‘THIS INTRICATE QUESTION’ - SOME REFLECTIONS ON MĀORI PROPERTY RIGHTS, CUSTOM AND CONSTITUTIONALISM IN THE 1840S

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DRAFT ONLY

I propose to tell part of a larger story of how legal sources on the common law and ius gentium the law of nations fared when carried across the seas and brought into touch with indigenous norms and usages on property and the authority to speak upon it. I argue that policymakers and officials saw common law sources and those of ius gentium as inadequate insofar as incorporating Māori narratives as to the content and substance of indigenous customary property rights within New Zealand in a way that assuaged intra-European politics. How formulators of policy responded to others who said otherwise in the later 1840s reasserted the pre-eminence of local colonial administration rather than non-governmental actors in commanding the material and intellectual resources for political negotiation at a number of points with ongoing Māori political autonomy – for that is what it was. Deeds of purchase were used to quiet not only the proprietary interests in territory which Māori polities might claim but also the normative indigenous authority or jurisdiction to determine how such resources might be allocated and to whom. The residuum of ‘sovereignty’ regarding the allocation of resources was to be addressed and silenced. A place was cleared for the making of untroubled Crown grants under the royal prerogative to others. So the aspirations of theory and at least the look of practice went.

This was not a historiographical question of the application of English law to indigenous subjects pace Lauren Benton, Lisa Ford and others, and the amenability of such subjects to the introduced courts. Rather, it entailed two questions: first, the extent to which transposed legal sources were capable of imbibing the translation of diverse indigenous voices regarding claims to property and natural resources; and, second, whether such sources introduced with settlement were reshaped at all or remained relatively insulated and untouched. A distinct preference for sorting out the nature of Māori tenure in land and natural resources politically from time to time rather than working through the juridical and philosophical underpinnings of legally binding recognition of such tenure was in evidence. The debates around this issue came to characterise a key element of

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how the conduct of pākehā constitutional politics came to be conceived and how these politics dealt with both theoretical and practical indeterminacy and disagreement. Abetting this approach, towards the end of that decade and beyond, we begin to find explicit musings on the non-justiciability of native title within New Zealand; that is, it was viewed as not legally enforceable in the ordinary courts against the Crown or its grantees. Nor was it seen as especially translatable in English law terms of fee simple and leasehold estates, tenements and easements, a view with consequences for the constitutional positioning of Māori under the franchise.

This essay draws out and builds upon themes in my earlier work by arguing that the application and understanding of these legal sources were ‘regionalised’ and varied not merely in the localities of a colony within the field, as it were. They were also ‘regionalised’ within the imperial metropole itself.

New Zealand supplies a rich profusion of debated material on this subject. Neither the New Zealand Company nor the Colonial Office saw transposed legal norms as sufficiently accommodating to incorporate Māori determinations as to what custom said about the nature and extent of Māori tenure in land. Yet each assumed this view for different reasons. The New Zealand Company and a number of its political allies in Westminster and in New Zealand claimed that sources on the common law and law of nations (ius gentium) were omnicompetent insofar as sorting out the proper nature and scope of Māori property rights in natural resources (land principally) and the interaction between Māori tenure, political autonomy and the introduced legal regime from 1840. The Colonial Office generally disagreed with this claim for much of the 1840s, arguing that neither the common law nor the law of nations had little of substance to either say or add to its policy preferences. It did not necessarily accept that the common law was sufficiently flexible to assist in co-ordinating the co-existence of customary property interests of Māori communities (howsoever conceived), and the adjustments wrought by an introduced system of English tenure (in the limited areas where that tenure was effective). Introduced common law sources or those of the law of nations were not to be taken as a guiding discipline by which interactions between the Crown and indigenous populations within New Zealand were best addressed.

The Aborigines’ Protection Society in London, the chief justice (William Martin) at times, and various missionaries on the ground within New Zealand, as well as their parent societies in Britain, thought otherwise. But this last group of participants in debate thought differently on the

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3 I am using the concept of ‘tenure’ rather imprecisely and broadly as connoting an interest in, or holding of, land as property. In the strict sense, it is not necessarily appropriate, at least under current legal-policy theory within New Zealand, to speak of ‘tenure’ when analysing customary interests, as the use of tenure is ordinarily taken to imply the doctrine of tenures and the hierarchically tiered tenurial regime of land-holding either mediatly or immediately of the Crown: for instance, the category of ‘customary land’ under Te Ture Whenua Māori Act 1993 is not consistent with this sort of technical approach to the doctrine of tenure.
basis of interpretations of the common law and law of nations differing from those of the New Zealand Company. Their arguments were certainly framed as approaches drawn from the intermingling of common law and law of nations sources. Yet their translation of such sources signalled important differences in emphasis and understanding from those which the Company advanced. As a whole, these tissues or strands of conversation and dispute contributed to and refreshed the overall image of what I have referred to as an ‘empire of variations’. They tell us something about ways in which legal sources were used in the politics of trans-oceanic empire, as well as the local patterns and regional variations that affected the translation of these sources into novel environments. In essence, what was at issue was the ongoing and vexed question of the intersection between indigenous norms and values regarding natural resources and an alien legal regime transposed across the seas. The problem was that of showing how such imported laws might interact with bodies of information about different and changing human experiences and practices derived from indigenous sources. What we find at these points of intersection and tension are considerations about the suggestive linkages between claims to property in natural resources, such as territorial space and indigenous political autonomy to determine how settlements might relate to these resources. It is in the debate in the first decade of New Zealand as a Crown colony between a corporation in favour of the systematic colonisation of New Zealand (styled the ‘New Zealand Company’ or ‘New Zealand Land Company’) and the Colonial Office that we see these issues cast into distinct relief.

Also at issue was the role, if any, of vocabularies of common law and the law of nations in mediating and co-ordinating the intersection between indigenous norms and a novel legal regime that travelled with the Crown and its cross-party settlers. Law was one of the ways in which a particular usable sense of the past and the present were united. But it proved to be less than adept at accommodating the diverse range of voices and narratives regarding customary conceptions of property not to mention the change in such conceptions. The report of a board appointed to inquire into ‘the system of purchasing land from the Natives’ in 1856 amply reflected this

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perceived inadequacy and the privileging of political options for sorting out the practice of interacting with Māori interests in natural resources. The board’s report stressed the flexible policy and political practices of engagement with Māori rather than the juridical aspects of engagement. In this sense, we see in New Zealand in the 1840s and 1850s, a set of debates (still unresolved there and elsewhere) about the determinative power and place of indigenous custom in common law concepts and in anglophone politics.

These intra-European disputes particularly arose regarding the ordering of beachhead settlements and the acquisition of space for those settlements. Different understandings of these important architectural features of colonial New Zealand – the role of the incoming Crown, the occupation of land, the disciplining effect of pre-existing property rights of Māori and Māori political autonomy upon both the introduced Crown and its immigrant subjects – churned the political waters of both colony and imperial metropole. These differences and the manner in which they were expressed in law and politics represented a form of constitutionalism. I say this because they reflected efforts of the various participants in those debates to explain the form and substance of the Crown introduced to New Zealand, as well as the legitimacy and scope of its authority to sort out proprietary rights within the colony. Constitutionalism was both enabling and restraining in terms of politics. By using ‘constitutionalism’, therefore, I am not restricting it narrowly to what some have called ‘negative constitutionalism’ or conceiving of constitutional arrangements as principally directed towards restraining state activities, often through legal means.

Addressing the place of indigenous custom within or alongside the legal and political approaches freighted in by settlers was not, of course, a novel predicament. Paul McHugh, Lisa Ford, Shaunnagh Dorsett and Damen Ward have examined this question in examining colonial claims to jurisdiction concerning indigenous populations. As an issue, it had undoubted

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7 Refer to report of board (C.W. Ligar, Major Nugent, W.C. Daldy and T.H. Smith), transmitted to the House of Representatives of New Zealand, 9 July 1856, enclosed with Gore Browne to Labouchere (received 28 November 1856), Great Britain Parliamentary Papers (‘GBPP’) 1860, xlvi, [2747], 237-245.

8 For illustrations of differing approaches to this question in the recent past, compare section 32 of the Foreshore and Seabed Act 2004 (territorial customary rights in the public foreshore and seabed) with the definition of ‘Māori customary land’ appearing in section 129(2)(a) of Te Ture Whenua Māori Act 1993 (‘Land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land’). For an analysis of the evidential and conceptual difficulties posed in litigation by the tendency of certain officials to focus upon the evidence of the physicality of use and occupation in a part of the early twentieth century, refer to Hickford, ‘John Salmond and Native Title in New Zealand: Developing a Crown theory on the Treaty of Waitangi, 1910-1920’. Victoria University of Wellington Law Review 38 (2008), 853-924. For a suggestive plea for the sensitive accommodation of tikanga, refer to Alex Frame, Grey and Iwikau: A Journey into Custom, Kerei Raua ko Iwikau: Te Haerenga me Nga Tikanga (Wellington, 2002).


10 Refer to the useful discussion in Duncan Ivison, ‘Pluralism and the Hobbesian Logic of Negative Constitutionalism’ Political Studies 47 (1999), 83-99.

resonances elsewhere within Britain’s early nineteenth-century empire and at much earlier times. John Davies, the attorney-general in Ireland from 1606 until 1619, had asserted in a treatise published in 1612\(^\text{12}\) the corrupting unhelpfulness of permitting Gaelic law and custom to continue to apply within Ireland.\(^\text{13}\) Sophisticated legal histories have emerged to analyse these claims to jurisdiction in the early part of the nineteenth century. Ward, for one, has recently commented on the alignment between sovereignty and jurisdiction in South Australia and New Zealand, as officially promulgated through the Colonial Office in London.\(^\text{14}\) Yet the emphasis in this essay is upon the treatment of what were presented as customary accounts of Māori property rights and the manner in which such accounts were interwoven with imported juristic sources, if at all. Accordingly, my interest here is in both the conceptual and practical meeting places between information and intelligence obtained from Māori sources within New Zealand and sources drawn from *ius gentium* and common law regarding property in land and other resources.

