in the European imagination. Some form of amorphous New Zealand, under various spellings, had appeared on maps across Europe from 1644 onwards (Hooker 2004: 41-2). By 1769 Cook had fairly accurately mapped the entire coastline, thus creating a bounded space that could be filled with the simple proclamation of jurisdiction (Dorsett 2007: 146). As Ford points out, jurisdiction is territorially defined and the geographic boundaries are a ‘bright line rule’ that is not flexible (1999: 853).³⁰ Indeed the synthetic jurisdiction covering New Zealand was territorially based in both the words ‘Islands of New Zealand’, in

the New South Wales Judicature Act 1823, and in the maps that circumscribed its boundaries.

The words 'Islands of New Zealand' gained meaning in the European imagination as a result of the mapping. Maps are not neutral. They are selective in content and represent ways to conceive, articulate and structure the human world, in this case a European world. The map serves as a symbolic statement of power and dominion (Blomley 1994:83). As Dorsett explains, the techniques of mapping facilitate the abstraction of territory from the physical earth and allow the concept of territory to act as a mediator between sovereignty/jurisdiction and the physical (2007 149). New Zealand, as a number of islands, was defined by a coast, which avoided some of the problems of defining its external borders.

Abstracted and mapped, New Zealand could be seen in the British imaginary as a bounded territory awaiting colonisation. However, the physical and social reality was very different: right up until 1840 the Colonial Office was reluctant to colonise New Zealand and also reluctant to invest in the further development of this ghostlike jurisdiction (Seuffert 2007: 105; Orange 2010). This was in part due to the dominant position of Maori, its vast distance from England, and the increasing costs of maintaining the existing colonies and the American secession (Hight 1914: 46).

Conclusion

By the late 1830s New Zealand was ripe for the colonial harvest and was being watched with interest by the Americans who had appointed James Clendon as Consul to New Zealand in 1839 (Wasserman 1949). The French also were sending increasing numbers of ships and concerns were escalating as to their motives with respect to colonisation (Williams 1941: 25-8). A sense of community, created through the assertion of the somewhat incomplete jurisdiction of the Supreme Court of New South Wales, had been strengthened by the homogenising influence of the spectral nature of the jurisdiction. This fiction of sameness and uniformity, as well as New Zealand's well-mapped geographical

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boundary and bounded territory, were essential to the pre-political and cultural formation required to create an organic jurisdiction.

New Zealand in the late 1830s had the necessary elements for the creation of an organic jurisdiction: a pre-political community, imagined as sharing similar goals and culture — the British subject and a bounded mapped territory. The difficulty from the perspective of the colonisers was that Maori had the economic, demographic, political and cultural upper hand. Just as the extension of the New South Wales jurisdiction had been justified in terms of the protection of Maori from the lawless European, so too the adoption of the Treaty of Waitangi was justified in terms of protection of Maori from the anarchic growing settler population: law within an organic jurisdiction was required to remain civilised.

Despite the reluctance of the Colonial Office, the fiction of an organic jurisdiction would emerge on 21 May 1840. Lieutenant-Governor Hobson issued two Proclamations of British sovereignty over both the North and South Islands and approval was granted by the Colonial Office in *The London Gazette* on the 2 October 1840.³¹ This fiction would coalesce into what Seuffert refers to as New Zealand's dominant founding story that facilitated its emergence as a modern nation (2007: 105).

Although the jurisdiction of the New South Wales Supreme Court remained in theory after the signing of the Treaty of Waitangi, in practice no more cases were heard; rather than an exorcism of the spectral jurisdiction, it just faded away, and was replaced in December 1841 with the creation of the Supreme Court of New Zealand. The legal connection with New South Wales was severed by an Ordinance passed on 15 March 1842 which repealed all New South Wales laws and ordinances in force in the Colony of New Zealand which 'shall thereafter have no force or effect whatever within the Colony', thereby completing (at least externally) the organic jurisdiction (NZLJ 1938: 234).

