Perspectives on Sovereignty as Colonial Administration in the Early New Zealand Crown Colony Period

“[Imperial history has neglected] … the possibility that officials and political office holders, might be affected by ideas, even theories. … The ‘official mind’ need not be supposed to have been circumscribed entirely by routine, precedent, pragmatism and office walls.”

This paper tells a story of both a movement of laws and the transmission of ideas across Empire. Through an examination of sovereignty, and in particular singular sovereignty, the paper explores differing understandings of the legal settlement of New Zealand, and the consequent relationship and character of British and Maori sovereignty. In so doing it seeks to contribute to the placing of New Zealand within the broader intellectual framework of Empire and ideas, and to examine how different configurations of sovereignty were significant in different times and places. The topic around which this consideration of sovereignty is organized is that of colonial administration. Here colonial administration refers to the ordering of empire and the management of colonial relations, between metropole and colony, as well as the internal legal relations of the colony.

As a concept, colonial administration enables the tracing of different ways of addressing sovereignty between different genres: particularly of legal doctrine and political theory; but to some extent of policy. What holds these different genres together is the medium of biographical transmission in the form of the writings of two men, Henry Samuel Chapman and George Cornewall Lewis. Much of the paper focuses on Chapman, appointed second judge of the Supreme Court of New Zealand in 1843. Both before his appointment to the Supreme Court, and as judge, he wrote on various aspects of sovereignty: acquisition; nature and relationship to Maori sovereignty; and of the internal legal ordering of New Zealand. These can be found in different genres of legal scholarship itself: published material, largely in the service of the New Zealand Company; extra judicial commentary; and judgments. To a much lesser extent, the paper looks at the writings of George Cornewall Lewis, classicist, lawyer and administrator. In the 1830s and 1840s he published both in political theory and constitutional law, examining the notion of sovereignty and the relationship of Britain to her colonies. The lives of Chapman and Lewis briefly intersect, both are on the periphery of a particular intellectual milieu in London in the 1830s, and both attended John Austin’s lectures at University College London in the early part of that decade. Cornewall Lewis’ writings on political theory illustrate an approach to sovereignty which is prevalent at the time of Chapman’s legal writings - a conception of unlimited, absolute sovereignty - articulated at the moment of New Zealand’s founding as a Crown colony and its subsequent legal settlement.

2 In other contexts, it could and would, also include the ordering of relations between colonies.
Part I looks at Chapman’s earlier work on acquisition of sovereignty. This part examines Chapman’s deployment of the doctrine of discovery, employed on behalf of the New Zealand Company. In Chapman’s early work sovereignty is primarily a mode of organization of the relations of Crown and Company through which the goal of systematic settlement can be achieved. Part II moves to consider Cornewall Lewis’ articulation of an Austinian singular and absolute sovereignty, placing it in the context of increasingly authoritarian views of Empire and of the (re)location of sovereignty of British Empire in the now Imperial parliament. In so doing, it looks at Austin’s influence on Cornewall Lewis and, to a lesser extent, Chapman. Here Lewis, in common with others of the time, sees singular sovereignty as a mechanism of control and a mode of organization of the relations between Britain and its dependencies. Part III returns to Chapman’s texts, this time largely in the form of judgment. It examines Chapman’s ‘flirtation’ with the language of Marshall’s divided sovereignty, before its ultimate rejection in favour of singular authority, and the consequent task of sovereignty in the new colony. To conclude, the paper seeks to open up discussion by considering briefly what might be gained through using ‘colonial administration’ as a topic of organisation.

I. Discovery

Like New Zealand’s founding itself, Chapman sits in that relatively underexplored place between the end of the ‘First Empire’ and the rise of what might be termed ‘Victorian international law’ from the 1860s.\(^4\) After a career in Canada, largely as a newspaper man, he trained at the Middle Temple and was called to the Bar. He was well-connected in radical circles through his work with various publications, subediting the London Review; and, its successor, the London and Westminster Review, his association with John Roebuck’s Pamphlets for the People and as an advocate for the New Zealand Company.\(^5\) There is some evidence that he worked as an (unacknowledged) sub-editor, under Bowring, on Bentham’s works,\(^6\) and was a Benthamite utilitarian,\(^7\) albeit with a practical, reformist, bent.\(^8\) As a group, the

\(^4\) On ‘Victorian International Law’ see the essays in Duncan Bell (ed) Victorian Visions of Global Order: Empire and International Relations in Nineteenth Century International Thought, Cambridge University Press, Cambridge, 2007. Victorian Visions has in common with a number of other works, such as Anthony Anghie’s Imperialism, Sovereignty and the Making of International Law (Cambridge University Press, Cambridge, 2004) and even Martti Koskenniemi’s The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge University Press, Cambridge, 2004), that its contributions commence their examination from 1860 or later, thereby not considering the vital contributions of the early part of the nineteenth century to resulting formations of sovereignty.


\(^6\) While the ‘Bentham Project’ at UCL have no record of his participation (personal communication with Professor Paul Schofield, by email, December 2008), see [Sir Frederick Revans Chapman] Memo [to the Department of Internal Affairs] on Presenting his Father’s Copy of Jeremy Bentham’s Works to the Alexander Turnbull Library: MS Chapman papers 1835-1929, Folder 19, Reel 6.

\(^7\) For an example of his views on utility (‘greatest happiness’ etc) see Chapman’s remarks on suffrage in HS Chapman “Preliminary Reforms: Being a Summary of the Principles Advocated in these Pamphlets” in Pamphlets for the People, edited by J Roebuck, 1835, Vol 1, No. 22, 10. As to his political bent, see, for example, “Toryphobia” in ibid, Vol 2, No. 9, 12; “Taxation of the Rich and the Poor”, in ibid, Vol. 2 No. 10, 5 or “Wholesale Obstructiveness of the Lords” in ibid, Vol 1, No. 13, 12 (calling for abolition of the House of Lords as an upper house and replacement with an elected body).
‘philosophical radicals’ were ambivalent towards empire. As a broad generalisation, they were mostly anti-colonial in the period pre-1830, but after that time many became associated with the new imperial endeavours, and in particular the systematic colonization of Wakefield. Chapman personally expressed general anti-colonial sentiments, agreeing with Adam Smith in 1836 in “The Colonies” that colonies were an “the evil influence”, not least as a burden on expenditure. Nevertheless, he was strongly in favour of what might be termed Wakefieldian principles of colonisation, explaining Wakefield’s position and commenting at some length on advantages of this in the 1842 Encyclopaedia Britannica entry for “Zealand, new”. Colonies which were not a drain on England’s finances, and which furnished resources, were quite a different prospect.

In the late 1830s, Chapman published several works on sovereignty and New Zealand, in the Dublin Review and the New Zealand Journal. Despite its name, the first was a London periodical. The second was a paper subsidized by the New Zealand Company, and Chapman was its editor-proprietor. Building on his publications prior to his appointment to the New Zealand Supreme Court, in c. 1845 Chapman authored a document entitled “Status of the Native Races considered in relation to the sovereignty”. Chapman’s are not the only extra-judicial commentary by a judge of

---

8 For example, Chapman wrote to his father that Bentham would be proud of the new Supreme Court rules of procedure (authored with William Martin, 1844): “Henry Samuel Chapman to Henry Chapman (ATL) qMS-0418, vol. 1, XXX, letter dated X.


