

Juridical Encounters: Māori and the Colonial Courts, 1840-1852

By Shaunnagh Dorsett

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Reviewed by Carwyn Jones

Juridical Encounters: Māori and the Colonial Courts, 1840-1852 by Shaunnagh Dorsett is an engaging and nuanced study of the development of colonial laws and institutions in Aotearoa New Zealand and the expansion of the jurisdiction of state law that begins in this period. The issues explored in the book – relating to the relationship between the law of the settler state and Indigenous law; the recognition of Māori law by the state legal system; and the authority with which Māori and state law speak – remain live issues today. Studying how those issues were addressed during the Crown colony period helps us to understand the current relationship between Māori law and state law, how we arrived at this point, and, crucially, it helps us to think about how to approach that relationship with legal techniques appropriate to the social and political context and objectives of the 21st century.

This book examines the ways in which the settler courts during New Zealand’s Crown colony period engaged with Māori law/tikanga Māori. In particular, *Juridical Encounters* explains how mechanisms of recognition and exception were deployed in the colonial courts to progress assimilationist goals. Consequently, despite the fact that Dorsett demonstrates that there is much to be learnt from the way in which the colonial courts dealt with Māori law/tikanga Māori during this period, she rightly cautions the 21st century reader to be aware of the assimilationist objectives that sat behind the design of laws and legal institutions at that time.

Juridical Encounters is divided into three major parts. Part I, ‘Whose Law? Which Law?’ explores the various approaches of colonial officials to questions about when and how British law might apply to Māori in the years following the signing of the Treaty of Waitangi. Part II, ‘Designing Exceptional Laws and Institutions’, considers the institutional design of courts and associated laws that were implemented during the 1840s. Part III, ‘Juridical Encounters in the Colonial Courts’, looks at the courts in action, taking in the operations of key offices – Protector of Aborigines, interpreters, and lawyers – and examining Māori engagement with the courts in both criminal and civil cases. Throughout the book, Dorsett skilfully uses close studies of particular cases to illustrate the operation of colonial legal institutions and how Māori came to use those institutions.

One of the most significant aspects of *Juridical Encounters* is the way in which Dorsett uses the concept of jurisdiction to frame the exploration of the relationship between Māori and British legal systems, reminding us that jurisdiction is not simply a technical matter of procedure, that is, “a prosaic matter of determining the monetary limit of the particular court”. Jurisdiction should, instead, be understood as “key to the ordering of law (and laws)” because it “brings someone or something to a particular law” and “figures a particular relation to law and a particular form of legal subjecthood”.

‘Jurisdiction’ is a concept that Dorsett has explored and deployed to great effect throughout her scholarship, including with Shaun McVeigh in their 2012 book, *Jurisdiction* (Routledge). Dorsett has shown a particular interest in the role in which jurisdiction played in the legal settlement of British colonies. From the Latin *juris* meaning “law” and *dicere* meaning “to speak”, ‘jurisdiction’ can be understood as “the power and authority to speak in the name of

law”. Framing the examination of the operation of the New Zealand courts in the Crown colony in this way invites the reader to focus on who has the power and authority to speak in the name of law and in the name of whose law it is that they speak.

Examining the way in which Māori engaged in the New Zealand courts during the Crown colony period is, therefore, crucial to understanding the relationship between Māori and the settler institutions and between tikanga and British law. *Juridical Encounters* describes the ways in which settler laws and courts were designed to encourage Māori to participate in these settler institutions as part of the colonial project. The impact on tikanga Māori as a system of law is of central interest. Dorsett is careful to note that tikanga Māori has not been extinguished. However, Māori participation in the settler courts during the Crown colony period (and subsequently) engaged the jurisdiction of those courts and, Dorsett argues, “had the effect of beginning the slow displacement of traditional adjudicatory fora and, consequently, the places from which Māori law could speak”. Tikanga Māori has not been eradicated as a legal system but the places from which it speaks with the authority of law have been reduced as the structures of British law have been built over the top of tikanga. Understanding jurisdiction in the way deployed by Dorsett in *Juridical Encounters* helps us to think about the places from which Māori law and British law speak and how that affects the relationship between the two legal systems.

