Metropolitan Theorising:
Legal Frameworks, Protectorates and Models for Māori Governance 1837-1838

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This article considers the little-known 1838 proposal by Robert Torrens for the establishment of a native government in New Zealand. In so doing, it joins recent literature which seeks to move away from doctrinal or juridical legal history through an exploration of the ways in which legal concepts were used in the first part of the nineteenth century by colonial actors as tools, deployed for political advantage, rather than in strict reliance on them as a particular legal form. In so doing, however, this article also contends that although legal concepts were often malleable and could be, and were, deployed in this way, those who relied on them were also bound by Imperial constitutional principles which, while often broad and ambiguous, nevertheless acted as limits on the deployment of these concepts.

In late 1838 Colonel Robert Torrens, the political economist, Chairman of the South Australian Colonisation Commission and member of the first New Zealand Colonization Society, wrote to James Stephen, Permanent Under-Secretary at the Colonial Office, begging a quarter hour of his time to discuss Torrens' proposal for an independent native government in New Zealand.[1] Broadly, Torrens proposed that New Zealand should become a protectorate of Great Britain, and that its government should be funded by a new chartered corporation to be known as 'The New Zealand Society of Christian Civilization'.[2] The proposal went on to outline in some detail how this protectorate would come into being, and how it would function – the legislative, executive and judicial institutions, as well as the plans for Māori participation in this new governance structure. Some weeks later a more detailed version of the proposal was resent to Lord Glenelg (Secretary of State for War and the Colonies), along with a companion document which focused on the New Zealand Colonization Society's plans for systematic colonization, and the powers consequently required by the proposed new chartered corporation.[3]

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1 Torrens to Stephen, 6 November 1838, The National Archives, London (TNA), CO209/3, fol. 297. The original letter is dated 6 October. October has been crossed out, presumably at the Colonial Office, and replaced with November. The letter bears the Colonial Office stamp, stating it was received 7 November 1838. The date of the letter is presumably therefore 6 November.

2 'Outline of a Plan for establishing under the protection of the British Crown an Independent Native Government in the Islands of New Zealand', enclosure in Torrens to Stephen, ibid, fol. 299.

3 Lyall to Glenelg, 14 December 1838, TNA, CO209/3, fol. 313, again requesting an interview. On 20 December Glenelg asked for more information prior to the interview, in particular as to what assistance the Company specifically wanted from the Government: Glenelg to Lyall, 20 December 1838, TNA, CO209/3, fol. 315. Lyall sent more information: Lyall to **Grey, 28 December 1838, TNA CO209/3, fol. 317**, which included two enclosures. The first is an explanatory memo of the powers required by the New Zealand Colonisation Society (fol. 324 ff) and the second is the Plan (fol. 333 ff).

Torrens' proposal is one of a plethora of governance models suggested for New Zealand from the mid to late 1830s. Regardless of their form, they have in common that all addressed in some way the place of Māori generally in the proposed politico-legal order set out in these models. These models took the form of proposals, policies and Bills and were put forward by almost every group that considered itself to have a stake in the settlement of New Zealand: the Christian Missionary Society; the Aborigines Protection Society; the first New Zealand Company; the New Zealand Association (later the second New Zealand Company); the British Resident in New Zealand, James Busby; and several private individuals. Almost without exception, none were ever realised, including that of Robert Torrens and the proposed New Zealand Society of Christian Civilization.

While the models are fascinating in their own right – providing a rich account of pathways not taken and alternatives that might have been – they can offer insight into more. They were proposed at an important juncture. The first part of the nineteenth century was a crucial period for what Benton describes as the 'consolidation of imperial legal control and jurisdictional streamlining'.[4] By the time of the colonization of New Zealand, the British Empire was 'conceived increasingly in terms of hierarchy and subordination, rather than, as the American colonists had originally viewed it, as an "empire of liberty"'.[5] Since the 1770s, Britain had survived a series of colonial crises including the loss of the American colonies and upheavals in Canada. These forced thinking about the ordering of empire. What was required was a united empire, controlled effectively from London, through the medium of the British Parliament. This in turn led to an emphasis on the sovereignty of the Imperial Parliament, with a concurrent downplaying of the liberties of colonists and the requirements of representative government in the colonies.[6] In practical terms this re-ordering was effected through a number of strategies, for example constraining the power of local officials and the prerogatives of local elites,[7] and reworking colonial courts and issuing new charters of justice.[8] It also required thinking about ways to structure and control contact between wayward British subjects and Indigenous groups in the Empire as well as, more broadly, between indigenous polities and the Empire itself.

Recent literature has explored the ways in which legal concepts were used as tools by colonial actors.[9] This literature emphasises that legal forms were mutable, changing and contingent.