14 HS Chapman 'Legal Notes', c. 1858, Alexander Turnbull Library (ATL) MS-Papers-8670-047, [hereafter Chapman ‘Legal Notes’]. The paper is undated. It is part of a collection of materials, including correspondence, which has been collated and designated 1858 by the Alexander Turnbull Library. However, the contents point to this document having been written around 1845. At the earliest it can have been authored in late 1844 as it refers to an incident involving slavery in that year. At the latest it can have been authored in early 1846, as Chapman notes that the enumeration of customs which should be abrogated would be of use to the Aboriginal Protectors, an institution which was abolished in 1846. The purpose for which this document was initially written is unclear. Originally, Chapman may not even have had a specific purpose. In requesting his father send paper he writes that: “I write a good deal of law which may or may not grow into an essay or article or perhaps even a book: “Henry Samuel Chapman to Henry Chapman (ATL) qMS-0418, vol. 1, 323, letter dated July 1, 1846 [hereafter Chapman ‘Letters 1’]. By 1847 he had determined that “[o]n this [R v Symonds] and other subjects of Colonial law I intend to write some articles or a book or both”: HCS to HS (ATL) qMS-0419 Letters vol. 2,
the New Zealand Supreme Court in the Crown Colony period. Martin CJ also wrote (anonymously) on the Treaty, Crown policy and Maori proprietary rights in 1847. However, Martin’s views were not focused on sovereignty as much as title. A comparison of Chapman’s various works reveals that between the late 1830s and 1861 his views on sovereignty remained virtually unchanged. The 1845 document, however, necessarily factors in the position of Maori. While Maori were hardly missing from earlier discussions, their position was subordinate. This is not to say that the position of Maori could be ignored. The clear distinction of Maori on the scale of civilisation from their Australian counterparts meant that any sovereign solution had to take that presence into account. Chapman, through his connections with the Company, had received much material on the Maori. However, Chapman’s early writings were not concerned with British sovereignty vis-à-vis the Maori, other than in so far as was necessary to establish legitimate British sovereignty, which in turn could underpin systematic settlement plans of the New Zealand Company, as well as displace the activities of the Land Commissioners investigating title acquired pre-1840. What was at stake was the ordering of the relations of the British Crown and its sovereignty to the New Zealand Company’s settlement plans. His audience, therefore was the Colonial Office, officials, and the supporters of Wakefield and the New Zealand Company. While it may not have been his strategy, his endeavours were rewarded with a recommendation by the supporters of the Company that Chapman be appointed a puisne judge of the Supreme Court of New Zealand.

As background to Chapman’s views, for the Colonial Office’s own purposes the official designation of New Zealand was as settled. By the time that sovereignty was established over New Zealand (however that many have been), the distinction between settled and conquered colonies which underpinned British Imperial law had begun to break down, at least in Colonial Office practice. Campbell v Hall, determined at the dawn of the American revolution, and firmly attached to the older, bifurcated approach, was some way in the past. It was the Crown’s official stance in the late 1830s that the Maori had a sufficient sovereignty (or sovereignties) that consent was a prerequisite to the acquisition of British imperium. As is well-known,
the method in the end chosen to acquire sovereignty was treaty. Of course the consent of all iwi was inevitably not obtained, and in the end Hobson chose in addition to declare the Crown’s sovereignty by Proclamation, declaring sovereignty obtained by cession over the North Island and simply asserting it over the South and Stewart’s Island. These steps, in any case, were sufficient for the Crown. Sovereignty was based on either/and Treaty and proclamations.

The capacity of ‘barbarous nations’ to enter into legal relations had long been established and the Colonial Office took the stance that Maori could enter into such relations. Initially, the Company also took the view that Maori were independent sovereigns, with the capacity to transfer land to third parties. Later, they moved to endorsing the doctrine of discovery. The Company took the stance that lands which were not subject to Maori proprietorship could be transferred by Crown grant to settlers in its proposed settlements. In 1839 the Company had begun the acquisition of land in the lower part of the North Island and the upper portion of the South Island by purchase from the Maori. For Chapman, therefore, one of the key issues was the timing of that sovereignty, and the consequent status of titles acquired pre-1840. It is not a coincidence that Chapman authored a number of works on the acquisition of Crown sovereignty in the critical year of 1840.

Chapman himself noted that: “Numerous existing treaties show that the English and other European natives and following them the United States have uniformly conducted diplomatic relations with the several tribes. In such documents they are called “Nations” and are held capable of maintaining the relations of war and peace … I possess a large collection of such treaties, the uniform language of which is as between two independent states able to contract.” Chapman’s familiarity with the jurisprudence of the United States Supreme Court in the Marshall decisions, and its reception of ius gentium into the common law has already been explored, particularly by Hickford, including his familiarity with Kent’s Commentaries and the jurisprudence of the Marshall Court. Nevertheless, while Maori might be admitted

Wales to include New Zealand; the second stating the Crown’s intention to only recognize titles derived from the Crown itself: Issued 30 January 1840, Hobson to Gipps CO 209/7: 23-4.

Issued 21 May 1840, CO209/6: 156-158; Hobson to Russell CO 209/7: 61-2, London Gazette, 2 October 1840. For a full account of the process see McHugh Aboriginal Rights of the New Zealand Maori.

Stanley to Shortland 21 June 1843, GBPP 1844 xii (556) Appendices, 475; Stephen to Hope, minute, 28 December, 1842, CO 209/18: 416.


See Mark Hickford “Decidedly the Most Interesting Savages on the Globe”: An Approach to the Intellectual History of Maori Property Rights, 1837-1853 (2006) 27 History of Political Thought 122, 153. Hickford’s article unwraps the complex politics of the period, and the different arguments deployed by the Company and the Colonial Office over almost a decade, matters which are beyond the scope of this paper.

Ibid, 136.


Chapman ‘Legal Notes’, X. Chapman collected works on colonial law, colonial history and international law throughout his career. Throughout Chapman’s letters to his father in the 1840s he both requests particular books, and lists the number of volumes and some titles.