A central concern of *Juridical Encounters* is to explain why Māori during the Crown colony period came to the colonial courts, how they used these courts, and what this has meant in terms of jurisdiction – the places from which tikanga Māori speaks and the places from which British law speaks. Dorsett points out that this was also a central concern of the colonial government. The issues of the jurisdiction of British and Indigenous laws were not unique to Aotearoa New Zealand. The various approaches taken by the gubernatorial regimes of Hobson, Fitzroy and Grey through the Crown colony period were underpinned by ideas of ‘amelioration and protection’ that were discussed in the broader context of British imperial activity and had a history that pre-dated colonial government in Aotearoa New Zealand. Amelioration and protection took on a particular meaning in the context of Indigenous peoples and the colonial state as a result of the 1835 Select Committee of the British House of Commons that inquired into the situation of aboriginal inhabitants of British settlements. The Select Committee reported in 1837 and identified that Britain had a duty to protect Indigenous peoples and that “in the context of the indigenous peoples of the Antipodes it was violence and the effects of crime from which indigenous peoples in Australasia most immediately needed protection.” Evidence given by witnesses to the Select Committee and subsequent proposals suggested models for maintaining law and order in the settlements and dealing with crime between settlers and Indigenous peoples.

The principles of amelioration and protection raised questions about the amenability of Māori to British law and of the toleration, by colonial legal institutions, of aspects of Māori law. In this context, amenability refers to whether Māori could be subject to British law. This was both a legal and practical question. Consideration of amenability therefore led to the associated question of toleration. That is, if it was not either legally or practically possible to assert British law over Māori, to what extent should British law tolerate tikanga responses to legal issues. One way of dealing with the issues of amenability and toleration was to provide for exemptions or exceptions for Māori in laws and legal institutions.

Dorsett compellingly argues that the use of exceptionalism in the design of laws and institutions was a key strand of bringing Māori to engage with the jurisdiction of the colonial courts. Although it may seem counter-intuitive at first, laws and institutions that in some way provided exceptions or special processes for Māori were designed to achieve assimilationist objectives. This is true of the native courts models that were proposed in the early days of the colony under Hobson; Fitzroy's modification of criminal procedure through instruments such as the Native Exemption Ordinance 1844 "excluding Māori on Māori crime from the reach of English criminal law and applying muru-like penalties in inter-racial theft cases"; and the Resident Magistrate's Courts established by Grey, which, significantly, involved Māori 'native assessors' sitting with Pākehā magistrates. All of these mechanisms were exceptional in some way, exempting Māori from some aspects of colonial law or allowing for the application of aspects of Māori law in some circumstances. However, these exceptional laws were not aimed at perpetuating Māori law and the jurisdiction of tikanga. Instead, they were "intended to be temporary, a staging post on the way to social and legal assimilation".

This is an important reminder. The role of tikanga and the recognition of Māori law within the New Zealand state legal system has remained a live issue. Recent cases before the New Zealand courts are requiring engagement with tikanga concepts and processes in a more sophisticated way than ever before. The New Zealand Supreme Court decision in *Takamore v Clarke* in 2012 directly addressed the role of tikanga and its recognition as law. Moreover, many aspects of New Zealand statute law now include some reference to a Māori dimension. This might be seen as another form of exceptionalism. In his 2013 Harkness Henry Lecture, entitled '*Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*', Justice Joe Williams, of the New Zealand Court of Appeal, suggested that the difference now is that this new exceptionalism is aimed at perpetuating distinctive Māori legal forms, as opposed to extinguishing those distinctions in a process of assimilation, as was the case during the Crown colony period (and later). To some extent, the issue remains the same, although the questions of recognition and exceptional laws are being raised with a very different purpose. Dorsett would caution us that this will likely require different techniques than those applied in the design of laws and institutions during the Crown colony period.

Juridical Encounters is an insightful and very readable account of a key strand of the development of New Zealand's colonial legal system. It speaks to big constitutional questions of jurisdiction at a conceptual level but remains firmly grounded in the practical encounters of Māori with the colonial legal system. As the nature of the relationship between Māori law and state law continues to evolve, *Juridical Encounters* provides an important framework that helps us, not only to see how we arrived at this point, but how to ensure that we pay careful attention, in this evolution, to the concept of jurisdiction and the places from which Māori law and state law speak.