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4 Lauren Benton 'The Melancholy Labyrinth: The Trial of Arthur Hodge and the Boundaries of Imperial Law', *Alabama Law Review* 64 (2012): 91-122, 93.

5 Christopher Bayly, 'The First Age of Global Imperialism, c.1760-830', *Journal of Imperial and Commonwealth History* 26 (1998): 28-47, 28, qtd in Duncan Bell, 'Dissolving Distance: Technology, Space, and Empire in British Political Thought, 1770-1900', *Journal of Modern History* 77 (2005): 523-63, 523, 541.

6 P. D. Marshall, 'Empire and Authority in the Eighteenth Century', *Journal of Imperial and Commonweath History* 15 (1987): 105-122, 106-9.

7 Benton, 'The Melancholy Labyrinth', 93.

8 Shaunnagh Dorsett, 'Reforming Equity: New Zealand 1843-1856', *The Journal of Legal History* 34 (2013): 285-306, 285-6.

9 Bain Attwood, 'Returning to the Past: The South Australian Colonisation Commission, the Colonial Office, and Aboriginal Title' *The Journal of Legal History* 34 (2013): 50-82; Shaunnagh Dorsett 'Sovereignty as Governance in the Early New Zealand Crown Colony Period' in *Law and Politics in British Colonial Thought: Transpositions of Empire*, ed. Shaunnagh Dorsett, Ian Hunter (New York: Palgrave McMillan, 2010); 209-228; Mark Hickford '"Vague Native Rights to Land": British Imperial Policy on Native Title and Custom in New Zealand, 1837–53', *Journal of Imperial and Commonwealth History* 38 (2010): 175-206; Damen Ward 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', *History Compass*, 1 (2003): AU 049, 001–024.

Sovereignty, jurisdiction, property, occupancy, for example, were all concepts deployed in order to gain advantage or leverage in highly specific contexts,[10] although this should not be understood as meaning that legal concepts were merely discursive with no normative aspect or legal force. At the least, concepts were employed loosely, as a claim to legitimacy rather than being relied upon as narrow, technical terms of art.[11] As the century wore on their mutability was somewhat reduced, and they took on more familiar modern meaning or understandings. In this transformative period, however, sovereignty had not yet attained the particular form which underpins the relations between modern states – its earlier plural valences had not yet fully been refashioned to the later, more modern, absolute state sovereignty. This was particularly evident in the area under consideration here: that of the relations between the British Empire and indigenous polities. By the end of the 1840s many of the conditions of the form that such relations would take in the late nineteenth century, and the basic concepts on which they were founded, had been, if not settled, then at least strongly pre-figured.

Emphasis on the way in which law and legal discourse could be selectively deployed, however, should not distract from paying equal attention to the legal frameworks within which they were sited (and which, importantly, constrained that deployment) and the institutions through which that deployment occurred. In giving these models institutional form there were examples throughout the Empire from which inspiration could be drawn. Models proposed for New Zealand drew on those which had proven expedient and legally viable in other parts of the Empire. Treaties, contracts, royal charters, protectorates and factories were all suggested.[12] All had pedigrees in colonial governance and more than one was often employed in regulating particular relations. The diversity of these in the models proposed for New Zealand reflected an era poised between older and newer ideas as to how the legal relations between the Empire and its constituent parts should be organised. Some, forms, such as royal charters and contracts, would become less common in this era. Others, such as treaties, would be even more frequently resorted to as the capacity of various indigenous polities, of which Māori were one example, to enter such agreements was increasingly recognised.[13] Metropolitan theorisers drew on this Empire-wide experience to craft their models of governance.[14] The institutional arrangement

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10 Attwood, 'Returning to the Past', 52.

11 Attwood, 'Returning to the Past', 58, citing Lauren Benton and Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice', *Law and History Review* 28 (2010): 1-38, 1, 2, 14-15, 30.

12 See, for example, in the same period, William Hobson's governance proposals for New Zealand which relied on a factory model, similar to that of the East India Company in the Calcutta Presidency: Shaunnagh Dorsett, '"The Precedent is India": Crime, Legal Order and Governor Hobson's 1840 Proposal for the Modification of Criminal Law as applied to Māori', *law&history* 1 (2014): 29-55.

13 As an example one only need look at the number of agreements entered into by Britain between the mid-1830s and the mid-1840s on the borders of the Empire and indigenous polities in Africa: the Cape; Gambia, the Gold Coast and others. The Treaty of Waitangi was one example of a broad practice of treaty-making at the time. On the wave of treaty writing generally see Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century', *American History Review* 117 (2012): 92-121.