James Kent, Commentaries on American Law, 2nd ed, New York, 1832; Hickford, “Decidedly the Most Interesting Savages on the Globe”, 148-151; Mark Hickford “‘Vague Native Rights to
to the *ius gentium*, it was for a limited purpose only. Their sovereignty was of a different character to that of Britain. This is sufficient sovereignty to contact away rights. It is a cautious, but not complete, admittance to the *ius gentium*. As Pocock reminds us, the British attributed just enough sovereignty to make them capable of entering into a treaty.\(^{30}\)

Chapman agreed that sovereignty had been effectively established over New Zealand. However, despite Chapman’s acknowledgment of the ability of native nations to contract, sovereignty did not follow from either of bases accepted by the Crown: the Treaty or Proclamation. Rather, Chapman sourced the Crown’s sovereign rights on the doctrine of discovery and subsequent possession/occupation, prior to the signing of the Treaty of Waitangi. In numerous publications he stated that “It is a well-known principle of international law, that discovery and occupation give to the discovering nation a right of sovereignty *as against all civilized powers*. The relations which the discovering country may establish with the native tribes do not in any way affect this right of sovereignty.”\(^{31}\) In “Is Killing no Murder in New Zealand? – A Dilemma” he stated that that “[w]e have already expressed our opinion that her Majesty has possessed a right of sovereignty over New Zealand from the period of Cook’s discovery. This right has been repeatedly exercised; and, until recently, was never disputed.”\(^{32}\)

As an advocate for the New Zealand Company, it certainly suited Chapman to argue that sovereignty had already been acquired by the late 1830s: “the expedient of repudiating the sovereignty of New Zealand, seems to have been hit upon for the purpose of deterring people from joining in, or in any way seconding, any plan of colonization which might be put forward.”\(^{33}\) Both the draft Act of the New Zealand Association for the British Colonization of New Zealand in 1837 and the Hutt’s draft Bill on behalf of the New Zealand Company’s took the position that sovereignty had already been established, albeit not necessarily following the same reasoning.\(^{34}\) Chapman recited what he perceived as a number of anomalies flowing from the Colonial Office’s repudiation of sovereignty pre-1840, suggesting “the inconsistencies into which government must necessarily be involved by the foolish jealousies of the colonial-office would fill one number, and therefore tire our readers”\(^{35}\). Unsurprisingly, the Land Claims Commission was seen as a major anomaly.\(^{36}\) If there was no sovereignty pre-1840 then the Commission could not have

---


\(^{31}\) Chapman “Zealand, new, 981, emphasis in the original; see also Chapman, ‘Legal Notes’, X; Chapman “The English, the French and the New Zealanders”, X.

\(^{32}\) Chapman “Is killing no Murder in New Zealand?”, 173; see also Chapman “Zealand, new”, 981.

\(^{33}\) Chapman *Dublin Review*, 208.


\(^{36}\) *New Zealand Land Claims Act* 1840 (NSW); *Land Claims Ordinance* (1841) (NZ). The
had jurisdiction to consider land titles from that era. If they had jurisdiction, then Hobson’s proclamation on titles was “a dead letter”. Either way, the Company’s interests pre-1840 could be maintained. He concluded “The Treaty of cession and the commission are like buckets in a well – both cannot appear on the stage together.”

Chapman, therefore, viewed the process of acquisition of sovereignty by the Crown as simply an attempt to “embarrass the New Zealand Company”, labeling Hobson’s commission as Consul, later Lieutenant Governor, as a “farce”. This was a position on which it appeared he did not change his mind. Chapman found it “extremely difficult to understand the principle on which a part of the executive government of this country can treat as alien a country over which we have certainly constantly exercised sovereign functions. … It has been exercised in many ways. Magistrates have been appointed; criminals have been taken up, have been carried to Sydney, and there been tried and punished. Yet in 1839 her Majesty was advised to declare that the crown had no jurisdiction over those islands … and that if we accredited any representative of the crown to make his appearance in New Zealand, it must be in the character of a consul only that he could enter into preliminary negotiations with the chiefs, to barter sovereignty for a blanket.” As a result, according to Chapman all the Crown had to do was appoint a Governor: “[s]overeignty had been exercised. No doubt had been thrown upon it.” Chapman viewed the Colonial Office as actively obstructionist to proposals such as that of the New Zealand Company, commenting in 1836 (albeit in a slightly different context) on “… the hatred of all official personages to the proposal of a colony to pay its own expenses.” At that time, Chapman could be almost dismissive of the place of Maori in management of the affairs of colonial administration. In “Zealand, new”, for example, Chapman discussed the Maori, but largely in order to point out the advantages to them of colonisation by the Company and their limited needs for land as cultivators. He noted in August 1840 that “… some time since, it suited the Government to treat with a few of the chiefs as independent sovereigns. There was nothing in this, as the Americans do so every day: but after it had been nearly forgotten, as any other amusing farce would have been, it

Commission was established to examine pre-1840 land transactions. Titles were confirmed or overturned after investigation of the surrounding circumstances of the transaction.

38 HS Chapman “What Law does a New Colony Take?” Chapman Papers Relating to Cases and Land Sales, (ATL) MS-Papers-8670-046 (original in (ATL) MS-Papers-8670-06) (document is unpagedinated, quote from p. X of document). From content, it was written post-1854 but based primarily on the earlier work in the Encyclopaedia Britannica and the Dublin Review. This document may have been written for/to one of his children, possibly Frederick Revans Chapman, who became the first New Zealand born Supreme Court judge. In setting out the rules on importation of common law into New Zealand, Chapman notes that: “New Zealand was first established as a dependency on New South Wales – and the Government of New South Wales sent down officers – a Judge, an Advocate General (your uncle C Brewer) and Magistrates. …” (at 46 of entire file.)
41 Chapman Dublin Review, 207; Chapman Encyclopaedia Britannica, 981.
43 Chapman, “Zealand, New”, 979.
was laid hold of, among other events, as a reason for renouncing the sovereignty of New Zealand.”

By 1845, Chapman does not equivocate. It is not the Treaty on which sovereignty is to be founded: “[t]he Waitangi Treaty [is] considered (erroneously) as the foundation of the Queen’s sovereignty ….” Not only had sovereignty already been acquired, but in addition it got around the matter (the “legal difficulty noticed”), that: “[t]he treaty can of course only be binding on such independent tribes as are parties thereto and doubts have therefore been expressed as to whether the Queen had any authority at all in districts occupied by tribes, the chiefs whereof had not become parties to the treaty.” However, those doubts arise “…from not clearly separating that sovereignty which the Queen hath by right of discovery and possession followed …, from that limited sovereignty which the chiefs of savage tribes retain inter se until the have parted with it by treaty.”

However, while Chapman may not have seen the Treaty as the foundation of sovereignty, that did not mean it was nullity. It clearly could be binding on those who signed, and in any case it was a sufficient mechanism by which iwi could divest themselves of the limited sovereignty which they retained post-discovery: “[I]t is [their] modified sovereignty which the natives of New Zealand part with by the Treaty of Waitangi.” One might wonder as to what happened to that limited sovereignty of those who did not sign, a ‘legal difficult noticed’ that Chapman glossed over, although it may have been this exact problem which resulted in a margin note at this point which reads “to be further worked out”.