A non-juridical space for transposed legal sources on property rights

These contested approaches on property rights in the 1840s and 1850s demonstrate something of the sinuosities of common law opinion and argument, and its limitations. The disputes also reveal the breadth and dynamism of voices contributing to imperial policy formation on the property rights of Māori and settlers both in New Zealand and in Britain. To adapt a phrase of J.G.A. Pocock, policy processes within the imperial and colonial Crown were pressed to include new categories of counsellors and representatives, drawn from out-of-doors (whether from the New Zealand Company, settlers based at Auckland or elsewhere).\(^\text{15}\) Various vocabularies drawn from common law sources or texts concerning *ius gentium* were used to ease this process of political suasion and of seeking influence.\(^\text{16}\) They were a currency of argument and conversation. The Colonial Office certainly neither inhabited nor exhibited a ‘common law mind’, to use a phrase associated with the nuanced historiographies of English constitutionalism in the early seventeenth century.\(^\text{17}\) Rather, government regulated the supply of legal recognition accorded to certain

\(^{12}\) John Davies, *A Discovery of True Causes, why Ireland was never entirely subdued, nor brought under Obedience of the Crowne of England, until the Beginning of his Majesties happie Raigne* (London, 1612), 272.

\(^{13}\) Nicholas Canny, ‘The Intersections between Irish and British Political Thought of the Early Modern Centuries’ in David Armitage ed., *British Political Thought in History, Literature and Theory*, 1500-1800, 67-88, 80.

\(^{14}\) Ward, ‘Constructing British Authority in Australasia’, 489-491.

\(^{15}\) Pocock’s memorable phrase referred to the ‘medieval technique of expanding the king-in-parliament to include new categories of counsellors and representatives’ in his *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, rev. ed. 2003), 547.

\(^{16}\) Hickford, ‘Making “Territorial Rights of the Natives”’.

practices and values, as opposed to others. The threat of the withholding of recognition proved to be a potent one, particularly as secure and legally unchallenged Crown-granted titles had failed to materialise in key settlements, such as Wellington, even by the mid-1840s. As such, the imperial administration and its representatives within colonial New Zealand used claims to property rights recognized at law as levers to be deployed in sorting out land distribution to settlers and therefore as conducive to state formation. It preferred relatively free-floating politics and policy to doctrinaire positions nourished by texts on the common law or law of nations although these sources might be of use from time to time. The recognition of undefined ‘territorial rights of the natives’ was a vector for disciplining settler conduct together with the pace, spatial extent and distribution of settlement.

As I have argued elsewhere, from 1840 the New Zealand Company and its political allies in Britain were the principal drivers in using northern American jurisprudence on relations between Amerindians and increasingly intrusive colonial polities. In effect, it was claiming an entitlement to influence policy outcomes at Westminster and in New Zealand, largely through actively nourishing and using the networks of its directors and members in the House of Commons and in commercial enterprise. A cluster of northern American sources was gathered up and deployed, specifically James Kent’s *Commentaries on American Law* and Joseph Story’s *Commentaries on the Constitution of the United States*, as well as reports containing the judgments of the Supreme Court of the United States during the period of John Marshall’s tenure as chief justice (from 1801 until 1835). I have traversed the ways in which these juristic texts were deployed in the New Zealand context before, largely with an emphasis upon the entwining of these texts with assumptions about the placement of Māori horticulture within stadial history – history divided into stages – and on the resistance of the Colonial Office to these travelling legal sources.

The American jurist and justice of the United States Supreme Court, Joseph Story, observed in a chapter on the ‘origin of the title to [the] territory of the colonies’ in the 1833 edition of his multi-volume text containing *Commentaries on the Constitution of the United States* that the
aboriginal inhabitants’ or ‘natives’ populating the eastern seaboard of northern America were ‘admitted to possess a present right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the [European] discoverer’. 23 Story, adapting the collected jurisprudence of the United States Supreme Court on this topic during Marshall’s time as chief justice, stated that the Amerindians were ‘admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion’. 24 ‘In a certain sense’, he said, ‘they were permitted to exercise rights of sovereignty over it’. 25 At this point, questions of indigenous rights of occupancy and modified authority or ‘sovereignty’ were entwined. Some of what Story surmised was readily traceable to aspects of the decisions of the Marshall-led court in Johnson v M’Intosh (1823), Cherokee Nation v Georgia (1831) and Worcester v Georgia (1832) and a Marshalllesque tone characterised the language of his text. Thus, he treated Marshall’s characterisation of colonial history in the Johnson decision and elsewhere as accurate without demur and he recounted that the indigenous populations ‘might sell or transfer [the soil] to the sovereign who discovered it; but they were denied the authority to dispose of it to any other persons’. But, in elaborating upon this point, Story pursued the analysis of the significance of this sort of characterisation further and suggestively. Hence, he added the remark that, ‘until such a sale or transfer, they were generally permitted to occupy it as sovereigns de facto’ if not de jure.26

Furthermore, numbered amongst the fragile idiosyncrasies of the Native American ‘right of occupancy’ was that, ‘notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil, while yet in the possession of the natives’. In this, he certainly echoed the language of Marshall in Johnson v M’Intosh, and a view expressed in that decision which certain commentators have since considered controversial.27 Yet again Story contributed an interesting gloss in adding that the ‘title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treaties of public law, it was a transfer of plenum et utile dominium [by which he meant the passing of the full right of property in the space, including an entitlement to complete enjoyment of the fruits of such property]’. 28 Elsewhere, Story cited Worcester v Georgia, James Kent’s Commentaries on American Law and Thomas Jefferson’s correspondence as the basis for the view that, ‘the title of

23 Story, Commentaries on the Constitution of the United States: with a preliminary review of the constitutional history of the colonies and states, before the adoption of the Constitution 3 vols. (Boston, 1833), I, 7. Story dedicated this text to the then chief justice of the United States Supreme Court, John Marshall: ibid, I, iii-iv (January 1833).
24 Ibid., I, 7-8
25 Ibid., I, 8.
26 Ibid.
27 For instance, refer to Stuart Banner, How the Indians Lost their Land: Law and Power on the Frontier (Cambridge, Mass., 2005), 168-190. But see Hickford, “Decidedly the most interesting savages on the globe”: An Approach to the Intellectual History of Māori Property Rights, 1837-1853’, 152, which refers to a 1765 legal opinion by John Kempe, then the attorney-general for the colony of New York.
the Indians was not treated as a right of propriety and dominion; but as a mere right of occupancy’. He averred that as ‘infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute sovereign and independent nations’, using the past tense not only to distance this alleged historical practice but to also acknowledge and assert that the United States of Story’s time had been constructed on, and was an inheritor of these tales of foundation.

The New Zealand Company and its affiliates used these sorts of sources for different purposes at manifold points on a case-by-case basis. Initially, the emphasis of the New Zealand Company in 1840 was upon privileging James Cook’s landfall upon New Zealand shores in 1769 and 1770 during his first circumnavigating voyage as a ‘discovery’ of New Zealand. On this analysis, following the decisions of the Supreme Court of the United States in *Cherokee Nation v Georgia* (1831) and *Johnson v M’Intosh* (1823), such ‘discovery’ was imbued with legal effect. It was treated as establishing the pre-eminence of the sovereign rights of the United Kingdom as against other European polities. Henry Chapman, the editor of New Zealand Company-sponsored periodical *The New Zealand Journal* (until 1842) was sufficiently circumspect in April 1840 when claiming that United States jurisprudence on such relations was relevant to New Zealand in leaving the question of the substance of territorial rights of Māori relatively moot. He stated that it, ‘must be clear that the rights reserved to the nature tribes could only be of a modified character, but whether those rights were abridged or extensive – whether they were confined to a mere right of occupation, or amounted to something deserving the name of sovereignty, was a question which did not affect the relation between the discovering nation and other civilised powers’. He would, however, express his views upon the quality of such ‘rights [that might be] reserved to the native tribes’ in New Zealand much more clearly in other periodical literature. Thus, writing anonymously in *The Dublin Review* also in 1840, Chapman wrote that the ‘New Zealanders would civilize easily’ in the aftermath of the arrival of the New Zealand Company-funded expedition to enter into ambitious deeds of purchase with certain coastal Māori communities and to found settlements in 1839. ‘This was because, ‘[i]n the first place they were never hunters, as there never were animals to hunt; hence they commence at a stage of civilization somewhat removed from utter barbarism’. As they were perceived as a population of horticulturists and cultivators of the soil, Chapman expressed the view that a ‘breadth of land would be valueless’, a point arising out of the entwining of stadial theory and *ius gentium* that I have discussed in detail in preceding work. Hence, Chapman argued, as ‘[t]hey cannot use much land, they are therefore well provided for, in

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29 Ibid., I, 135.
32 Ibid., 198. Refer to Hickford, ‘“Decidedly the most interesting savages on the globe”: An Approach to the Intellectual History of Māori Property Rights, 1837-1853’.
proportion as they are taught to use a little land with effect’. He would re-iterate and further develop these approaches in a contribution entitled ‘Zealand, New’ to Macvey Napier’s edition of *The Encyclopaedia Britannica* in 1842. Chapman, a regular correspondent with John Stuart Mill, would remain connected with Company interests throughout the first decade of the Crown colony in New Zealand. In July 1841, he travelled throughout northern England, ‘for the purpose of disseminating information respecting the colony and the objects of the Company’.