14 The idea of movements of laws, and of different kinds of mobility, in and around the Empire is now an accepted part of the 'new Imperial history': Zoë Laidlaw, 'Breaking Britannia's Bounds? Law, Settlers, and Space in Britain's Imperial Historiography' *The Historical Journal* 53 (2012): 807-830, 811. There is a rich literature addressing movement, through metaphors such as networks, webs, trajectories and 'travelling laws'. For a selection see Zoë Laidlaw, *Colonial Connections 1815-45: Patronage, the Information Revolution and Colonial Government* (Manchester: Manchester University Press, 2005); Lauren Benton, *The Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010); Tony Ballantyne, *Webs of Empire*: *Locating New Zealand's Colonial Past* (Wellington: Bridget Williams Books, 2012); Alan Lester, *Imperial Networks: Creating Identities in Nineteenth Century South Africa and Britain* (London: Routledge, 2001); Tony

proposed by Torrens was of an overarching protectorate underpinned by treaty. The protectorate was a form which, configured somewhat differently, was to be so vital in organising Britain's legal relations with indigenous polities in the latter part of the nineteenth century.

Torrens' proposal, along with those of others, has disappeared almost without trace.[15] No claims can be made that the proposal had any significant consequences, either for the structure of legal order in New Zealand or for the developing relations of Britain to the Māori polity. It certainly was not influential in the legal (re)ordering of the Empire. However, that does not mean it, and other largely ignored models, do not deserve investigation. Models such of those of Torrens and Busby are important examples of the variety of ways in which institutional arrangements could be crafted, as well as of the strictures placed by imperial legal frameworks on how concepts such as sovereignty and jurisdiction could be deployed. Such proposals sit within the debates about imperial control, the structural form that this control should take, and the institutions through which it could be effected. Torrens' proposal is an example of the crafting of a local institution which was intimately connected to the broader project of imperial control.

I. The Imperial Framework: Extra-territorial Jurisdiction and the Problem of Legal Order

In June 1837, Mr Wright, a 'settler', was the victim of a robbery with violence at his home in the Bay of Islands. The robbers took twenty yards of calico, ten shirts, twenty pounds of gunpowder, and sundry other articles. It seems the robbery was committed by four men. Three of them were identified by Mr and Mrs Wright: Doyle (likely an escaped convict), Fell (apparently a pirate) and a man interestingly known as 'the Shoemaker'. The Wrights determined to travel to Sydney in order that the wrongdoers might be prosecuted. At the time, Captain William Hobson (later the first Governor of New Zealand), and his ship the "Rattlesnake", was in New Zealand. At the request of James Busby, the British Resident, he agreed to transport two of the accused, James Golding and Edward Doyle, as well as the witnesses, from New Zealand to Sydney.[16]

Ballantyne and Antoinette Burton, *Moving Subjects: Gender, Mobility and Intimacy in an Age of Global Empire* (Champaign: University of Illinois Press, 2008); Alan Lester and Fae Dussart, 'Trajectories of Protection: Protectorates of Aborigines in early 19th century Australia and Aotearoa New Zealand' *New Zealand Geographer* 64 (2008): 205-220; Travels of Laws: Indian Ocean Itineraries, a special edition of the *Law and History Review*, especially the introduction by Renisa Mawani and Iza Hussin *Law and History Review* 33 (2012): 733-747.

15 Torrens proposal is briefly mentioned in Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland: Auckland University Press, 1977); Damen Ward, 'The Politics of Jurisdiction: "British" Law, Indigenous Peoples and Colonial Government in Australia and New Zealand, c.1834–60', DPhil Diss, Oxford University, Oxford, 2003, 76. It has also been mentioned in passing in the recent Waitangi Tribunal Report: The Waitangi Tribunal, *He Whakaputanga me te Tiriti*: The Report on Stage One of the Te Paparahi o Te Raki Inquiry, WAI 1040 (Lower Hutt: Legislation Direct, 2014), 312. This report in turn is underpinned by a number of historical reports, of which the most relevant here is Samuel Carpenter *Te Wiremu, Te Puhipi, He Whakaputanga me te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty*, Report Commissioned by the Waitangi Tribunal (2009), 17-18, document A17, where Torrens' proposal is referred to at 120. The proposal is also mentioned in Ian Wards *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832-1852* (Wellington: Government Printer, 1968), 21, fn 4.

16 Busby (British Resident in New Zealand) to Deas Thompson (Colonial Secretary New South Wales), 3 July 1837, TNA, CO 209/2, fol. 353; Busby to Hobson, 1 July 1837, TNA, CO 209/2, fol. 356.