Internal jurisdiction would take another 37 years to undermine and extinguish the dual jurisdictional nature of Aotearoa/New Zealand and

replace it with the certain jurisdictional boundaries of New Zealand (Seuffert 2007). This assertion of internal jurisdiction was intrinsically linked with the assumption of sovereignty and the construction of a national identity, albeit a unitary Austinian conception of sovereignty (Rumbles 1998: 32-40). The 19th century British conception of law operated in a jurisdiction, with the law being both the expression and the tools of sovereignty. This meant that the expansion of the colonial jurisdiction needed to fill the 'Islands of New Zealand'. In the light of this conception of sovereignty, any accommodation of a dual jurisdiction could only be temporary. It was the expansion of the jurisdiction, especially throughout the 1860s, that began the process that would extend the hegemonic control of the law over Maori,³² effecting what Blomley refers to as the closure of law (1994: 8-26). This delegitimisation of non-Western polities was crucial in structuring conventional routes towards colonial domination and was not unique to New Zealand (Strang 1996: 25).

Although Hobson's proclamation asserted that 21 May 1840 was the date that full sovereignty was vested in the British Crown,³³ this date is neither the beginning nor the end of a process of assertion of sovereignty. The seeds of sovereignty had already been sown in Aotearoa/New Zealand over the preceding 17 years, resulting in a community, territory and jurisdiction that could be eventually filled with the idea of a New Zealand nation (Moon 2006: 217-18). The expansion of jurisdiction by the New South Wales Supreme Court was a step along this path of bringing together a people, place and culture and, eventually, displacing a people, place and culture.

Notes

- 1 *London Gazette* No. 19900: 2179-80 <http://www.london-gazette.co.uk/issues/19900/pages/2179>
- 2 *New South Wales Judicature Act* 1823 (UK)
- 3 For example, in the *Crimes Act* 1961 (NZ), ss5, 6 &7 create the 'in place' jurisdiction of the New Zealand criminal law — although this has been extended in certain circumstances, for example, sexual conduct with

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- children outside New Zealand (ss144A-144C — introduced 1995) and the application the cybercrime sections (ss249-252 — introduced 2003).
- 4 I use Aotearoa/New Zealand when referring to the dual jurisdictional space of Maori and the New South Wales Supreme Court; and Aotearoa when referring to the jurisdictional space solely occupied by Maori and likewise New Zealand when referring to some form of sole British jurisdiction.
 - 5 ‘Kendall, Thomas’ from *An Encyclopaedia of New Zealand*, edited by A H McLintock, originally published in 1966. *Te Ara: The Encyclopaedia of New Zealand* Updated 22 April 2009 URL: <http://www.TeAra.govt.nz/en/1966/kendall-thomas/1> See also Chief Justice Dame Sian Elias 2002 *Justices’ Quarterly* 71/2: 2. It was in 1840 that New Zealand legally became a dependency of New South Wales and this was only for a few months (Cramp 1914: 3-7).
 - 6 ‘Letter from Reverend Samuel Marsden to the Colonial Secretary’ 3 March 1817 in Elder 1932: 224.
 - 7 Author unknown ‘An Epitome of the Early History of New Zealand’ in MacKay 1873 1: 2 (doc 1). See also evidence of William Yates in *Report from the Select Committee on Aborigines (British Settlements) Minutes of Evidence* 1836: 188.
 - 8 It is unlikely that this had much effect either on Maori being carried off or requests to Maori before landing. See *Sydney Gazette* 12 November 1814 in Vol 12: 571.
 - 9 This was re-enacted in 1828 in the *New South Wales Judicature Act* 1828.
 - 10 Sir Francis Forbes was appointed the first Chief Justice in 1823 and sat as sole judge. In 1825 he was joined by John Stephen, and in 1827 by James Dowling. Even with this increase in the number of judges the bench struggled to cope with its workload in Sydney. See Sir Francis Forbes <http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_sirforbes>
 - 11 ‘Those in authority in this Colony would have failed in their duty had they spared any trouble or expense in bringing this case home to the prisoner; the Court had reason to know that the expenses on the case had been immense, but they could not look upon the expense in a case where it was so necessary.’ *R v Doyle* (*Sydney Herald* 20 November 1837: 6).