The understandings of common law and *ius gentium* brought with them their own senses of local customary usage but in a fashion distinct from voices indigenous to New Zealand settings. The precise manner in which these types of law internalised a sense of custom indigenous to their host jurisdictions is a subject matter in its own right, which I cannot presume to deal with fully here (although it is worthy of separate jurisprudential attention). The contributor on ‘custom’ to the seventh edition of *The Encyclopaedia Britannica* issued in 1842 stated that it was ‘a comprehensive term, denoting the manners, ceremonies, and fashions of a people, which having turned into habit, and passed into general use, obtain the force of laws’. It was thus defined, said the author, ‘both by lawyers and civilians, *lex non scripta*, a law or right not written, established by long usage and consent of our ancestors; in which sense it stands opposed to the *lex scripta*, or the written law’. Jeremy Bentham had distinguished between two forms of custom that might comprise customary norms legally binding on oneself and one’s fellows: custom *in foro* or the custom of and recognised by a population of legal officials and custom *in pays* (the custom of a population of legal subjects). These sorts of sophistication did not accompany the instructions from London or Auckland for colonial administrators to acquire functional information as to the ‘territorial rights of the natives’. In December 1842, protectors of aborigines within New Zealand were directed to furnish reports on ‘the nature of the holding of landed property among the aborigines of New Zealand, settling the more particularly whether they have an individual right or a common right or interest in the soil and what is the right or interest of the chief’. Yet, there was no sense of the information to be so obtained as co-mingling with the notions of, say, English customary usages endemic within the common law travelling to New Zealand. That is, the imported common law would not accommodate such officially-mustered information and render it juridical – something

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33 Ibid. In this passage, Chapman was adverting to the utility of the New Zealand Company’s proposal that reserves for Māori be scattered amongst the sections for settlers within Company settlements.
34 Refer to minutes, court of directors, New Zealand Company, 22 July 1841, CO208/181, fo.111, National Archives, Kew, London (hereafter ‘NA’).
36 Ibid.
that could be unravelled and tested in the ordinary courts. There was to be no casual convergence between the two types of sources.

In the main, these policy disputes wrestled with the problematic concept of ‘occupancy’ (occupatio)\textsuperscript{39} and its apparent stress upon the significance of physically tangible forms of interaction with a landscape (such as cultivating crops and constructing fortifications or dwelling places). The New Zealand Company and its political fellow-travellers preferred to focus upon this sort of evidence of a material footprint upon the landscape rather than more intangible signs of connection to place – memorialised narratives of genealogical connections to certain sites or resources, accounts of remembered warring or of voyaging across territories, recited tellings of vying with competitors for prestige. Indeed, many of these subtleties were rubbed out, assessed as capriciously driven or motivated, as unduly complex, or as irrelevant or unhelpful archaisms (although that is not to say that these sorts of accounts would not claim places of relevance in the future). We see this complex process in action throughout the decade starting in 1840, the year in which the Crown formally asserted British authority within New Zealand. Profoundly tied to questions of ‘occupancy’ were issues about locating the identity or identities of those who had authority to speak for certain areas and resources – to whom should officers of the intrusive Crown speak? These were as much questions of authority and jurisdiction, as they were of property.

We all know that the conceptual and practical difficulties attending ‘occupancy’ were neither novel nor unheralded. David Hume, for one, had contended in 1739-1740 with the complexities of handing ‘the idea of property to the first possession or to occupation’.\textsuperscript{40} To illustrate the possibilities for profound disagreement on the question of what counted as ‘first occupancy’ and the difficulty of reaching either reasoned or intuitive answers, Hume recited an ancient tale (already told by Plutarch, Hugo Grotius and Samuel Pufendorf). He told of ‘two Grecian colonies, leaving their native country, in search of new seats’.\textsuperscript{41} Each colony, informed of a ‘city near them ... deserted by its inhabitants’, launched two messengers between them ‘who finding on their approach, that their information was true, begun a race together with an intention to take possession of the city, each of them for his countrymen’. Critically, recounted Hume, ‘[o]ne of these messengers, finding that he was not an equal match for the other, launch’d his spear at the gates of the city, and was so fortunate as to fix it there before the arrival of his companion’. This event sparked ‘a dispute betwixt the two colonies, [specifically] which of them was the proprietor of the

\textsuperscript{39} As noted above, I have addressed this conception previously albeit from the perspective of the entwining of stadial histories and \textit{ius gentium} in debates concerning the proprietary rights of Māori populations: refer to Mark Hickford, ‘“Decidedly the most interesting savages on the globe”: An Approach to the Intellectual History of Māori Property Rights, 1837-1853’, 122-167.

\textsuperscript{40} David Hume, \textit{A Treatise of Human Nature}, edited by David Norton and Mary Norton (Oxford, 2000), 324 (emphasis in original).

\textsuperscript{41} Ibid., 325, note 73 (emphasis in original) (§3.2.3: ‘Of the rules, which determine property’).
empty city’ and the dispute, observed Hume, subsisted to his day amongst the philosophers.\textsuperscript{42} One authoritative English-language source published in 1842 associated the ‘occupancy’ of non-agricultural populations with a constrained form of proprietary interest that did not harbour the complete range of attributes or incidents of an estate in fee simple, for instance. But it was also the foundation or point of origin for a much more substantive sort of proprietary interest in the underlying soil. Thus ‘occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the substance of the earth itself which excludes everyone else but the owner from the use of it’.\textsuperscript{43} Patrick Matthew, an enthusiast for colonial settlements as fields for British emigration, had written in 1839 that ‘[c]ultivation labour laid out upon land constitutes the best property right’.\textsuperscript{44} As such, the ‘property right in uncultivated land by aborigines, who subsist only by preying upon the fere naturæ is defective; and this is more especially so, when the aborigines are sunk so low in barbarism, as to be incapable of instituting a regular government to protect property’.\textsuperscript{45} Whilst technical meanings of ‘occupancy’ and ‘occupation’ in international law and the common law doctrine of tenure could be expounded in textbooks, their impact on pre-existing populations was not so apparent.\textsuperscript{46} The complexities of initial and ongoing ‘occupancy’ conceptually and what it might look like in terms of observable conduct or habits were well appreciated. There was, however, no necessary concurrence on these matters. In such circumstances the realm of politics became pre-eminent in working through what was to be done even though the deployment of legal sources marked many of the key conversations within this realm.

A persistent focus upon the physicality of ‘occupation’, and its limitations within a New Zealand context, proved to be a central interpretative trope about which meaningful conceptual consensus was not achieved. There was, however, a problem for a conceptualisation of proprietorship predicated upon physical interaction with the landscape rather than Māori norms and usages per se. Certain critics of the New Zealand Company, for instance, would insist that a study of what purported to be ‘custom’ must move in a particular cultural idiom or vocabulary; it must encompass ideas about proprietorship that went beyond the frame of purely visible evidence of physical activity or forms of occupation. The legal imagination and legal–policy preferences of New Zealand Company representatives and political allies as to what indigenous ‘property’ ought

\textsuperscript{42} Ibid.
\textsuperscript{43} ‘Property’, \textit{The Encyclopaedia Britannica} (Edinburgh, 7\textsuperscript{th} ed., 1842), vol. 18, 666 (emphasis in original).
\textsuperscript{44} Patrick Matthew, \textit{Emigration Fields: North America, the Cape, Australia, and New Zealand, describing the Countries, and giving a Comparative View of the Advantages they present to British settlers} (London, 1839), ‘note D Land-Property Right’, 222.
\textsuperscript{45} Ibid (emphasis added).
\textsuperscript{46} By way of illustration, refer to Travers Twiss, \textit{The Oregon Question Examined, in respect to the facts and the law of nations} (London, 1846), 154: ‘[T]he word occupancy is required in its own sense to mark the right to take possession, as distinct from the right to keep possession, - the \textit{jus possidendi} from the \textit{jus possessionis}, - the \textit{jus ad rem}, as civilians would say, from the \textit{jus in re}.’ Twiss elaborated that, ‘the right of a nation to colonise a given territory to the exclusion of other nations is a right of occupancy. The right of the colonists to exclude foreigners from their settlements would be a right of occupation’ (emphasis in original).
to look like were subjected to dissent and challenge. In 1845, Viscount Stanley, as secretary of
state for colonies in Sir Robert Peel’s tory ministry, insisted in debate in the House of Commons
that ‘native law and custom’ had to be consulted to determine the question of what land was subject
to native title.\[^{47}\]

In this context, New Zealand offers insights on how a conception of ‘occupancy’ fared in a
particular field for British settlement in the early nineteenth century. While the philosophical
niceties were left abstractly indeterminate and unresolved, the Colonial Office, the New Zealand
Company and its assorted critics, used legalistic sources and arguments in largely political, non-
juridical sites rather than in the courts.\[^{48}\] They did so with a view to obtaining leverage in political
settlements about what to do at least for a time, without resolving underlying questions about the
nature and extent of Māori tenure in land. The politics of Crown decision-making remained
disparate, discursive and unsettled. We find these sources appearing in letters, in the
correspondence of the commissioner appointed to inquire into the New Zealand Company’s claims
to land in New Zealand, and in debates in the House of Commons in 1840 and 1845.\[^{49}\] These legal
sources were undoubtedly presented as important ways of seeing and talking about property rights.