On arrival in New South Wales only Doyle was indicted. Golding was discharged. Wright stated that he had never identified him as one of the perpetrators and in fact had not even realized initially that he had been into custody.[17] The trial was short. Doyle's only defence was a challenge to the jurisdiction of the court. He alleged that he was not a British subject and therefore could not be tried as New Zealand was not a British possession, and the Court's extra-territorial jurisdiction applied only to British subjects. However, he failed to convince the Court that he came from New Bedford in America. Doyle was found guilty and executed three weeks later.[18] In summing up, Acting Chief Justice Dowling made it clear that while the costs of the trial had been immense, no efforts would be spared to bring to trial 'lawless ruffians [who suffered from] a delusion that by distance they were secured from the visitation of justice'.[19]

Doyle's Case exemplifies the problems of legal order which bedevilled the British, not just in New Zealand but throughout the Empire, throughout the 1830s. Across the Empire and beyond unruly British subjects resorted to areas outside the Dominions, beyond the legal reach of British justice. British subjects were increasingly mobile, travelling and trading across the Empire and in the territories of foreign powers. In the 1830s the area around Kororāreka was a bustling melting pot of Māori, British traders and whalers and sailors of other nationalities (particularly French and American). Missionaries had arrived in 1814 and some British subjects had made New Zealand their home. There were also escaped convicts. Across that decade, there was an escalating problem of lawlessness and violence by British subjects in New Zealand, particularly in the far North. However, British capacity to control its peripatetic subjects was limited, not just in New Zealand, but in many parts of the globe. In the Levant and China, and on the edges of Empire in India and Africa, subjects acted with impunity, virtually immune from criminal prosecution. In the end, the inability to control British subjects was a significant driver for the acquisition of sovereignty in 1840.

In a nutshell, the legal problem was this: both the rules of British Imperial law (which regulated Britain's legal relationships with her colonies) and the rules of emerging international law provided that Britain had no capacity to exercise judicial power over British subjects in foreign territory, unless they had been given the authority to do so by the local sovereign. In other words, there needed to be some treaty of some kind by means of which the foreign sovereign allowed the exercise of British jurisdiction within its territory. Without this permission, Britain could not erect courts for its subjects in foreign territory, appoint magistrates or consuls, or even physically apprehend subjects. This is not to say that these rules were always adhered to by local officials. At the Gold Coast, MacLean, the local President of the African Committee, and later judicial assessor and magistrate, was known to have exercised irregular jurisdiction over the local inhabitants by reason of voluntary submission by several local chiefs.[20]

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17 John Wright, Deposition, 27 July 1837, Clerk of the Peace Depositions, Sydney Police Office, State Records New South Wales (SRNSW), NRS 800 [9/6310] (loose bundle); *The Sydney Gazette*, 4 November 1837, 3.

18 *The Sydney Gazette*, 9 December 1837, 3.

19 *The Sydney Gazette*, 4 November 1837, 2-3. For the case against Doyle, see *R v Doyle*, 1 November 1837, Supreme Court of New South Wales, Dowling ACJ, *Proceedings of the Supreme Court*, vol. 143, SRNSW, NRS 5869 [2/3328], 156.

20 Maclean to Stanley, 2 February 1844, TNA, CO96/4, fol. 16; Report from the Select Committee on the West Coast of Africa, GBPP 1842 (551), v; W Smith, minute, 12 September, on the reverse of Nicolls (on behalf of the African Committee) to GW Hope MP, 25 August 1843, TNA, CO96/2, fol. 273. From 1828 to 1843 the Gold Coast Forts were governed by the Company of Merchants Trading to Africa which in turn was managed by a committee of merchants known as the African Committee. In 1844 their Government was resumed by the Crown. Judicial functions were devolved from Hill to a new office of

Nevertheless, the rules were generally adhered to, and taken seriously, particularly by the Colonial Office. The rules of British Imperial law constituted the legal framework through which peoples and laws formally encountered each other on the edges of the Empire and were a significant barrier to the exercise of British authority abroad. These rules were therefore significant in structuring the relations between British and other nations and Empires. After many (largely impotent) attempts to legislatively provide for extra-territorial jurisdiction (including specifically for New Zealand) the matter was finally addressed in the *Foreign Jurisdiction Act* of 1843.[21]

Where treaties had not been signed, or were ineffective, Britain had no power over matters outside the Dominion, including over its own subjects. In some cases that meant that the disciplining of British subjects abroad was simply left to the legal systems of the foreign countries where these subjects found themselves. But in some cases, where Britain was reluctant to allow its subjects to be judged according to particular foreign laws, or foreign laws were simply deemed inadequately civilized, this was problematic. Bound by the limitations of the rules on extra-territorial jurisdiction Britain could not bring its own subjects to heel. New Zealand was one such place. Doyle's 'extradition' to New South Wales had been an extraordinary event. Busby had taken the unusual step of obtaining a 'document' from local *rangatira*. He described this as 'a warrant from the relevant native authorities for the seizure and removal of the prisoners', and as a 'commission'[22] The 'warrant', signed by four Chiefs, who were the Committee appointed by the Chiefs of the United Tribes of New Zealand, requested Busby remove the men, take them to Port Jackson, take them before a court and punish them.[23]