In his writings prior to his appointment to the New Zealand Supreme Court, therefore, Chapman’s attention is focused primarily on the Crown’s acquisition of sovereignty: in general; against the Maori; and even against the French. Here sovereignty performs a particular task: of bolstering the goal of systematic colonisation and the plans of the Company. As a matter of colonial administration, the doctrine of discovery provides a tool though which to argue for the prior acquisition of sovereignty and hence prior rights of the Company. However, discovery, particularly the discovery of the American jurisprudence of the Marshall Court, is a configuration of sovereignty with consequences, if for no other reason than its result is divided sovereignty. This is clear from Chapman’s own formulations. According to Johnson v

---

45 Chapman, ‘Legal Notes’, X, emphasis in the original.
46 Ibid.
47 Ibid, emphasis in the original. Chapman was not the only one to express doubts as to whether absent consent the Treaty could be binding. In 1842 and again in 1843 Swainson, the second Attorney-General, suggested that as various iwi had not given their consent to the Treaty, those iwi retained their sovereignty and were not British subjects. These arguments received short shrift from the Colonial Office: see Damen Ward “Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c 1840-60” (2006) 34 J Imp and C’th Hist 483, 490.
48 Chapman ‘Legal Notes’, X
49 Ibid, X.
50 As to the French see Chapman “The English, the French and the New Zealanders”; Chapman “Zealand, new”. 
*M’Intosh* and *Cherokee Nation*, sovereignty was acquired against other European nations, the Indian nations retaining a domestic dependent version of sovereignty, subordinate to that of the United States, and tied to a territorial base.\(^{51}\) Unless, and until, they parted with that sovereignty or it had been extinguished by conquest, the tribes retained their residual sovereignty.\(^{52}\) Each party (Federal, State and tribal) has different spheres of ordering in which they have competence and responsibility. Thus, the American constitutionalism of the 1840s stood in stark contrast to that of Britain, both internally, and as emerging within the British Empiric order in the 1800s. Chapman, therefore, has a choice: live with the consequences of discovery in the form of divided sovereignty; or reconfigure his account of sovereignty to more closely correspond to the developing singular sovereignty of British imperial constitutionalism of the period.

II. **Singular Sovereignty: Crown and Empire**

This part moves to a different genre – that of the ‘science of politics’ - to consider the way in which sovereignty was conceived in the mid-part of the nineteenth century, both conceptually and in British imperial constitutionalism, in the writings of George Cornwall Lewis. This, in part, is the intellectual milieu of Chapman. Paul McHugh has already written of the emergence of ‘Leviathan sovereignty’ in the mid-part of the nineteenth century, particularly as it relates to subsequent conceptions of the Crown in New Zealand.\(^{53}\) By ‘Leviathan sovereignty’ is meant the particular version of sovereignty which later came to dominate British constitutionalism in the mid-nineteenth century and beyond, particularly in relation to its dependencies, and which began to coincide with international law understandings of the sovereign state: as unlimited, singular and with an absolute, final and supreme authority. What is (briefly) considered here is the domestic constitutional realm, in which sovereignty performs a similar, but not identical, function to that which it plays in the international realm. As McHugh reminds us, New Zealand’s political life as a Crown colony was beginning as the English were “proclaiming the perfection … of their own constitutional arrangements. … As in the metropolitan centre of Empire, the sovereignty of the Crown was the central principle of constitutional organisation in this new colony.”\(^{54}\)

By the time of the colonisation of New Zealand, the Empire was “conceived increasingly in terms of hierarchy and subordination, rather than, as the American colonists had often viewed it, as an “empire of liberty”.”\(^{55}\) Since the 1770s, Britain

---


\(^{52}\) On conquest and its effect on residual sovereignty and Indian nationhood see *The State v Foreman* 16 Tenn 256 (1835), Supreme Court of Tennessee, Catron CJ. On Marshall and divided sovereignty see McHugh, *Aboriginal Rights*, 109; Mark Walters XXXXX.

\(^{53}\) McHugh has written of this in a number of works, but see for example Paul McHugh “A History of Crown Sovereignty in New Zealand” in Sharp, McHugh *Histories: Power and Loss*.

\(^{54}\) McHugh, ibid, 191-2.

had survived a series of colonial crises: the loss of the American colonies and the upheavals on Canada. These forced thinking about the ordering of empire. What was required was a united empire, controlled effectively from London, through the medium of the British parliament. What was emphasised, therefore, was the sovereignty of Parliament, with a concurrent downplaying of the liberties of colonists and the requirements of representative government in the colonies. This new authoritarian atmosphere was mirrored at home, a response to concerns over order and licentiousness in the mid-late 1700s. The position is summed up by Thomas Erskine May in 1841, according to whom: “[T]he authority of parliament extends over the United Kingdom and all its colonies and foreign possessions. There are no other limits to its power of making laws for the whole empire.” Also in 1841, Cornewall Lewis noted that “[s]ince the close of the American war, it has not been the policy of England to vest any portion of the legislative power of the subordinate government of a dependency in a body elected by the inhabitants.”

At the time of New Zealand’s colonisation a number of tracts began to appear on Britain, her Empire and relationship to her dependencies. Unsurprisingly given Britain’s recent experiences in Empire, many of these dwelt on the issue of sovereignty via questions of representative government. Of these the best known is Herman Merivale, although for contemporaries, Cornewall Lewis’ Government of Dependencies was probably seen as the intellectually superior work. These were joined by a raft of other publications between 1840 and 1860 by John Roebuck, Macaulay, JS Mill, Thomas Erskine May, Jerrod and Clark, to name a few. These were largely works of political economy and of constitutional law. George Cornewall Lewis was a classicist, lawyer, government servant and self-proclaimed disciple of Austin. He was a prolific writer, publishing in linguistics, classics, political theory

57 Thomas Erskine May “The Imperial Parliament” in Knight’s Store of Knowledge for all Readers, 1841, 101. The Knight’s Store of Knowledge for all Readers was a series of treatises by various authors, under the creation and editorship of Charles Knight. It was issued in weekly numbers at two pence, commencing in 1841.
58 George Cornewall Lewis Government of Dependencies, rev ed, New York, 1901 (1841), 91. Although a number of colonies gained limited constitutions and representative bodies from the 1850s onwards, Miles Taylor mounts the case that these were less independent than some historiographical traditions might suggest - that the British Parliament always retained the “upper hand”: Miles Taylor “Colonial Representation at Westminster; c. 1800-1865” in Julian Hoppit (ed) Parliaments, Nations and Identities in Britain and Ireland, 1600-1850, Manchester University Press, Manchester, 2008.
60 According to Baghot “Sir George Lewis was deeply penetrated by this abstract teaching. [by Austin]... Once a jurist, always a jurist.” Walter Baghot (Richard Hold Hutton ed.) Biographical Studies, Longmans, London, 1881, 236. Lewis later agreed to the Commission to Malta to ‘serve’ Austin: Gilbert Franklin Lewis (ed) Letters of the Right Hon. Sir George Cornewall Lewis, Bart., to Various Friends, 1870, 56.
and law. He held a number of government posts, including Chancellor of the Exchequer, Home Secretary and Secretary of State for War. He was never Secretary of State for the Colonies, although he was influential on Herman Merivale, who did hold that post. His *Government of Dependencies* (1841) is frequently referred to and infrequently read, even less so his *Use and Abuse of Political Terms* (1832). While for modern readers Cornewall Lewis is somewhat of a second-rate constitutional theorist, his contemporary importance, both in this and generally, was much higher. *Use and Abuse* was described by its editor, Raleigh as “the first fruits of John Austin’s lectures.” It was one of the (if not the) first works by a student of Austin. Like Austin, Cornewall Lewis took great pride in delineating his field of study. Like Austin, Cornewall Lewis’ perspective was juridical. He was interested in juridical sovereignty. What makes Cornewall Lewis interesting, therefore, is his willingness to grapple with the contemporary nature of sovereignty, both conceptually and within the British colonial order, at the moment of New Zealand’s founding as a Crown colony, through his specific reliance on Austinian sovereignty (if not entirely method) as the basis for understanding the nature and form of a sovereign government, and of the relations of a dominant and dependent community. Late in the nineteenth century, the philosopher John Dewey credited Hobbes and Cornewall Lewis, rather than Austin himself, with the main version of Austinian sovereignty which circulated during that century: “a careful study of Austin’s *Jurisprudence* has convinced me that the theory that is ordinarily put forward under his name is not his at all. If it belongs to anyone, Hobbes and Cornewall Lewis deserve that it be credited to them.” As Walter Bagehot put it in the 1881: “Mr Austin sized hold of several strong minds, and by the help of these he greatly influenced his time. You will find thoughts distinctly traceable to him far away among people who have never heard of him.”