Yet the Supreme Court in New Zealand was seldom resorted to in settling questions of land
tenure, except in relation to particular intra-European disputes. Thus, with the decisions in the
Scott v Grace proceedings (1848) or in Regina v Taylor (1849) on the status of Crown grants and
The Queen v Clarke (1848) on the legal status of recommendations of commissioners concerning
settler land claims arising before 14 January 1840, the Supreme Court commented on the royal
prerogative to issue Crown grants and to extent to which it was subject to juridical constraint.\[^{50}\]
Even then, however, courts were not the pre-eminent sites for discussions of the sort I am interested
in. To express it another way, the formalistic judicial or adjudicative dimension of the Crown - in
the form of the monarch’s oath-bound judges of the Supreme Court - was not as regularly called
upon in litigation. Furthermore, much of what the executive arm of the Crown did (or omitted to
do) was not the subject of formal judicial scrutiny. As I have discussed in other places, the
Supreme Court in Wellington and Auckland, in treating the prerogatives of the Crown in granting
land to others within New Zealand as relatively unconstrained, permitted a significant space for

\[^{47}\] Stanley, 10 July 1845, Hansard’s Parliamentary Debates, third series, vol. 82 (London, 1845), column 318.
\[^{48}\] A theme which I presented in 1999 by way of a critique of the ‘official mind’ approach to imperial policy
formulation in Hickford “Making “Territorial Rights of the Natives”” (in referring to the ‘official mind’ I am, of
course, adverting to the classical work of Ronald Robinson and John Gallagher in Africa and the Victorians: the
official mind of imperialism (London, 1st ed., 1961)). For a recent complementary approach, see also Damen
Ward, ‘Civil jurisdiction, Settler politics, and the Colonial Constitution, circa 1840-1858’ Victoria University of
\[^{49}\] Hickford, ‘Making “Territorial Rights of the Natives”’.
\[^{50}\] Hickford, “‘Settling some very important principle of Colonial Law’: Three “Forgotten” Cases of the 1840s”.
The Supreme Court decision in The Queen v Clarke was successfully appealed ex parte by the Crown to the
judicial committee of the Privy Council in London, the report of which can be located in (1849-1851) 7 Moo PC
77; 13 ER 808 (as well as in [1840-1932] NZPCC 516).
political negotiability. Whether based in London or in Wellington and Auckland, those who participated in these political processes were well aware that Māori populations were in a state of flux, had warred amongst each other and had displaced prior populations. In spite of Jeremy Waldron’s recent suggestive essay on ‘first occupancy’, therefore, the intellectual vocabularies drawn from common law sources or texts regarding *ius gentium* and political practices were deployed in situations where it was appreciated that philosophical niceties might not apply. As Sunstein has pointed out, incompletely theorised agreements on a general principle to be adopted, or a particular approach or an outcome to be pursued for a time, tend to assist in concealing significant or considerable disagreement about particular cases or even the details of the general principle. Localised and temporally specific or bound practices of claiming and negotiating property rights suffused the early constitutional order of colonial New Zealand and subsequently. Understandably, the practice of politics tended to yield temporary fixity or provisional agreements on such matters of property rights rather than substantive intellectual consensus or closure. Such points of agreement about what was to be done for the time being were never stable.

**A composite image of native title – the language of ‘claims’ and ‘claiming’**

Despite this *de facto* malleability, what was still seen as vexed and challenging, however, was sorting out the place of non-static or dynamic indigenous narratives in populating ‘occupancy’ with practical legal and policy content. This issue ignited a broad-ranging political controversy in Westminster and in New Zealand in 1845 and again in 1847-1848, for example. In 1845 the ‘New Zealand question’, as it was called, emerged out of New Zealand Company agitation concerning the insecurity of land titles within its settlements. In a personal memorandum presented to George Grey dating from June 1847, the Anglican missionary, Octavius Hadfield, displayed access to a host of sources on United States jurisprudence (an unspecified edition of James Kent’s *Commentaries on American Law*), political philosophy, the English common law, and the government of colonies. Retained within Grey’s personal papers, Hadfield’s script claimed that ‘[b]y ... [the] cession [“acquired by Treaty with the native tribes”] (through a fiction of law derived

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51 Ibid., 3, 27, 30.
55 See Hickford, “Decidedly the most interesting savages on the globe”: An Approach to the Intellectual History of Māori Property Rights, 1837-1853’, 166.
from feudal usages, but now prevalent in all European countries, and in the United States of America) the Crown acquires a paramount title to all waste lands [and] not to wild lands (as her been ignorantly asserted), but lands without owners’. His source for this proposition was Kent’s Commentaries on American Law, specifically a passage that Kent had drawn from the judgment of Marshall in Johnson v M’Intosh in 1823. Hadfield’s reference to ‘land without owners’ spoke to the need to develop a methodology for identifying such proprietors; that is, locating those who could speak for a particular space and its natural resources on behalf of others. The immediate purpose of Hadfield’s statement was to contest statements concerning Māori territorial rights within the third Earl Grey’s instructions as secretary of state for colonies to George Grey of 23 December 1846. These instructions suggested that the appropriate theory underpinning native title was that which restricted their ‘occupancy’ to that which they used by way of cultivation. Earl Grey proposed institutions for ascertaining what land was subject to Māori proprietorship (and those spaces that were not). To this end, the proposed charter for the colony of New Zealand, which accompanied the instructions, proposed ‘land courts’ to establish finally, in a domesday fashion, the proprietorship of all such territories within the colony, with the results of that investigation precisely registered and any land not owned or sufficiently occupied to be declared royal demesne. Although this proposal came to nought on account of considerable political pressure exerted within New Zealand and in the United Kingdom. Yet, it is revealing for the particularity of inquiry that it envisaged. Chapter thirteen of the charter, for instance, required that the land courts be satisfied that the [Māori] claimants or their progenitors, or those from whom they derived title, have actually had the occupation of the lands so claimed, and have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, ... or otherwise for the convenience and sustentation of life by means of labour expended thereon’.

What we begin to see in the New Zealand setting from the 1840s is the emergence of a distinct language of ‘claiming’ or ‘claims’. This language was used to characterise the interests in territory that certain Māori communities asserted and which required quieting through purchase or soothing through the payment of compensation. In practice, we find this language of purchasing or compensating ‘claims’ beginning to suffuse official communications on the ground within New Zealand, as well as those in London. Thus, by 1846 a special committee of the New Zealand Company was also expressing an awareness of the problem of ‘claims’ and ‘claiming’ in stating that, ‘We have only to leave the natives undisturbed in the northern and middle parts of the northern island, and to form our settlements in the neighbourhood of New Plymouth, or of

57 Notes, enclosed with Hadfield to Grey, 15 June 1847, GLNZ H1(2), Auckland Public Library, Auckland (‘APL’) (emphasis in original).
58 As explained in Hadfield to Grey, 15 June 1847, GLNZ H1(2), APL.
59 Earl Grey to Grey, 23 December 1846, CO209/47, fo.277, NA. The charter was produced under the enabling authority of 9 & 10 Vict c.103.
Wellington, or in the middle and Stewart’s islands, the whole extent of which is unencumbered by
the presence or claims of native tribes’. In March of that year, Stanley’s successor as secretary of
state for the colonies, William Ewart Gladstone, prepared a draft note for George Grey
lieutenant-governor of New Zealand in the wake of the recall of Robert FitzRoy, stating, ‘I deem it
probable that the middle island [the South Island] may be regarded as in no respect subject to the
native claim of property in the gross’. ‘Claim’ and ‘claiming’ were conventionally used as terms
that could apply to broader areas of space than those that were physically ‘occupied’ in the form of
cultivated sites, villages or fortified emplacements. It would prove to be a persistent way of
talking. The concept apparently converged, relatively neatly if not completely, with the Māori term
of take or an underlying ‘cause’, ‘basis’ or ‘foundation’, which had already surfaced in a number of
anglophone sources by the late 1840s. In 1840, Robert Maunsell, a Church Missionary Society
representative, introduced the term take in relation to aboriginal title, denoting a ‘root’ or
foundation to an assertion of interest in a territorial tract. In this assessment, the difficulties of
negotiating territorial transfers with Māori were evident. ‘The land does not, generally speaking,
belong to one individual, but chiefly to the tribe’ collectively. Maunsell admitted that a single
take might be embodied in a multiplicity of persons, stressing the significance of intra-Māori
political relations and diplomacy. As a term, it had not yet attained status amongst pākehā officials
as a generic concept to be used in underpinning colonial approaches towards analysing the various
roots of Māori tenure.

Other approaches to characterising indigenous narratives about natural resources were in
evidence in other regions. An itinerant assistant protector of aborigines, Edward Shortland, layered
his views of aboriginal tenure at Banks peninsula in the South Island, predicating these perceptions
on classes of Māori claims possessing ranked priorities. These priorities ranged from ‘i a ratou te
turuturu o te kaika’ or ‘those [claims] of persons who have especially a right to the place’ to ‘nga
piringa’ or ‘those persons allied to the former’. He advised that it was necessary to obtain the
names of individuals entitled to an individual right or ‘i a ratou te turuturu o te kaika’ before

61 ‘Report presented to the directors of the New Zealand Company by the special committee appointed to peruse
and consider the detailed plan proposed by Mr Wakefield’, 1 April 1846, CO209/48, fo.158, NA.
62 Gladstone to Grey, [March 1846], British Library, London (‘BL’) Add Mss44363, fo.294, British Library,
London.
63 In the early part of his appointment as an assistant protector of aborigines, Edward Shortland, referred to ‘taki’
(sic) in his journal entry for 12 October 1842 in relation to a dispute in the Tauranga district: NZMs 15/3, APL.
64 McKay, ‘Opinions of various authorities on native tenure, 1890’, 85-173-5/6 [Appendix to the Journals of the
House of Representatives 1890, G-1], 6, Alexander Turnbull Library, Wellington (‘ATL’); Robert Maunsell (24
October 1810?-1894) was a member of the Church Missionary Society and ordained as a priest in 1834. He
arrived in New Zealand on 26 November 1835.
65 Ibid., 6.
66 Shortland to Clarke, 14 March 1844, NZMs998/4, APL. Edward Shortland, 1812?-1893 (baptised, 19th May
1812). Brother of Willoughby Shortland. Educated at Exeter Grammar school, Harrow and Pembroke college,
Cambridge, where he graduated Bachelor of Arts in 1835 and Master of Arts in 1839. He then studied medicine
and was admitted as an extra-licentiate of the Royal College of Physicians in 1839. Private secretary to Hobson
from 1840; appointed protector of aborigines, 3 August 1842 (colonial secretary’s office (Auckland) to Clarke, 3
August 1842, IA4/271, fos.64-65, Archives New Zealand, Wellington).
completing any purchase of land. Shortland’s precise, localised treatment of intelligence on Maori descent-groupings and aboriginal tenure in the Bay of Plenty or southern island conveyed tales of complexity to an administration at Auckland. In general, however, both the notion of take and other descriptions of the bases of Māori tenure implied a historical narrative as to how particular claims had emerged. Shortland, for instance, realised that genealogical trails were linked to claims to territories and resources. Such a conclusion accentuated the significance of identifying, if at all possible, the complicated intersections of historical, familial and political relations amongst and between Maori descent-groupings. The concept of ‘claims’ was soon deployed by William Spain, appointed as commissioner on 20 January 1841 and who investigated and reported upon the putative purchases of the New Zealand Company from various Māori (under deeds in 1839 and early 1840) through convening hearings at Port Nicholson (Wellington), New Plymouth in the Taranaki, Wanganui and Nelson.67