That Busby would resort to rangatira for such a document demonstrates the extent to which he was aware of his lack of legal or other capacity to deal with British miscreants in New Zealand. This lack of capacity was not just a problem for Busby and the British Government. For private individuals, such as Torrens, a lack of order threatened ventures. Torrens and the first New Zealand Company, fixed on the idea of systematic colonisation and the construction of a profitable venture, were aware that this would not be possible unless the venture were underpinned by a regular government which could maintain law and order. While the actual practice of legal officials in the Empire did not always correspond to the legal principles under which they operated, in the main the rules on extra-territorial jurisdiction were observed and enforced in this period. Any models proposed, therefore, not only needed to respond to, but to be crafted within, this framework.

II. Political Manoeuvrings

It is difficult to easily disinter the many proposals of the 1830s from their surrounding politico-legal contexts. They were sited within evolving colonial policy for New Zealand, including the

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Assessor and Stipendiary Magistrate. Captain Maclean, the former President of the African Committee, was appointed to the position.

21 On this problem and this period in New Zealand see PG McHugh '"A Pretty Gov[ernment]!": The 'Confederation of United Tribes' and Britain's Quest for Imperia Order in the New Zealand Islands in the 1830s' in *Legal Pluralism and Empires, 1500-1850* ed. Lauren Benton, Richard J Ross, (New York: New York University Press, 2013), 233-260

22 Busby to Colonial Secretary, New South Wales, 4 July 1837, TNA, CO 209/2, fol. 356.

23 Ibid, fol 360. A copy can also be found in Clerk of the Peace Depositions 1837, SRNSW, NRS 800 [9/6310] (loose bundle).

problems caused by of lack of British legal authority in New Zealand discussed above, the impact of (broadly put) 'humanitarian' thought, and the difficult history of private proposals for systematic colonisation. Torrens' proposal for an 'Independent Government of New Zealand', for example, finds its specific place within contestations between the first and second New Zealand companies and their relations with each other and the Crown in the late 1830s.

In order to further systematic colonisation, in 1837-1838 both the New Zealand Association (the 'Wakefieldians') and Torrens (for the first New Zealand Company) put forward proposals for the governance of New Zealand. The New Zealand Association was campaigning hard for a charter which would give the company extensive powers over proposed settlements in New Zealand. The influential Lord Durham had just taken up the Directorship of the Association and, as his support was critical to the survival of the Melbourne Government, there was an expectation that such a charter would be forthcoming.[24] Despite this, by mid-1838 the plans of the Association were in tatters. They had failed to gain the needed government support. While after much wrangling, and Durham's personal intervention, a *Bill for the Provisional Government of New Zealand* had been introduced into Parliament. The Bill, although introduced by the Government, was similar to a Bill proposed by the New Zealand Company.[25] The Bill was soundly defeated,[26] voted against even by many Government members.

The proposal by the New Zealand Association relied on a model already found in the Empire: the factory. Initially to be underpinned by a charter, later changed to an Act of Parliament, the *Bill for the Provisional Government of New Zealand* set forth a local governance structure and jurisdictional arrangements reminiscent of those of factories or Presidencies of the East India Company at the end of the nineteenth century, albeit somewhat less complex.[27] This form, despite being by this time rather old fashioned, would be revisited in the same year in the most influential model never enacted, that of Captain (later Governor) William Hobson.[28] The provisions of the Act vested extensive powers in Commissioners, including a delegated prerogative power to enter into treaties of cession on behalf of the Crown for areas to be known as 'British settlements'. Within these, the Commissioners would have the sole power to erect institutions: legislative; executive; and judicial. All who were within the settlements, British or Māori, were to be subject to British law, although exceptional and temporary laws could be made for Māori within the settlement. Treaties or contracts were to be entered into to give the Commissioners extra-territorial jurisdiction over those parts of the Islands where Māori continued to hold sovereignty.[29]

Although introduced by the Government, it does not seem that anyone actually expected it to pass. Several key government members, such as Howick, denied they had even supported

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24 Helen Taft Manning 'Lord Durham and the New Zealand Company' *New Zealand Journal of History* 6 (1972): 1-19, 5. While I do not agree with all of her analysis in this article it provides an excellent overview of the contestations in this period. For a detailed account see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, 301-308; Adams, *Fatal Necessity*, ch 4. Durham had previously had the same position with the first New Zealand Company.