Lewis was precise about his understanding of, and use of the word, ‘sovereignty’. As he wrote in 1832, in his *Use and Abuse of Political Terms* the book was “intended to assist in assuring the results or detecting the fallacies of political reasoning by putting the reader on his guard against unconsciously passing from one signification of a word to another.” His method was to determine the province of words from “agreed vocabularies”, specifically including the works of those authors with whom he disagreed, such as Blackstone. As method this appears more Benthamitic than

61 George Cornewall Lewis (Thomas Raleigh, ed) *Remarks on the Use and Abuse of Some Political Terms*, new edition, Clarendon Press, Oxford, 1898 (1832). It appears, for example, that his biographer, RWD Fenn, has read neither in detail. They receive only brief passing mention. See RWD Fenn (in association with Sir Andrew Duff Gordon, Bart.) *The Life and Times of Sir George Cornewall Lewis*, Cart., Logaston Press, 2005. One of the only works to consider in any detail is Mark Francis *Governors and Settlers*. Francis does not, however, discuss its precursor, *Use and Abuse of Political Terms*.

62 Ibid, xi.

63 According to Lewis, these questions are the subjects of the science of politics: Lewis, *Dependencies*, Author’s Preface, B2.

64 John Dewey “Austin’s Theory of Sovereignty” (1894) 9 *Political Science Quarterly* 31, 31.


66 Lewis *Use and Abuse of Political Terms*, 2.

67 Ibid, 2.
Austinian, although it may in fact have owed more to Whatley. Austin generally proceeded by taxonomy not agreed usage. Nevertheless, in the particular context of ‘sovereignty’ he noted that certain: “… words owe a divided allegiance to politics and law – there is an imperfect separation of their provinces so they lie on debatable ground. In these, such as right, sovereignty &c, I have followed the definitions laid down by Mr Austin in the outline of his lectures on General Jurisprudence;” Unsurprisingly, therefore, he also used the same sources as Austin, for example, Paley, Bentham and Blackstone. In effect, what results is a genealogy of key terms, perhaps not unexpected from one trained as a common layer. Lewis noted that he had also the “advantage of hearing filled up by Mr Austin, in his oral lectures”, an advantage also enjoyed by Chapman. Along with others of the Bentham circle, including Cornewall Lewis, Chapman attended Austin’s lectures in the early 1830s at University College London, labelling him “a great writer on jurisprudence”.

Cornewall Lewis’ understanding of the absolute nature of sovereignty is placed within the context of the British constitutional structure. Like Austin, Cornewall Lewis was of the opinion that juridical sovereignty was vested in the King in Parliament (and not in those who elect them). Britain was, effectively following Hobbes, a limited (aristocratic) Monarchy. Sovereignty was therefore located in the King, Commons and the House of Representatives. Parliament’s sovereignty is unlimited: “[t]here is no law which it has not power to alter, repeal or enact”. Thus, “it is an error to suppose that sovereign government is not subject to any other than moral restraints, and that it does not possess an absolute and despotic power. All attempts to limit legally the power of a sovereign government by positive laws, promises, compacts, and constitutional checks or balances, are nugatory.”

Austin’s views on law and sovereignty are well-known, and it is unnecessary to devote significant space to them here. In brief, Lewis chiefly based his understanding

---

68 In 1829 Lewis published “An Examination of some Passages in Dr Whatley’s Elements of Logic”, a work also concerned with language and the meaning of words.

69 Ibid. John Austin Outline of a Course of Lectures on General Jurisprudence (1832); In Governors and Settlers, 1992, X Mark Francis suggests that in Government of Dependencies Cornewall Lewis followed Bentham and Hobbes, rather than being directly influenced by Austin. They were of course were also significant influences on Austin. However, Austin’s direct influence would seem to be greater than Francis allows. However, whether Cornewall Lewis captured the subtleties of Austin’s arguments is debateable. Dewey argued not, pointing out, for example, that while Cornewall Lewis recognized the distinction between legal and moral orders, he had no criterion by which to distinguish them: Dewey, “Austin’s Theory of Sovereignty”, 32.

70 Ibid. Cornewall Lewis had also read Martens Treatise on the Law of Nations of 1789, an influential text of the time in Britain, particularly after its translation into English in 1802. Martens, says Cornewall Lewis, states that: “For a State to be entirely sovereignty, it must govern itself and acknowledge no legislative superior but God”: ibid, 41.

71 Chapman “The English, the French and the New Zealanders”, X. Austin’s lectures were not well attended. Enrolments were apparently dismal, although the first of his lecture series, November 1829 – July 1830, was attended by a number of the Benthamite circle: Edwin Chadwick, Edwin Strutt, Charles Buller, JS Mill (who reportedly took the class twice), John Romilly, Charles Villiers: see Lewis (in Morison). Cornewall Lewis attended in 1831.

72 Use and Abuse, 43.

73 Use and Abuse, 41.

74 Lewis, Dependencies, 2
of sovereignty on Austin’s distinction between rights and obligations and powers. According to Lewis, a Sovereign has powers, but it cannot lie under legal (as opposed to moral) rights or duties, as these are the product of positive law, and positive law is the creature of the sovereign.\(^\text{75}\) “Law properly signifies a general command of the sovereign, whether conveyed by way of direct legislation, as in the case of statutes, or of permissive legislation, as in the case of legal rules established by courts of justice.”\(^\text{76}\) All laws therefore are positive laws, and, as a result of the distinction between rights and powers of the Sovereign: “As long as a government exists, the power of the person or persons in whom the sovereignty resides, over the whole community, is absolute and unlimited.”\(^\text{77}\) A government (civil or political) is, in turn, is a body of persons yielding obedience to no superior, who issue commands to do or forbear from certain acts: ie the whole body in whom sovereignty is vested.\(^\text{78}\) Dewey argues that this is where misconceptions arose, that this is pure Cornewall Lewis, not Austin, although that in saying this “… Cornewall Lewis undoubtedly thought that he was representing his Master’s doctrine correctly.”\(^\text{79}\)

This is the conception of sovereignty which underpins Lewis’ *Government of Dependencies*. *Dependencies*, however, has a direct purpose: to explain the nature of the relationship between Britain and her dependencies. Lewis prefixes an essay, a “Preliminary Inquiry” to *Dependencies*. This is an “Inquiry into the powers of a sovereign Government”, a necessary organisational pre-cursor to any discussion of the relationship of dominant and subordinate communities. The section on sovereign power is almost identical to the definitions in *Use and Abuse*. For Lewis then “[a] dependency is part of an independent political community which is immediately subject to a subordinate government”.\(^\text{80}\) This included colonies such as New Zealand.\(^\text{81}\) Whatever the type of dependency, according to Lewis, the sovereign government of United Kingdom (consisting of the Crown and the two Houses of Parliament) is supreme in every British dependency.\(^\text{82}\) This, of course, is not to preclude subordinate governments residing conjointly with the Crown, such as the East India Company or elected body, but in all cases these derive all existence and powers from the sovereign.