To the extent that ‘occupancy’ continued to be tied to the physical imprint or sign of human activity, such as ‘cultivation’ or the planting of crops, then, we find the survival of such a concept in conjunction with the language of ‘claims’ over larger spaces. The importance attached to ‘cultivation’ was seen by some as permitting Māori politics to game convolutedly against the interests of pākehā settlements. Thus, by 1845 and 1846, even the Company began to see ‘cultivation’ as replete with evidential difficulties on the ground if areas excluded from its litigated Crown grants of 29 July 1845 at, say, Nelson or Wellington were to be determined with any precision.68 The contestability of cultivated areas was a subject of considerable exchange between the New Zealand Company and a Colonial Office driven by political pressure after Stanley’s departure from office and his replacement by William Ewart Gladstone to assuage Company concerns. Thomas C. Harington, secretary to the Company from 1844, argued that ‘cultivation’ would only amount to meaningful ‘occupation’ if the areas had been cultivated at the establishment of the colony. He referred to lands that had been in a ‘state of waste (in many instances covered with primeval forest) at the establishment of the Colony but had once been under temporary cultivation’ by Māori.69 Harington advised Stanley’s successor as secretary of state for colonies, Gladstone, that FitzRoy’s January 1844 definition of aboriginal ‘cultivations’ was injurious to flourishing settlements. Defined as, ‘those tracts of land which are now used by the natives for vegetable productions or which have been so used by any aboriginal natives of New Zealand since the establishment of the colony’, Māori cultivated sections were treated by Harington as encompassing two classes of property.70 These were areas that had either been in vegetable

67 Spain was appointed a commissioner ‘for investigating and determining Titles and Claims to Land in Our said Colony’ under a warrant dated 20 January 1841 issued in London under the royal prerogative: CO380/122, fos.291-295, NA.
68 Harington to Gladstone, 28 February 1846, CO209/48, fos.27-30, NA.
69 Harington to Gladstone, 17 March 1846, CO209/48, fo.94a, NA.
70 Ibid., fos.94-94a, NA.
cultivation at Port Nicholson’s inception but were subsequently ‘improved’ by settlers with assorted clearances or constructions and, secondly, ‘lands which were in a state of waste’ at the point of establishment of a pākehā settlement. This final category embraced discrete sections that were ‘cultivated’ sparingly after the settlement had been established, as part of a politically motivated strategy for Māori assertions of territorial claiming and entitlements in order to induce pākehā negotiators to consult with certain Māori as opposed to competing hapū (as with Ngāti Toa in Wairau).

In effect, an untidy melding of concepts of ‘occupancy’ and claiming was adapted and deployed within colonial New Zealand. Here, then, the conceptual or abstract vocabularies begin to be shaped by and coalesce with practices in negotiating spaces between various officials and Māori upon the ground. These localised inflections occasioned by negotiated practices in the field reflected political practices that were specifically adapted to the exigencies and complexities of negotiating multiple engagements with assorted Māori descent-groups. Bespoke or customised forms of interaction with certain Māori groups on issues to do with the occupation of territorial space occurred in areas set around the nodes of pākehā settlement at places such as New Plymouth, Wanganui (Petre), Port Nicholson (Wellington). Imperial administration assumed and insisted upon its primacy in attributing the rationale and meanings to such activity as opposed to admitting any determinative relevance for imported legal sources. Nevertheless, the degree to which the meanings attributed to these specific sets of negotiations might have been shared or mutually understood on the part of a variety of Māori audiences remains hidden in the shadows. Various agendas and calculations relevant to the positioning of intra-Māori concerns and politics were being played out.

As such, transactional engagements of the sort involving the settlement of territorial claims at this time risk supplying an insufficiently nuanced impression of the range of possible social behaviour on the part of Māori communities or settlers. Yet the significance of these transactions tended to lie in their locating and implication of Māori within a ritualised framework of evidence that often enough tells us much more about the anxieties and approaches of elite anglophone audiences within the colonial polity and at Westminster. In general, individual colonial officials, including protectors of aborigines (such as Donald McLean), provided an element of continuity in terms of personal approach and rationale from one particular transaction to another. McLean, in particular, supplies a bridge connecting the early, halting approaches to sorting out a basis for settlement (often adapted from assorted missionary precedents) to a committed Crown-controlled purchasing regime in the late 1840s. Until the effective dissolution of the role in 1846, protectors


72 Hickford, ‘Making “Territorial Rights of the Natives”’, chapter four; Hickford, “‘Decidedly the most interesting savages on the globe”: An Approach to the Intellectual History of Māori Property Rights, 1837-1853”, 164-166.
of aborigines were key official intermediaries amongst a variety of participants, including Māori descent-groups, land claims commissioners (such as Spain) and anglophone settlers.

McLean had been an assistant protector of aborigines for the western district of the northern island. In that role he was called upon in 1844 to assist negotiations to resolve the New Zealand Company’s purchase claims in the area around the settlement at New Plymouth in Taranaki. In November 1844, McLean had walked, in the company of ‘natives’, the proposed boundaries of the parcel of land containing the fledgling New Plymouth settlement. He had undertaken the perambulation of the intended boundaries at the direction of the then governor, Robert FitzRoy, who, in his turn, was following a suggestion which the Wesleyan missionary, John Whiteley, had expressed. Whiteley had advised that ‘[a]s there [had] been so much stupidity and misunderstanding on the part of the natives relative to the boundary line … that nothing further be attempted with them until the line has been completely traced not only on the map, but on the land from one end of it to the other’. A minute in FitzRoy’s hand stated ‘Mr McLean – I wish you to act in conformity with these suggestions – and ask Mr Forsaith and Mr Carrington to accompany you’. McLean’s personal papers and those of FitzRoy’s personal secretary, J.W. Hamilton, illustrate that the negotiated lines of the block were walked along and marked on at least three separate occasions from 13 November 1844 until 15 November 1844. Cultivations were reserved within a parcel of land comprising some 3,300 acres. Reflecting upon his approach in the Taranaki some twelve years later in 1856, McLean commented that he ‘did not think … it … practicable to issue Crown grants to natives by defining the boundaries of individual rights to land’. He alleged that ‘there is really no such thing as individual title that is not entangled with the general interest of the tribe, and often with the claims of other tribes who may have migrated from the locality’. He recounted how he had endeavoured to pursue ‘this system’ of identifying individual interests at the suggestion of the Anglican bishop, George Selwyn, in the negotiations regarding the New Plymouth block at Taranaki. McLean reported that it occasioned considerable delay. Furthermore, participating Māori appeared to regard the arrangement premised on individual entitlements ‘as altogether imaginary, and it did not appear to effect [sic] in the estimation of the natives the general or tribal right’. He concluded that with the comment that:

73  George Clarke senior to McLean, 2 August 1844, Ms-1306, ATL.
74  Donald McLean, journal, 13 November 1844, volume I, Ms-1284, ATL.
75  This communication from Whiteley to FitzRoy, 14 November 1844, appears in the papers of Donald McLean, Ms-0032-0634, ATL (emphasis in original).
76  Ibid.
77  Donald McLean, journal, 13 November 1844, volume I, Ms-1284, 80-81, ATL; McLean, journal, 14 November 1844, volume I, Ms-1284, 82, ATL; J.W. Hamilton, journal, 15 November 1844, Ms-2303, ATL.
78  McLean to Clarke senior, 17 December 1844, CO209/33, fo.201a, NA.
79  ‘No. 33. Mr McLean, Chief Commissioner, April 17, 1856’, GBPP 1860, xlvii, [2747], 303-305, 304.
80  Ibid.
81  Ibid.
‘When I considered the title settled of some individuals on this basis, I found the natives quarrelled among themselves about the boundaries, and prevented any definite arrangement being carried out until I afterwards purchased the whole of the tribal claim, in order to secure a clear title’.82