25 Baring (on behalf of the New Zealand Company) to Melbourne, 21 November 1837: TNA, CO 209/2, fol. 398.

26 *Hansard*, Wednesday 20 June 1838, Series III, vol 43, cc 868-893. The bill was defeated 92/32.

27 *Bill for the Provisional Government of British Settlements in the Islands of New Zealand*, TNA, CO209/3, fol. 549.

28 For a full examination of Hobson's proposals see Dorsett 'The Precedent is India'.

29 *Bill*, cl. 10-13.

bringing the bill.[30] Objections varied. Sir Robert Inglis, for example, was simply against the idea that private persons should be able, as he saw it, to purchase rights of sovereignty and the right to make laws in a foreign country.[31] Some, such as Gladstone thought that if anything were to be done to regulate relations with Māori it ought to be done by the government, not private individuals. He stated that there was no evidence that Māori had parted with their sovereignty, and dispossession should not happen by this kind of underhand means.[32] Sir Walter James agreed that the bill compromised the independence recognised.[33] Others simply thought the bill gave the commissioners too much power with too little accountability or that the Crown should not effectively transfer its prerogative to the Association.

The failure of the Association's plans in mid-1838 opened the door for Torrens and Lyall, on behalf of the proposed New Zealand Society for Christian Civilization (and the remnants of the first New Zealand Company), to present their own plans to the Government. Despite the detail of the plans presented, it is unclear that the Company ever intended to recommit to colonisation. The Company was virtually defunct. Over a decade before it had, in the (not necessarily realistic) expectation of a Charter for a monopoly over trade to New Zealand, sent an expedition to New Zealand to purchase land. The venture had been a failure. Nevertheless, the later emergence of the Association prompted the first New Zealand Company to action. The Company was not inclined to meekly give up what they saw as their rights over New Zealand to the Wakefieldians.[34] Torrens' plan, therefore, was more likely therefore a gambit in the ongoing 'negotiations' between the companies for compensation. While the broader story of the company and the Association have been well documented, little evidence of Torrens' plans and these particular events seems to have survived. We do know that in November Torrens asked to present his proposal for a native government to James Stephen. We know that in December Lyall wrote again asking for an interview. We know that Glenelg asked for more information before that interview, and that the plan for a native government was again sent, this time with an outline of what seems for the government to have been the more problematic matter – that of the powers that the company wanted in order to undertake its plans. In the end it is not at all clear that the meeting ever occurred. It was simply communicated that company's requests would not be fulfilled. Nothing more was ever heard of Torrens' plan. James Stephen noted on the back of Lyell's letter of 28 December 1838 that, subject to a determination of the overall question of colonisation of New Zealand, it might be desirable if the 'various projectors of plans of that nature…meet together to ascertain the practicability of their all cooperating in some one scheme'.[35] This was unlikely, given the personal animosity between members of the various colonisation schemes.

III. Torrens' Proposal

The purpose of the proposal, as made clear in the several letters to the Colonial Office, was to 'adopt in such parts of New Zealand as may be ceded by the native chiefs a uniform system of

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30 *Hansard*, c 876.

31 Ibid, c 872.

32 Ibid, c 875.

33 Ibid, c 880.

34 Taft Manning, 'Lord Durham', 3-4.

35 Lyall to Grey, 28 December 1838, TNA, CO209/3, un-numbered folio following fol. 320.

colonization, under the protection of a regular form of government…'.[36] The proposal required the appointment of a Resident Commissioner (approved by the Crown and with the character of a diplomatic agent) to negotiate with the Chiefs and tribes who signed the Declaration of Independence as they collectively held sovereignty over New Zealand.[37] The Commissioner is to meet at 'Waitanger, in the manner proposed by the third article of the Declaration of Independence' to meet in congress and consider the establishment of a Provision Government.[38] On the basis of the 'cardinal principle' that they hold collective sovereignty,[39] the company would take up, as he saw it, the 'invitation' in the 'fourth article of the Declaration to become the Parent and Protector of the independent state of New Zealand'. Once this was done, the Commissioner (as a representative of Her Majesty) and 'in her character of Protector of the State of New Zealand' shall proposal the establishment, under the Protection of the British Crown, a provision government for a period not exceeding 21 years. It was to be styled 'The Provisional Government of the United Tribes of New Zealand'.[40]