- 12 In a charge of murder against Stewart, by the time the case came to trial the witnesses had left NSW: all Stewart's co-accused had fled the colony while on bail, leaving only Stewart to stand trial. Eventually Stewart himself left the colony and the case was abandoned (*R v Stewart* 31-66).
- 13 Author unknown 'An Epitome of the Early History of New Zealand' in MacKay 1873 1: 2 (doc 1).
- 14 The Supreme Court of New South Wales itself was only formed in 1823 under Chief Justice Forbes who commented: 'The laws of England are essentially the laws of New South Wales, that the Government is essentially an English Government; and that the courts are essentially the courts at Westminster.' <http://www.ipc.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_sprcrt_hist1>
- 15 The captain of the *Alligator* was persuaded to take Lewis back to Sydney in order to ensure the safety of the vessel (*Cape Packet*), 'that if the [Lewis] had not been taken out of the vessel, [*the Cape Packet*] must have returned without cargo to Sydney to the complete loss of the voyage' (*Lewis v Lambert* [1835] NSWSC 73: 85). This was clearly in line with the *Alligator*'s mission to protect 'British Shipping and trade' (102).
- 16 The case report gives clear instruction on how Lewis (and other seaman) could have been liable, and gives a guide to the legal limits of violence aboard economic shipping including the legal use of irons, flogging and imprisonment aboard their own ship through contractual authority between master and mariner. However once Lewis was handed over to the other ship the Captain's contractual authority (or domestic jurisdiction) was also gone. See Dowling 1835: 82-102.
- 17 The court referred to Lewis's claim as frivolous and *damnum abseque injuria*, (damages without injury) and his conduct as so 'mutinous and disorderly that the Master might have brought him in irons to this port [Sydney]'.
- 18 It has been argued that this continued to be the basis on which the Colonial Office and Hobson approached the signing of the Treaty of Waitangi (Kingsbury 1989, McHugh 1989)
- 19 Goderich (Colonial Secretary) to the new Governor of New South Wales Governor Bourke, 31 January 1832, in *Historical Records of Australia* Series 1, Vol 16: 512.
- 20 See *R v Stewart* [1831] NSWSC 31 and Goderich's discussion of Moore's argument in *Historical Records of Australia* Series 1, Vol 16: 512

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- 21 'Missionaries' Replies to Mr. Bigge's Queries' attached to 'Thomas Kendall to Commissioner Bigge' 8 November 1819 in McNab 1908: 442.
- 22 The word 'coverture' is used in the sense that mobile peoples are under the authority of jurisdiction whether they choose to submit or not.
- 23 This is illustrated in the case of Doyle where he describes being born in America, moving to South Sea Islands, then Sydney and finally New Zealand.
- 24 Similar to the reporting of violent crime today see Sacco1995: 141-54.
- 25 For example see *The Sydney Gazette* 17 November 1832: 3.
- 26 See evidence of William Yates for examples in the *Report from the Select Committee on Aborigines (British Settlements)* Minutes of Evidence 1836.
- 27 Goderich Governor Bourke 2 May 1832 *Historical Records of Australia*, Series 1, Vol.16: 662
- 28 See Goderich to Governor Bourke, 22 May 1833 in *Historical Records of Australia*, Series 1, Vol.16: 662:510:51.3
- 29 See weekly 'Shipping Intelligence' in the *Sydney Herald* 1831- 1842.
- 30 Ford explains that this territorial rule is vital for the organic jurisdiction the "organic conception posits an organic relationship between such groups and the territory they occupy It is not simply that the groups themselves are of primary importance , but also that the groups' identities depend on their control over a particular territory, a significant and culturally encumbered place" (1999: 860)
- 31 The London Gazette No. 19900: 2179-2180 <http://www.london-gazette.co.uk/issues/19900/pages/2179>.
- 32 See for example Native Land Court Act 1862 and 1865, New Zealand Settlements Act 1863, Suppression of Rebellion Act 1863.
- 33 The London Gazette No. 19900: 2179-2180 <http://www.london-gazette.co.uk/issues/19900/pages/2179>.

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