While early colonies or plantations were practically independent, and later colonies were generally placed under subordinate government, since the American war, policy had changed.\(^\text{83}\) Lewis’ understanding of sovereignty, as hierarchical and vested in

---

75 Lewis *Use and Abuse of Political Terms*, ibid, fn 1, directly citing Austin.
76 Ibid, 39.
77 Lewis *Use and Abuse of Political Terms*, 41.
78 Ibid, 18-19.
80 Lewis *Dependencies*, 41.
81 For an extended essay on the meaning (and advantages) of colony at the time see JS Mill “Essay on Colonies”. Colony denotes an egress of people from the Mother Country to a new and permanent abode, a territory which is an outlying possession: 3-4. Cornewall Lewis’ definition is almost identical: see *Dependencies*, X. For Lewis, colony is a narrower term than dependency.
82 Lewis *Dependencies*, X.
83 Ibid, X.
Parliament, sits in opposition to concepts of birthright and liberties of colonists, as invoked, for example, in the many American colonies. Lewis is in favour of representative government for colonies. However, this comes not as a result of the inalienable rights of the colonists, but because granted by the sovereign. He declares that what are called inalienable rights, such as birthright and liberty “in most cases never have been rights”. This is because the “theory of the state of nature and the social contract”, from where they originate, is “an absurd and mischievous doctrine”. “All rights must be subsequent to the establishment of government, and are the creatures of the sovereign power.” The supremacy of Parliament in the colonies, and the subordination of the Crown, which exercises a delegated power over dependencies, to Parliament, was, according to Lewis, confirmed by Campbell v Hall. As a result, in those colonies which are a dominion of the King in right of his Crown, the Crown can give no rights which are contrary to fundamental principles, i.e., those laws or rules of law sanctioned by Parliament.

Much of *Dependencies* is taken up with the practice and history of Empires, including the British Empire. For Lewis, if practice is not law, then there is at least a high degree of coincidence between them. Lewis’ empirical descriptions of the British Empire reveal an external structure which perhaps unsurprisingly has come to more closely reflect the internal constitutional structure of Britain post 1688. Austeinian (or Hobbesian) sovereignty and the practical, modern governance of Empire post the loss of the American colonies resemble each other closely. Lewis’ largely Austenian sovereignty is coordinate with the organisational structure of Empire and the practice of governing Empire. This is not an Empire of natural rights, but one of laws posited by the sovereign. It is one of unlimited sovereign power, in which singular juristic sovereignty is firmly (re)located in the Imperial Parliament.

### III. Sovereignty and Jurisdiction

This part returns to Chapman in order to consider his views on the legal ordering of colonial relations through the genre of judgment. What I am interested in is the way in which cases on jurisdiction and the amenability of Maori to British law can be considered as a matter of colonial administration. By the mid-1840s Chapman’s role has changed and the dictates of colonial judgeship colony are not those of London. In this role, sovereignty has to do a different task. As the second judge appointed to the New Zealand Supreme Court, Chapman, along with the Chief Justice, William Martin, plays a key role in the organisation of relations between Crown, settlers and Maori. The legal settlement of New Zealand is a product of a myriad of (legal) encounters and practices throughout the Crown colony period and beyond and this is

---

84 For note of this see Francis, *Governors and Settlers*, ch 2; Miles “Colonial Representation at Westminster”.
85 Lewis, *Use and Abuse*, X.
86 Lewis, *Dependencies*, 33. [Use and Abuses?]
88 Ibid, X.
89 This is hardly a novel conclusion: see, for example, McHugh in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Victoria University Press, Wellington, 1991 as to the increasing co-incidence of internal and external views of sovereignty.
a process in which the Court plays a central role. Thus, what further changes with role here is not just the task of sovereignty, but now sovereignty is addressed to and from a different place. Here, unlike in Parts I and II, the sovereign is no longer an addressee. Rather, as Supreme Court judge Chapman addresses from the position of the sovereign. Seen this way, we are reminded that the courts are one strand of an internally pluralised Crown, and that the complex building of New Zealand sovereignty is an accretion of a number of not necessarily consistent views, not just views held contra the Crown, but within and by the different strands of the sovereign itself.

In the mid-1840s, the position of Maori has become increasingly central to Chapman’s views on sovereignty. In 1845 he authored “The status of the native races considered in relation to the sovereignty”, a work which ‘sets the scene’ for the first decisions on the amenability of Maori to British law in Rangitapiripiri and Ratea later in the decade. In this document, Chapman directly considers the legal relations of Maori and the Crown, and in particular the relationship of Maori and Crown sovereignty. In “The status of native races”, Chapman remains committed to discovery as the mode of acquisition of sovereignty over New Zealand. Given his publications on the matter it would be hard to retreat from that position. However, as noted above, discovery, particularly the discovery of American jurisprudence, is a configuration of sovereignty with consequences. Chapman’s initial remarks suggest that, like Marshall, he was of the view that, at least where acquisition was by discovery, some residual sovereignty may still continue in Maori:

“I apprehend that the Queen’s authority as sovereign by discovery and occupation gives her the clear right – (a right founded in humanity and ______ by the Comity of Nations), to suppress murder and cannibalism – without interfering with the sovereignty of the tribes for ___ purposes.”

If this were such an acknowledgement, Chapman would not have been the first Australasian judge to argue this position. The fact of Willis J’s decision in Bonjon, for example, was widely reported in the New Zealand papers. Chapman was unlikely to be unaware of it, if not necessarily to have read the reasons for judgment. However, Chapman immediately clarifies that: “…there is another principle, which ought to

90 For a discussion of different phases of thinking about the nature of the Crown in New Zealand historiography, and of the recent work on the pluralised nature of that Crown, see Paul McHugh “Sovereignty in Australasia: Comparatively Different Histories” forthcoming Macquarie Law Journal. For work exploring some other aspects of this pluralised Crown see Mark Hickford “Strands from the Afterlife of Confiscation: Property rights, constitutional histories and the political incorporation of Maori”, forthcoming; Damen Ward “Civil Jurisdiction, Settler Politics, and the Colonial Constitution c.1840-1858” (2008) VUWLR

91 For a discussion of Colonial Office policy see Damen Ward “A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia” 1 History Compass (2003), AU 049, 001-024.