Underpinning the validity of the establishment of this government was a recognition that Māori were sovereign, a position already taken by the Colonial Office. Whether this sovereignty was understood by either the Colonial Office or Busby as the same as the sovereignty of the British, or was intended to be equivalent to it, is debateable. Soverignty was still a malleable concept. It had not yet shed its earlier multi-valent form and taken on its familiar modern one. However, however Māori sovereignty was understood by the British, it was, for them, sovereign enough to mean that the rules forbidding the exercise of British jurisdiction on foreign territory applied, as well as sovereign enough to be able to enter into treaties with the British Government. The need for a treaty was clear. Only a treaty could provide a sufficient legal basis for the establishment of a protectorate and a valid ground on which to exercise extra-territorial jurisdiction. However, in whom that Māori sovereignty was actually vested was less clear. In 1835 Busby, had persuaded the chiefs in the Northland area to sign a Declaration of Independence (He Whakaputanga). According to that document at least Māori sovereignty (in the North) was vested in the collective of the Māori chiefs established under the Declaration itself. The proposal proceeded on the basis that this was the case. The fourth clause of the Declaration requested the King to be the 'parent of their infant state'. It was on this document (and its apparent invitation) that Torrens based the legal foundations of his proposal.

In the Declaration *rangatira* designated themselves te wakaminenga on nga Hapu o Nu Tireni (The United Tribes of New Zealand). The Declaration proclaimed that all kingitanga and mana (sovereign power and authority) resided with them, and that no one else could make laws for their territories or exercise kāwanatanga (functions of government) unless acting under their authority. They further agreed to meet at Waitangi every year to frame ture (laws) for the dispensation of justice, the preservation of peace and good order, and the regulation of trade. In particular, they agreed to exercise legislative authority (in their collective capacity). Over the next three and half years eighteen additional rangatira added their moko, other marks or signatures.[41] Busby sent the Declaration to Bourke for approval. The Declaration was accepted

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36 Lyall to Grey, 28 December 1838, TNA, CO209/3, fol. 318; 'Outline of a Plan for establishing under the protection of the British Crown an Independent Native Government in the Islands of New Zealand', enclosure 2 in Torrens to Stephen, 6 November 1838, TNA, CO209/3, fol. 299, cl. II, III.

37 'Outline of a Plan', cl. II, III.

38 'Outline of a Plan', cl V.

39 'Outline of a Plan', cl IV.

40 'Outline of a Plan', cl VI.

41 Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, 154.

both by the Governor of New South Wales and the Colonial Office, although whether they saw it as evidence of a New Zealand state is debatable. Glenelg sent a reply that earnestly assured Māori of the good will of His Majesty's Government. It was, however, hardly a legally consequential reply, committing the British Government to nothing in particular other than unspecified 'support' and that Britain would be a parent to the infant Māori state, a statement which referred to no specific legal status in this period.[42]

Only the year before Torrens' proposal for an 'Independent Native Government', Busby had also forwarded to Governor Bourke a plan entitled 'Outline of Plan of Government'. It also built on the 1835 Declaration and the invitation in Art. 4, and also proposed a protectorate.[43] Given the paucity of material surviving on Torrens' proposal we may never know whether he had seen Busby's plan of the year before, or whether the 'invitation' in Art. IV of the Declaration led Torrens along the same path towards the Ionian Islands as Busby.

According to Busby, the Congress of Chiefs established under the 1835 Declaration of Independence were the 'depository of the powers of State', and therefore had sufficient sovereignty to enter into a treaty with a Foreign Power. This was because the Declaration had centralized their powers 'both de facto and de jure'. 'Whatever acts approaching to acts of sovereignty or government have been exercised in the country by these chiefs, in their individual capacity as relates to their own people, and in their collective capacity as relates to their negotiations with the British Government'.[44] The recognition of collective sovereignty in the Congress would allow for a protectorate, similar to that of Great Britain over the Ionian Islands, to be put in place. What is wanted, according to Busby, was 'some paramount authority'…'by some Civilized State'. Otherwise there would be no prospect of peace.[45] Māori required 'foreign assistance in reducing the country under its authority to order'.[46] The problem was lack of law and order. The crimes of individuals became the bases of local wars. The 'connections' of the injured party would retaliate. Thus 'by every attempt to administer the law of retribution – the rude justice of nature – the breach is made to widen. New deaths involve more distant connections – tribe after tribe becomes a party to the contest, and peace, or rather an interruption of murders can only be procured when one of the parties becomes too weak to continue…'.[47] Busby had first suggested the Ionian Islands as a model for a governance

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42 There is some disagreement in as to how this declaration was received by the Colonial Office. For differing views, according it more or less importance at the Colonial Office, see, for example, Samuel Carpenter *Te Wiremu, Te Puhipi, He Whakaputanga me Te Tiriti*, Evidence given to the Waitangi Tribunal, *He Whakaputanga me te Tiriti*, A17, 49-51; Paul McHugh, 'Brief of Evidence 16 April 2010", Evidence given to the Waitangti Tribunal, *He Whakaputanga me Te Tiriti*, A21, 40-41; For discussion see Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, 185.