By 1848, McLean, now as inspector of police under Grey’s appointment, adapted the face-to-face technique of walking the boundaries of a block to be acquired with elite figures of the relevant Māori claimant groups for the unresolved Wanganui purchase, some of whom were referred to as ‘chiefs’. Reporting to the lieutenant-governor, Edward Eyre, in May 1848 on the proposal to settle the purchase of the Wanganui block, McLean signalled an approach predicated upon addressing the range of possibly relevant claims to the space in question. ‘The names of the principal chiefs and claimants in each tribe’, said McLean, ‘were written in the letters [forwarded as circulars] and after their names the following words were added “and to all others who have any claim to the lands for the Europeans at Wanganui” this distinctly giving them to understand in the most public manner that all who could prefer just claims should be recognized’.83 McLean noted he would organise a ‘public meeting of the natives’ with a view to ‘obtaining a sufficiently definite idea of the extent or position of the separate claims of the several tribes who own this district, so as to enable [him] to have a satisfactory and equitable division of the payment’.84 Ultimately, McLean requested the preparation of a particular map to accompany his negotiations for settling the purchase of the Wanganui block, which included the New Zealand Company settlement at Wanganui near the mouth of the eponymous river.85 The chart, prepared by Alfred Wills, the surveyor for the New Zealand Company at Wanganui, was used to assist McLean’s negotiations with Māori chieftains as the deed of purchase for the Wanganui block was read orally at the signing site in the Wanganui settlement.86 Signed by McLean it was inscribed with the words ‘[m]ap made for the natives in explanation of the boundaries of the block and of the native reserves (coloured yellow) as described in the final deed of sale’.87 The deed for completing the acquisition of the Wanganui block itself and setting out the reserves within its boundary lines bore some 207 names, with a large number belonging to women. This last feature may be seen as something of an innovation in official practice but was essentially directed towards ensuring the broadest coverage

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82 Ibid.
83 McLean to Eyre, 12 May 1848, qMs-1208, McLean papers, ATL. Also, IA1 1878/1499, Archives New Zealand, Wellington. Notices in Māori were prepared and circulated: refer to Donald McLean, journal, 3 May 1848, volume II, Ms-1285, ATL.
84 Ibid. McLean explained that Ngāti Apa had already supplied adequate information regarding their claims towards Wangaehu.
85 Alfred Wills, the surveyor for the New Zealand Company at Wanganui, reported that ‘On preparing the final Deed of Sale Mr McLean requested me to write the descriptions of the external boundaries of the Block and also those of the reserves mentioning the names of whatever natives had at different times accompanied me when engaged in the survey, and he desired me to make a skeleton map only for the Deed so that both the Deed and the map should be easily and thoroughly understood by the natives’: Wills to William Wakefield, Principal Agent, New Zealand Company, 23 June 1848, NZC3/8, fo.411, Archives New Zealand, Wellington.
86 Wills to William Wakefield, Principal Agent, New Zealand Company, 23 June 1848, NZC3/8, fo.412, Archives New Zealand, Wellington.
87 The plan is located at ABWN8102, W5279, fo.47, Wgn 286, Archives New Zealand, Wellington.
of markings and, on McLean’s approach, ‘claimants’ at the ‘public meeting’. McLean was aware that the location of graded authority within Māori communities and amongst their negotiators was less clear, and therefore the capacity to make unchallenged, authoritative pronouncements was much less pronounced.

An appreciation of the fluidity of indigenous relations and the considerable difficulties in forensically assessing the quality of physically tangible interaction with particular landscapes, resources and environments intruded into anglophone materials. But these forms of appreciation fell to be interpreted in various ways. Complexity proved to be unwelcome even though some, such as McLean, adapted and re-adapted practices and an intellectual vocabulary – a rationale – to address this very complexity. Far from assisting the process of acquiring secure titles for settlements, these critics of imperial policy maintained that the collection of intelligence about ‘custom’ (whatever that might be) simply encouraged tactical play and capriciousness amongst Māori informants. Joseph Somes, the governor of the New Zealand Company, responded to intelligence reports and retellings of detailed Maori conceptions of tenure with incredulity from a distance. In a despatch of 24 January 1843 to the secretary of state for colonies, he argued that, ‘It requires little discernment to conceive what a mass of perjuries the boundless mendacity of savages will produce, under the direction of white advisers; […] what strange notions of right will be advanced on the strength of unknown and incomprehensible customs of a savage state’.

Others responded in a manner contrary to the New Zealand Company, insisting that purchase would prove to be the practical and conceptual panacea for colonial New Zealand in prying spaces for settlement from Māori politics (and customary authority). Yet although customary norms and usages were imbued with complexity, the process of negotiation and purchase would broker and pacify Māori politics to an extent, as settlements were placed as buffers within disputed areas. In a putatively anonymous pamphlet of 1847 intended for limited circulation within the United Kingdom, the chief justice of the Supreme Court of New Zealand, Martin, contended that what he characterised as the ‘territorial rights’ of the ‘New Zealanders’ (used in the sense of Māori) were, in the main, areas that descent grouping were disposed to defend by force of arms. In a chapter within the pamphlet appropriately entitled ‘practical considerations’, Martin treated the exchanges and hearings within the purview of the commissioners appointed to investigate the pre-1840 land claims of the New Zealand Company and settlers as sustaining his view that ‘[n]o where was any piece of land discovered or heard of, which was not owned according to native usage, by some

88 Somes to Stanley, 24 January 1843, CO209/26, fos.85-85a, NA. Also, ‘New Zealand’, Fisher’s Colonial Magazine and journal of trade, commerce and banking (London, 1844) vol. 1, 204-205 (‘[The proposition that] the whole land of the island[s] was appropriated, and the property of either tribes or individuals [could be contradicted] … The fact is, that the country is most thinly populated, and the few there are living on the sea-coasts; whilst the interior of the country is the undivided unappropriated domain of nature, and clearly the waste lands of the crown, over which the rights of sovereignty should be exercised when wanted’).

person or set of persons’.\textsuperscript{90} He relayed that the commissioners, ‘who were appointed to investigate Land Claims, travelled, in the course of their inquiries, from the North to the South of these Islands, holding Courts from place to place’.\textsuperscript{91} Indeed, from 1840 there had been an increase in official intelligence reports conveyed via protectors of aborigines throughout New Zealand, as well as commissioners investigating the deeds of purchase entered into before 14 January 1840, the date of the governor of the colony New South Wales, George Gipps’ proclamation in Sydney declaring all direct purchases from Māori in New Zealand to be invalid.\textsuperscript{92}

Martin was aware that swathes of territory were subject to contested, overlapping claims, what he and Edward Shortland, an assistant protector of aborigines with whom he would correspond, referred to as ‘debateable lands’ or ‘kainga tautohe’.\textsuperscript{93} The term ‘tautohe’ denoted remonstration or argument. Shortland had initially used the phrase ‘kainga tautohe’ in characterising ‘large districts on the borders of different tribes wh[ich] remain uncultivated’.\textsuperscript{94} In this despatch of 15 August 1843 reporting on intelligence he had been ‘able to collect relative to the nature of the tenure whereby lands are held among the Aborigines’, Shortland viewed such territories as a ‘never failing cause of war till one party has lost all the principal men’.\textsuperscript{95} With the exception of this disputed penumbra, Shortland’s accounts nevertheless emphasised an inner core of relatively agreed territory within the control of a particular descent-group, comprising sub-groupings in the form of iwi and hapū. He noted that in the ‘immediate vicinity of a pa’ or a fortified site, for example, the intersecting and often overlapping web-work of both individual and group claims ‘would render it very difficult for Europeans to purchase lands once so occupied, even though the pa may have been deserted for many years’.\textsuperscript{96} His analyses, evidently filtered from disparate Māori sources and orientated towards functional questions of indigenous tenure, were sufficiently subtle to convey an impression that was not necessarily one of tranquil or static order but rather one of dynamism and negotiation, often associated with the fortunes of particular sub-groupings or individuals. In such circumstances, Shortland regarded that Māori polities entered into paper deeds to place settlements strategically: ‘as he [the New Zealander] found [settlers to] buy readily, he sold bountifully his disputed lands encumbered with their [intra-Māori] disputes – And he thought he had thus relieved himself, in an honourable and advantageous way, from the duty handed down to him by his ancestors to maintain the family claim’.\textsuperscript{97} Shortland was
of the view that Māori were ‘not naturally willing to part with land but saw in it the only means of inducing Europeans to settle in his country’.\(^98\) In a paper of 25 February 1847 to Benjamin Hawes, a whiggish member of the House of Commons and the parliamentary under-secretary to the third Earl Grey at the Colonial Office, Shortland related his views as to ‘some of the principal causes, which have operated to extend native claims over a greater space than is requisite for their present use, and than would at first seem probable to European ideas’.\(^99\) He listed these ‘causes’, including the, ‘value set on eel-fisheries, which causes every stream to have its weirs, and every large swamp its embankments, and channels to direct the eels into the weirs during a flood’.\(^100\)

**Politics and law within the face of indeterminacy and disagreement - the frailty of native title within the common law and *ius gentium***

What impact did these localised experiences have upon the legal sources that were introduced to New Zealand? Are we able to discern an approach that is indigenous to colonial New Zealand and the manner in which imperial administration imagined such a New Zealand? Māori were to be treated as ‘British subjects’, - so the third article of the treaty initially signed at Waitangi on 6 February 1840 claimed. Yet, for the purposes of customary property rights, Māori were ensnared in the universe of *ius gentium* and in legal and other intellectual sources not of their own making. Thus, paradoxically, they were other or less than ‘British subjects’, at least concerning the holding of tenure in land for the purposes of municipal law– those legal processes and norms which were thought to apply and fell to be interpreted in the coastal municipalities, rudimentary as they were, of Auckland, New Plymouth, Port Nicholson (Wellington) and Nelson. In such places, for instance, the sway of English legal norms could be registered, interpreted and acted upon in specific cases in the Supreme Court at Wellington or Auckland. In other areas, certain missionaries had begun to develop the practice amongst Māori associated with their ministries of instituting particular forms of dispute resolution, such as ‘whakawā’ or ‘kōti whakawā’, as Ballara has touched upon.\(^101\) At these sites, negotiated forms of engagement were very much in evidence.

In spite of limits on the practical reach of such courts and the resident magistrates, as well as protectors of aborigines, certain commentators, such as Henry Chapman (who assumed the role of first puisne judge of the Supreme Court of New Zealand from 26 December 1843) and Hadfield, thought that British curial and legal jurisdiction extended throughout the New Zealand

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\(^98\) Shortland to Hawes, 25 February 1847, Ms-868, fo.51, Hocken Library, University of Otago, Dunedin.