92 Chapman [‘Legal Notes’], X.

93 R v Bonjon, published in (1998) 3 AILR 417. For reports in New Zealand see R v Bonjon, published in (1998) 3 AILR 417. See also Damen Ward “Constructing British Authority”; Ford, Settler Sovereignty. For New Zealand reports see New Zealand Gazette and Wellington Spectator 15 March 1843, 3; Nelson Examiner and New Zealand Chronicle 18 March 1843, 216. Note however that these were published prior to Chapman’s arrival.
have restrained any subjects of the Queen from disputing the propriety of an exercise of sovereign power or that right. The principle to which I allude is that the Sovereign de facto is to be obeyed even to the exclusion of the rightful sovereign while out of possession of the throne … the mere declaration of the Queen’s sovereignty over _____ Islands is binding and conclusive on all persons who owe her allegiance and _____ supposing there had been any previous sovereignty in the Islands it would not be entitled to obedience while out of possession.” The result is that: “The practical application of the rule in New Zealand is that no sovereignty of native chiefs (putting the Treaty of Waitangi out of the question) can be legally set up against the authority of the Queen.”

Whether this amounts to an acknowledgment of residual sovereignty in absence of the Treaty is a little unclear. It appears that it does not. In the end, it does amount to a stance of ultimately singular authority, a stance which is reinforced by Chapman’s judgments in *Rangitapiripiri* and *Ratea*, discussed below. Chapman started with the language of discovery, convenient when an advocate for the New Zealand Company. However, once his prime concern is no longer that of acquisition of sovereignty and the relations of Crown and Government, and the matter of the internal legal ordering of the colony becomes paramount, the consequences of residual sovereignty have arguably become less palatable. Despite his acknowledgement that the Treaty could be seen as determining the matter of sovereignty, given that all tribes did not sign, Chapman nevertheless goes to some length to confirm that ultimate (singular) authority is vested in the Crown.

The central concern of Chapman’s 1845 extra-judicial comments was with what he saw as the failure of the Crown to deal with Maori disorder and violence. He decried what he saw as an unacceptable policy of toleration by the Crown of various practices: war, murder, rape, cannibalism. It was the policy of the Crown that laws against the ‘universal rules of humanity’ should not be tolerated, however it failed to either determine which specific customs should be abrogated, or in fact to do so.

However, Chapman had little opportunity to judicially address the matter of toleration. In his opinion, in New Zealand “some Crown officers” had similarly taken the view that no customs of the native tribes howsoever barbarous, savage or repugnant to the laws of God were to be interfered with or put down. Nor could the judges step in:

> [T]he judges cannot constitutionally act until the case is before them. Even an opinion given extrajudicially has no binding force and while the above erroneous view prevails it is not likely the judges will be called upon to decide. The executive will studiously abstain from

---

94 Ibid, X


96 Damen Ward “Means and Measure”.
bringing any case before the court.\footnote{Chapman 'Legal Notes', 23.}

That the Crown officers, the sheriffs and magistrates and others, were unwilling to pursue Maori ‘offenders’ was a view held by many settlers.\footnote{See Dorsett “Sworn on the Dirt of Graves” for examples of this.} In his extra-judicial comments, Chapman’s response to this violence and disorder was to enumerate acts or classes of actions: those that were void \textit{ab initio} on the acquisition of sovereignty, and those which were to be tolerated, but not enforced, by the courts.\footnote{Ibid, 22.} In the first category he lists six matters. These are largely in line with Colonial Office policy: private war or war of tribe against tribe; murder including infanticide; cannibalism as encouraging murder; wounding and maiming; rape; and (perhaps) slavery. In his second list, he includes customs to which tacit sanction may be given. He qualifies this, however, by noting that this must be permissive only and that “no aid should be given by the tribunals to enforce them”. In this category is “slavery (if permitted at all); claims for ‘utu’, ie satisfaction as retaliation; polygamy; and the Polynesian rite of tapu”.

Importantly, once the practices listed in the first category were abrogated, disorder and violence and could be transformed into crime. These could then be dealt with by and through the positive law of the sovereign. In 1847 and 1849 Chapman heard the first \textit{inter se} cases in \textit{Rangitapiripiri} and \textit{Ratea}.\footnote{In fact, the first decision was probably a case of theft, \textit{R v E Poti}, determined by Martin CJ in 1842. However, the newspaper report makes no comment on this being an \textit{inter se} case, although the fact was not lost on local newspaper editors: \textit{R v E Poti}, 7 Oct. 1842, Supreme Court, Wellington, Martin CJ, reported in \textit{New Zealand Gazette and Wellington Spectator} Oct. 19, 1842, 3. For comment see Editorial, Ibid, 2.} While his earlier writings had considered acquisition of sovereignty, and then the relations of sovereignty to Maori, it had not considered the internal ordering of laws under that sovereignty. Here, therefore, the interest is in his approach to jurisdiction as a way in which legal science could be put to work as a mode of governance, a pragmatic response to the conditions of the colony, violence and unacceptable practices, and the ordering of legal relations between settlers and Maori.

In 1847, \textit{Rangitapiripiri} was indicted for the murder of Koperene by drowning him in a river, while in 1849, \textit{Ratea}, alias Kai Kararo, was indicted for the murder of Parata Wanga some years before. At the time of Ratea’s crime (1843) there was much speculation on the part of settlers as to the amenability of Maori to British law, both \textit{inter se} and in their dealings with settlers. Although Maori had been tried under British law from 1840 (and purportedly before), the problems of, and sometimes reluctance to, actually enforce the law against Maori often led settlers to question whether they were actually subject to British law.\footnote{Some of this is detailed in Dorsett “Sworn on the Dirt of Graves”.} It was not until 1847 that the first \textit{inter se} case of any note came before the Supreme Court. In determining jurisdiction, Chapman did not hesitate to apply British law, framing the discussion within the remit of British Imperial law. Following his earlier extra-judicial comments, in \textit{Rangitapiripiri} Chapman J held that the ‘general rule’ was that ‘when a country came into the power of another, by cession or conquest, … that the laws of the ceded
country were in force amongst the natives of that country, unless they were contrary to humanity or the Christian religion…: - in cases of murder the general rule prevails'.

Two years later, in Ratea, Chapman J applied the same framework. Chapman went on to explain in Ratea that: “in smaller matters of custom the Court would not interfere, but would suffice the native laws to prevail among themselves; but in so grave an offence as that of murder, those laws would cease the moment the superior power came into the sovereignty”.

What is most noticeable about these decisions is the movement from the earlier language of discovery to that of conquest/cession. Maori sovereignty having been conveniently parted with by the Treaty, Chapman can then apply those rules of British Imperial law relating to conquered/ceded colonies. A new sovereign regime is in place. Most importantly, those include rules on abrogation of local laws, albeit not specifically indigenous laws and custom. Chapman effectively applies the *Case of Anonymous*, as previously outlined in his extra-judicial comments: ‘such of the native laws and customs as are repugnant of the Christian morality are mala in se (which ought to mean the same thing or are silent) are ipso facto void ab initio’. This simply means that any laws which are repugnant of Christian morality or wrong or evil in themselves are considered to be voided automatically on a change of (the acquisition of) sovereignty. No further action was required by the Crown. In his comments, Chapman had outlined a number of customs from around the Empire which he deemed to be intolerable, but which had in fact been both tolerated by the Crown, and even enforced by the Courts. For Chapman, such barbarous rites “ought to have been put down the instant we had the power to do so…”. However, they were tolerated ‘through weakness or oversight’ and now the “permission has grown into an antient custom which the courts of their own authority do not feel themselves justified in breaking in upon and which therefore now requires either an act of Parliament or at least a specific declaration of the will of the sovereign to abrogate”. Chapman would not make that mistake. His court would, and did, put them down the instant it had the power of judgment.

Sovereignty, therefore, provides both the power to judge and the form of judgment. Only if transfer of sovereignty has occurred can abrogation occur. Chapman arrogates to himself a power that other Crown officers will not exercise. While discovery was a useful tool as advocate, as judge Chapman required sovereignty to do a different task. Failure by the Crown to determine the relations between British law and Maori custom had led to intolerable practices, practices which needed to be dealt with. Chapman may well have been aware that that “small matters of custom” were not always being left to Maori themselves – they were being heard by the Courts. But it did not matter, Chapman’s concern was not the smaller everyday matters of colonial life and law, it was the larger problem of the legal ordering of the colony and the

---

102 *New Zealand Spectator and Cook’s Strait Guardian*, Dec. 4 1847, 3.
103 *New Zealand Spectator and Cook’s Strait Guardian*, 5 Sept. 1849, 3, and in substantially similar terms the *Wellington Independent* Saturday 8 Sept. 1849, 3.
104 Chapman, ‘Legal Notes’, X. This phrase is taken almost verbatim from *Case of Anonymous* (1722) 2 P. Wms 75 (24 E.R. 646). Note the misplaced closing parenthesis. The phrase should read: ‘such of the native laws and customs as are repugnant of the Christian morality are mala in se (which ought to mean the same thing) or are silent are ipso facto void ab initio’.
ability of the Crown (the Courts if not other officers) to effectively manage internal colonial relations.

As well as his background in radical politics, like Cornwell Lewis Chapman had been exposed to the world of the ideas of the first part of the nineteenth century. As indicated above, he both sub-edited Bentham’s Works and attended Austin’s lectures. The influence of Bentham is obvious in his earlier, non-legal, works, particularly for Pamphlets of the People. His approach to colonisation, and support for the ‘Wakefieldian approach’, is utilitarian. However, the extent to which Austin’s ideas, for example, influenced his later legal writings is unclear. Other than in “The English, The French and the New Zealanders”, Chapman does not directly reference Austin. However, as Pocock reminds us, documents may reveal more than the author intended to convey, the author’s language being moulded by the conditions of the world in which it was shaped.  

Chapman does have commonalities with Cornwell Lewis. His judgments in Rangitapiripiri and Ratea are conducted within the framework of positive law, and (possibly reluctantly) within that of singular authority. He eschews the natural rights approach of Willis’ Bonjon or even Forbes’ Ballard. As he tells us in “The French etc”, “Law is a Command”. How far he further agreed with Austin is unclear and may never be known. Did he, for example, see Maori custom as uncivilized and less than law, as it had no single authority? In the Dublin Review he did comment on the it “…customary regulation – we should be ashamed to call it law – of the natives tribes.” But this in itself is inconclusive. Nevertheless, although the influences may be subtle, and even unattributed, they are evident in the approach Chapman takes to colonial administration of the colony in New Zealand.

IV. Concluding Comments

What emerges from Chapman’s extra-judicial comments and judgments is a sovereignty which while perhaps singular, is not absolute. Chapman’s sovereignty is not yet the Leviathan sovereignty of Cornwell Lewis’s British Empire (or even overtly the increasingly conflated territorial sovereignty/jurisdiction of the Australian colonies). Within Empire there are still many sovereignties: of Empire; of colony; of ‘the natives’. Their precise configuration in any time or location is in part a pragmatic decision of the dictates of colonial administration. Sovereignty gives the power to abrogate and to order, but Chapman’s exercise of this is pragmatic. He is well aware that the Crown is not in a position to enforce law and order throughout the colony and that Maori continue to live in many areas under their traditional laws. It would be impossible to assert jurisdiction over every “small matter”. Chapman saw

---

108 Chapman “The English, the French and the New Zealanders”.
109 [Chapman] Dublin Review, 208
110 See R. v. Murrell (1836) 1 Legge 72; (1998) 3 A.I.L.R. 414, available at <www.law.mq.edu.au/>; Ford, Settler Sovereignty; R. v. We-war (Wiwar), Court of Quarter Sessions, Perth, W.H. Mackie and Bench of Magistrates, 9 January 1842, reported in The Inquirer, 12 January, 1842, available at <www.law.mq.edu.au/>. For an alternative report see The Perth Gazette and Western Australian Journal of 8 January 1842, 2. While the web version dates this case to 9 January, the Gazette dates it to 3 January 1842. This appears to be the correct date.
the Crown as having just enough sovereignty for the task of governance at hand.\footnote{Further, while cases such as \textit{Rangitapiripiri} and \textit{Ratea} can provide a useful ‘window’ through which to glimpse the formation of juristic sovereignty in a Crown colony such as New Zealand, they are only one window. In order to fully consider this process, other constitutional matters need to be explored. Damen Ward has begun this process. See Ward “Civil Jurisdiction”.}

For both Chapman and Cornewall Lewis, juristic sovereignty can be made to do particular tasks of organization. Their legal ordering of Empire and colony is a shuttling between the practical dictates of governance and systematic logic or knowledge: constitutionalism as norm and practice. For Chapman, the legal settlement of the colony is organized between pragmatic dictates and the structure and juristic language of particular accounts of the common law. For Cornewall Lewis, Empire and colony are forged between bureaucratic policy and the early 19th century discourse of positive laws and singular sovereignty.

At any time, sovereignty is configured through a complex account of law, practice and pragmatics (none of which exist in isolation). In recent work (including my own) there has been some emphasis on thinking through legal settlements using legal concepts such as that of (sovereignty and) jurisdiction. By organising around ‘colonial administration’ this paper attempts to re-adjust my approach to hold jurisdiction and sovereignty more fully in tension with the pragmatic politics of colonial settlement, looking at the tasks that can be achieved by concepts such as sovereignty. How practice and systematic knowledge together become crystallized as juristic sovereignty still requires much consideration, not only with respect to New Zealand, but across Empire. On a larger scale, therefore, colonial administration as method of rhetorical organization might be a convenient topic through which to begin to think about how an accretion of different elements of (contextualized) practice, discourse and legal science crystallized into juristic sovereignty in the second quarter of the nineteenth century. Colonial administration holds together a diverse range of practices across a range of genres in order to think through their relations. To organise around a topic such as colonial administration is to pay attention to a particular set of questions: What task is sovereignty to perform in this time and place? What is the role of the speaker? Who is the addressee? In this way, such a technique of organisation might be thought of as a kind of historical jurisprudence. It is a way of organising practice and jurisprudence or systematic knowledge so as to comprehend different repertoires of argument over the formation of configurations of sovereignty.