\(^99\) Ibid., fo.49.

\(^100\) Ibid.

archipelago. Each of these individual’s voices is of interest, with Chapman subscribing to a view of ‘native title’ that differed from his judicial colleague and superior, Martin. Both Chapman and Hadfield were counted amongst the politically engaged elites of the colony with ready social and professional access to other colonial notables. Hadfield, in particular, enjoyed the confidence of George Grey as an advisor during the latter’s governorship from 1845 until 1853. His comments to Grey in June 1847 on the fraught intersection between custom, land tenure and legal jurisdiction were tinged with regret. Their commentaries, framed as advice for others in the later 1840s in the face of the practices of political negotiations to secure spaces for settlement, attest to the attempts to adapt imported intellectual vocabularies to dynamic, localised political environments. For Hadfield, unlike Chapman, ‘[s]overeignty is acquired by Treaty [and not through discovery or otherwise] with the native tribes, - who cede the sovereignty formerly possessed by themselves’. The ‘right of discovery’, claimed Hadfield, ‘is merely a right to colonise – as against all other civilised nations: - it confers no actual right to the country discovered’. That is, it did not, properly speaking, entitle the discovering polity to assert untrammelled sovereignty over the New Zealand archipelago and its inhabitants. A secondary transaction was required in the form of a treaty of cession. As previously noted, however, Hadfield had advised Grey in this memorandum that it was by virtue of the specific event of cession that the Crown obtained a ‘paramount title to all waste lands – not to wild lands (as has been ignorantly asserted), but land without owners’.

Chapman’s personal notes dating from approximately 1845 or 1846 on the ‘status of native races considered in relation to the sovereignty’ averred that ‘savage nations ... retain a sort of modified sovereignty until abrogated by treaty’. The preparation of this memorandum was undoubtedly assisted by Chapman’s personal ‘law library’, which, he reported in June 1847, contained approximately ‘240 volumes of British and Foreign law valued about £200’. These notes, uncirculated as far as we know, were intended for the ‘purpose of informing the inferior magistrates and protectors as of warning and instructing the native population’. In Chapman’s account of the mid-1840s, inspired by his readings of the jurisprudence of the United States Supreme Court in Johnson v M’Intosh (1823) and Cherokee Nation v State of Georgia (1831) and since adapted to the New Zealand context with which residence in Wellington had given him some personal familiarity, the discoverer acquired ‘the sovereignty’ of the islands. This

102 Refer to Chapman, legal notes, undated [1845-1846?], Ms-Papers–860-047, ATL.
103 Notes, enclosed with Hadfield to Grey, 15 June 1847, GLNZ H1(2), APL, (emphasis in original).
104 Ibid.
105 Ibid (emphasis in original).
106 On the possible dating, refer to Hickford, ‘“Vague Native rights to land”: British Imperial Policy on Native Title and ‘Custom’ in New Zealand, 1837-1853’ (under peer review); Dorsett, ‘“Sworn on the dust of graves”: Inter se cases and the abrogation of the barbarous customs of the New Zealand natives’ (forthcoming, Journal of Legal History; draft on file with author).
107 Chapman, legal notes, undated [1845-1846?], Ms-Papers–860-047, 15, ATL.
108 Chapman to Chapman senior, 15 June 1847, qMs – 0419, ATL.
109 Chapman, legal notes, undated [1845-1846?], Ms-Papers–860-047, 24-25, ATL.
echoed a stance he had assumed in *The New Zealand Journal* in 1840 and in an anonymous piece in 1841. In the latter publication he had said:

‘The course which ought to have been pursued, in conformity with well-established principles of international law, was simple enough. Her Majesty’s sovereignty ought to have been asserted throughout New Zealand, by virtue of prior discovery and occupation. This right of sovereignty should be understood to have force only against European powers, but the rights of the chiefs should be in all cases guaranteed’.110

In his legal notes of 1845 or 1846, Chapman said that, until a compact expressly cleared the vestiges of the ‘modified’ or residual sovereignty away, the entitlements of the discovering polity were effective against all other European jurisdictions.111 On this legal view, the ‘native inhabitants retain their sovereignty and national character in relation to each other and to the discovering nation except in so far as such sovereignty impairs the sovereignty of the discovering nation in relation to its own subjects and other European powers’.112 In the various treaties within his personal collection, Chapman noted that ‘[i]n such documents [the tribes] ... are called “nations” and are held capable of maintaining the relations of war & peace and in case of the former are deemed “enemies” not “rebels”’.113 He concluded that it was ‘this modified sovereignty which the natives of New Zealand parted with by the treaty of Waitangi [in 1840]’.114 Chapman cautioned that in ‘considering the question of what laws prevail in a newly settled country where a civilized people come into contact with a rude people, the idea of sovereignty must not be confounded with that of laws either generally or in relation to the title to the land’.115 In this manner, he was able to subtly address the material actuality of the territorial autonomy of Māori communities and the theory of British jurisdiction – the overarching claims to ‘sovereignty’ of the Crown within New Zealand and the legal jurisdiction throughout were not compromised or rendered problematic in spite of certain legitimate *de facto* exceptions in particular cases.

Yet this reasoning also allowed Chapman to critique the ‘views taken by some of the officers of the governments of New Zealand’ in a fashion noticeably distinguishable from Hadfield in 1846. According to Chapman, these views of elements within the executive arm of colonial government muted and undermined assertions of the Crown’s pre-eminence as the ultimate authority and sovereign in the New Zealand islands. He adverted to ‘private wars’ between Māori descent groups that ought to have been quashed but had not. This observation attested to the practical persistence of both intra-Māori and inter-hapū politics beyond the ken of introduced officialdom. In this part of his discussion, a noticeable sense of discomfort and frustration intruded. As

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111 Chapman, legal notes, undated [1845-1846?], Ms-Papers–860-047, 15-16, ATL.  
112 Ibid., 16.  
113 Ibid., 15 (emphasis in original).  
114 Ibid., 16.  
115 Ibid., 16-17.
Chapman lamented, ‘[t]he judges cannot constitutionally act until the case is before them’ and he suspected that ‘the executive [would] abstain from bringing any case before the courts’. Here we see an acknowledgement, properly given, of the significance of official activity in contributing to the practical ways in which the constitutional order associated with the executive dimensions of the Crown within the colonial New Zealand were understood. Nevertheless, Chapman confused the situation in his own account through analysing the ‘legal difficulty’, as he called it, occasioned by the Treaty of Waitangi. He argued that the ‘Waitangi treaty considered (erroneously) as the foundation of the Queen’s sovereignty [had] led to this difficulty’, evidenced by the emergence of certain imprudent official views and conduct. Furthermore, argued Chapman, the ‘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’. Yet, Chapman continued, the rights of sovereign authority resided with the incoming Crown by virtue of ‘discovery [and subsequent] occupation’. Accordingly, the ‘limited sovereignty, which the clients of savage tribes retain[ed] inter se’ was consistent with the ‘clear right’ in the Crown ‘(a right founded in humanity and sanctioned by the comity of nations) to suppress murder [and] cannibalism’.

In essence, therefore, his reasoning seemed to imply that particular or localised treaties would be required to completely extinguish or remove the ‘limited’ or ‘modified’ form of residual sovereignty over territories within New Zealand subject to indigenous authority. It remained unclear as to whether particular deeds of purchase regarding relevant land and resources would count as such ‘treaties’ with sufficient effect for anglophone political audiences to terminate the remnants of indigenous customary authority regarding natural resources, such as land (as well as property rights or including such rights, if they were not to be considered as severable from the overarching authority). It is possible to read Chapman that way, however, and I suggest that this was his meaning, at least in respect of those hapū (and other descent-based groupings) that had not been signatories to the Treaty of Waitangi. The practice of Crown officials might be seen in this way with purchase deeds purporting to acquire and silence both the claiming of territories and the claimed authority to speak for such territories and their resources. This was the presentational effect to anglophone audiences but it was not necessarily the interpretation that Māori elites might have placed on such transactions. Nevertheless, the presentational significance was of importance. To claim ownership of a resource or a space was and is, in effect, to assert a strategically important

116 Ibid., 25.
117 Ibid. (emphasis in original).
118 Ibid.
119 Ibid., 26.
degree of control over that resource. Thus, property as a term or concept entailed particular, often calibrated concentrations of power over things and resources.\textsuperscript{120}

The negotiating space for these secondary compacts or deeds of purchase was pre-eminently a place for politics – for negotiations with the local practicalities of Māori political and territorial autonomy. Chapman’s sense of the limits of native title coalesced with this sort of approach but also, paradoxically, supplied a space for something of the local nuances of Māori autonomy on questions of land tenure to be registered. Chapman regarded native title as non-justiciable; that is, as not legally enforceable at the suit of Māori against the Crown or grantees of the Crown. He argued that the ‘rights and dominion which native tribes exercise over land are not such as come within the cognizance of the tribunals’.\textsuperscript{121} He also stated by way of conclusion that, ‘[n]o grant can be disputed to the subject on the ground that the Crown has not extinguished the native title’.\textsuperscript{122} In Chapman’s notes, Māori had a ‘mere right of occupancy’, which was not translatable into English law. ‘[A]ll that the courts could recognize as vesting in the [Māori as] the vendor [of land] would be an estate of occupancy in common with the conveying tribe and not the right to reduce any piece of land into personal possession’.\textsuperscript{123} In mid-1847, after the writing of these notes and following the decision of the Supreme Court of New Zealand in\textit{Regina v Symonds}, Chapman disclosed in private correspondence with his father that his interpretation of the substance of Māori rights in property accorded with that of the third Earl Grey in the despatch of 23 December 1846.\textsuperscript{124}

Not at all startlingly, practice and legal aspirations were clearly not aligned, however. In certain key senses, then, Māori remained non-consensual and unconscious subjects of particular interpretations of \textit{ius gentium}, particularly regarding any proprietary interests in natural resources or land space. Something of the sense of caution amongst certain anglophone settlers with access to officialdom that such treatment occasioned can be garnered from the commentary in 1844 of John Whiteley, a missionary of the Wesleyan Missionary Society at Taranaki witnessing the negotiations to settle the New Zealand Company’s purported acquisition of space for the precarious New Plymouth settlement – ‘this intricate question’ as Whiteley would term it. ‘The Law of England and the Laws of Nations’, he wrote, ‘may hopefully bear the comparison [between occupants and absentee Māori] out in the award which [William Spain, the commissioner] has given but I submit that in such a case as this, the Natives ought on the strict principles of justice to be dealt with in accordance with their own usages and laws and not according to laws of which

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  \item Chapman, legal notes, undated [1845-1846?], Ms-Papers–860-047, 31, ATL.
  \item Ibid., 33.
  \item Ibid., 32.
  \item Chapman to Chapman senior, 15 June 1847, qMs-0419, fos.437-438, ATL: Chapman reported to his father in England that, ‘[t]he principles [the third Earl Grey] lays down in relation to the native title to the land are precisely what I have asserted’. He added that, ‘I merely state them as positive law – he lays them down rather as principles of good policy and humanity which have been practised in dealing with the native title’.
\end{itemize}
they never heard’.\textsuperscript{125} In London, a periodical publication of the Aborigines’ Protection Society, *The Colonial Intelligencer or Aborigines’ Friend*, would sound a similar note of caution in late 1847 in the midst of a still intense dispute about the nature of Māori property rights that had arisen out of Earl Grey’s despatch of 23 December 1846. It reported that, ‘the important point to remember is this, that the New Zealanders will not stop to ask us to define territorial rights for them, nor will they defer to the authority of writers on the *Jus Gentium*’.\textsuperscript{126} Irrespective of Chapman’s meanderings through the questions of ‘modified sovereignty’ and native title, then, the relative inability of the introduced Crown to exert an influence on practical outcomes within Māori politics buttressed this view. In 1846, Octavius Hadfield, appointed by George Selwyn as the Church Missionary Society rural dean for the western district of Wellington and Taranaki in 1844, casually remarked in a memorandum to lieutenant-governor George Grey that ‘[e]ach tribe possesses absolute sovereign rights within the boundaries of its own territory’.\textsuperscript{127}

In many ways, however, the deployment of these sources in intra-European debate detached the living practices and pathways of Māori communities from the New Zealand landscapes that were analysed and examined through those imported sources. Claims to property in land were objectified legalistically and abstractly in ways alien to the web-like interconnectedness between communities and the territories and resources they claimed. The richness of the texture of relations between a Māori community and its resources was often missed or occluded in these accounts.\textsuperscript{128} If anything, the disputes reveal the infirmities of so-called common law approaches to conceiving of the property rights claims of indigenous populations and the relative imperviousness of common law sources to often complicated customary information provided from diverse Māori sources.\textsuperscript{129} The common law (or the law of nations) was not as porous as some might have claimed, whether in the 1840s or subsequently. What was in play, therefore, was a series of principally intra-European conversations seeking to sort out and press upon the terms of imperial policies on colonial land tenure, the security of titles, the production of public revenue through the control of land transactions and the acquisition of space for pākehā settlements. A principal agent for the New Zealand Company in the colony following the death of William Wakefield, William Fox, in his account of ‘native title to waste lands’ published in 1851 stood fast to the approach of Emerich de Vattel in Joseph Chitty’s 1834 edition as expressive of such title. That is, he claimed that, ‘in an unreclaimed country, “in which there are none but erratic natives, incapable of occupying the whole, they cannot be allowed exclusively to appropriate to themselves more land than they have

\textsuperscript{125} Whiteley to George Clarke senior, 10 July 1844, Ms Papers 4647, ATL.
\textsuperscript{126} *The Colonial Intelligencer or Aborigines’ Friend*, number 10, December 1847, 152.
\textsuperscript{127} Hadfield to Grey, memorandum, 1846, ‘System of government among the New Zealand tribes’, GNZ Mss 17, fos.73-96, APL.
occasion for, or more than they are able to settle and cultivate’’.  

Fox characterised the alternative theory as holding that the ‘savage inhabitants of an unclaimed country have an absolute right of proprietorship in its soil, based upon the mere fact of their residing on some portion of it.’

To this theory, Fox alleged that the Anglican bishop of New Zealand, George Selwyn, and the missionaries adhered, an influence that had already been noted in debate in the House of Commons in 1847.

Allowing the politics of negotiation to address information concerning customary usages and norms permitted the sides in these disputes to hold to their preferred intellectual views irrespective of practices within the field. Colonial and imperial politics would see the continuation of these sorts of dispute into the 1850s.

The persistence of argument also displayed the practical and conceptual fragility of ‘native title’ within legalistic sources in spite of the point that the precarious European settlements were scattered amidst relatively populous, armed and land-claiming indigenous communities. The martial capabilities of Māori communities vis-à-vis the embryonic pākehā settlements and the potential for serious turbulence should such capabilities be brought to bear against the settlements were keenly appreciated on the part of certain commentators. Markedly, these observers tended to be those, like Hadfield and Shortland, dwelling in parts of the northern island of New Zealand where the presence of loose collections and shifting alliances of descent-groups, such as hapū, and tales of competition and warring for scarce or desired resources, were especially noticed and reported upon. Their localised or locally-derived accounts, therefore, tended to stress the competitive nature of inter-hapū relations relevant to regions in which they were domiciled. Yet this did not imply that the reasoning extracted from either the common law or ius gentium pried open a portal of recognition for the incorporation of intelligence regarding these narratives or what they might have suggested about the relationships of various Māori populations to particular landscapes or questions of autonomy to influence the relations of strangers to those landscapes.

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131 Fox, The Six Colonies of New Zealand, 89.

132 Refer to the report of R. Vernon Smith’s remarks in support of a motion to suspend certain provisions relating to the proposed government of the colony of New Zealand: ‘He [Vernon Smith] expressed regret that Governor Grey had such a Bishop as coadjutor in the government of New Zealand, for his evident intention was to interfere with the civil and political rights of the Colonists’ (‘New Zealand and its Charter’, The Colonial Intelligencer; or Aborigines’ Friend, number 9, January 1848, 179).

133 Edward Shortland, as an assistant protector of aborigines, was active in the Bay of Plenty in 1842 and 1843 and the Anglican rural dean of the western district of Wellington and Taranaki, Octavius Hadfield (1814?-1904), was based in Waikanae and Ōtaki, to the north of Port Nicholson (Wellington), and then, for much of the period from 1844 until 1849, in Wellington itself (at the residence of the Wellington magistrate Henry St. Hill), owing to his ill-health.
The frailty of customary property rights as a form of land tenure and the placing of such rights-claims beyond the municipal reach of English common law on tenure in land, had consequences for the location of Māori groups within constitutional conversations. In the 1850s, for instance, the predominant (albeit contested) view of ‘native title’ was that it was not sufficient to qualify Māori for the electoral franchise under the New Zealand Constitution Act 1852. Martin would observe in November 1863 against the background of legislation contemplating the confiscation of Māori land that, ‘The case stands thus: no native can in any way enforce any right of ownership or occupation of land, held by the native tenure in the courts of the Colony’. He added that, ‘The native land is excluded from the political franchise, even in cases where there is in fact, a right of individual occupation, on the ground that his right, whatever it might be, is not in the technical sense a “tenement”’, a class of proprietary interest referred to in section 7 of the New Zealand Constitution Act 1852 – imperial legislation enacted by the legislature at Westminster.

Conclusion

In this essay, I have examined the manner in which sources drawn from the common law and ius gentium were treated as capable of incorporating the content of information about Māori customary norms and usages on property in natural resources. I have endeavoured to do so with an outlook towards the ambiguous relationships between concepts of political autonomy (government) residing with indigenous populations (the authority to determine the allocation of space and use of resources) and the proprietary interests that such populations might have in particular territorial spaces. I have contended that legalistic sources were indeed transposed into New Zealand settings in the 1840s and the 1850s but that such sources were predominantly addressed in non-juridical spaces of intra-European political negotiations. I have also sought to show how the practical reception of such sources was inflected by the obtaining of intelligence from Māori sources themselves but in a way that did not necessarily effect a profound reshaping of the legal sources that had travelled across the seas, at least for the purposes of debate internal to anglophone audiences. In spite of the theoretical pretensions of claims about the curial jurisdiction of the anglophone courts extending throughout colonial New Zealand, Māori populations were treated as subjects dwelling within the universe of ius gentium but in a space where political negotiability

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134 15 & 16 Vict c 72 (Imp).
135 Martin to Fox, Native Minister, 16 November 1863, ‘Observations on the Proposal to take Native lands under an Act of the Assembly’, CO209/178, fo.163 (35), NA.
136 Ibid. I address this issue more fully in Hickford, ‘Strands from the Afterlife of Confiscation: Property rights, constitutional histories and the political incorporation of Māori, 1920s’.
137 Section 7 of 15 & 16 Vict c 72, refers to ‘… a Householder within such District occupying a Tenement within the Limits of a Town (to be proclaimed as such by the Governor for the purposes of this Act) of the clear annual Value of Ten Pounds, or without the Limits of a Town of the clear annual Value of Five Pounds, and having resided therein Six Calendar Months next before such Registration as aforesaid, shall, if duly registered, be entitled to vote at the Election of a Member of Members for the District [emphasis added]’. 
predominated, a point with significance for their incorporation within a form of political (rather than juridical) constitutionalism.