43 Busby to Colonial Secretary New South Wales, 16 June 1837, TNA, CO209/2, fol. 333. While the Declaration has garnered much attention, Busby's accompanying plan of government has received comparatively little, not least because, as with other models never implemented, it has largely disappeared from view, referred to but rarely examined. For the most detailed examination of the proposal see Edwin Fletcher, 'A Praiseworthy Device for Amusing and Pacifying the Savages? What the Framers Meant by the English Text of the Treaty of Waitangi', PhD Diss, University of Auckland, 2014, esp. 624-8. For brief comment see Adams, *Fatal Necessity*, 88; Eric Ramsden, *Busby of Waitangi: H.M.'s Resident at New Zealand, 1833-1840* (Wellington: Reed, 1942), 171-2.

44 Busby to Colonial Secretary New South Wales, 16 June 1837, TNA, CO209/2, fol. 340. See also Adams *Fatal Necessity*, 88.

45 Busby to Colonial Secretary, 16 June 1837, fol. 335.

46 Busby to Colonial Secretary, 16 June 1837, fol. 340.

47 Busby to Colonial Secretary, 16 June 1837, fol. 336.

structure for New Zealand in 1835, at the time he transmitted the Declaration of Independence to the Crown. In 1837 he averred that all his 'experience subsequent to the date of that suggestion has strengthened my belief that the principle is peculiarly applicable to this country'.[48]

Solving the 'problem' of extra-territorial jurisdiction would not be sufficient. As Busby noted, even had Britain been able to find a constitutionally valid basis on which to exercise foreign jurisdiction in New Zealand, this would only give authority over British subjects.[49] According to Busby, the protectorate model would get past this limitation. Britain would administer the New Zealand State in trust for Māori.[50] Hence the need for this model to be underpinned by treaty. It was the strictures of British Imperial law which led Busby to fix upon a protectorate model from the outset. His 1837 'Outline of Government' was a full exposition of the model he had chosen in 1835. In transmitting the Declaration to the Governor of New South Wales he had remarked on the need for a protectorate such as that over the Ionian Islands. Busby also, more tentatively, suggested that some comparable examples could be found 'on the boarders of our Indian possessions'.[51] In fact the relations between those states and the Company were of quite a different legal character, based on a factory, rather than protectorate, model. Despite the appellation of protectorate – a feature of British imperial practice in Africa and South-East Asia in the late nineteenth century – the designation of a politico-legal arrangement as such in the early nineteenth century connoted no particular legal form, merely some idea of subordination to another power. Compared to later in the century, when the protectorate had become an important governance model in European (not just British) imperialism, in the first half of the century it was rare and did not necessarily assume the same legal form as later.[52] The Ionian Islands, therefore, provided one of the very few examples on which metropolitan theorizers and colonial administrators could draw.

On 5 November 1815 the islands of Corfu, Cephalonia, Zante, Ithica, Paxo, St Maura and Cerigo were declared 'a single, free and independent state, under the denomination of the United States of the Ionian Islands … and … under the immediate and exclusive protection of His Majesty the King of Great Britain'.[53] This was part of the territorial redistributions under the Treaty of Paris at the end of the Napoleonic wars. The islands had been ruled by the French, but were of obvious strategic importance to the British. They were joined together, constituted an independent state and put under the formal protection of the British in one move. A Constitution was to be prepared under the oversight of a Lord High Commissioner.[54] Thus, in

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48 Busby to Colonial Secretary, 16 June 1837, fol. 339.

49 Busby to Colonial Secretary, 16 June 1837, fol. 335.

50 Busby to Colonial Secretary, 16 June 1837, fol. 339.

51 Busby to Colonial Secretary, 16 June 1837, fol. 339.

52 On the increasing use of protectorates as a feature of British imperial practice in the latter half of the nineteenth century see PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004), 206-213; Peter Burroughs, 'Imperial Institutions and the Government of Empire', in Andrew Porter (ed.), *The Oxford History of the British Empire,* vol 3 (Oxford: Oxford University Press, 1999).

53 This was as a result of the Congress of Vienna at the end of the Napoleonic wars. However, unlike the distribution of territories and states generally. This was a series of treaties known generically as Treaty of Paris 1815, signed 20 November 1815. The Ionian Islands were, however, provided for by a separate treaty, Treaty Between Great Britain and Russia Respecting the Ionian Islands, 5 November 1815 (also known as the Treaty of Paris). The texts of all the treaties can be found in *Hansard*, 1816, vol. 32. The Ionian Islands remained a protectorate until 1864.

54 Treaty of Paris, 5 November 1815, Art. IV.

1817 the Islands were constituted a republic under the new constitution.[55] The Ionian Islands, therefore, were an early example of the protectorate which flourished in British imperial practice in the late nineteenth century. In 1866 Wheaton's famous *Elements of International Law* was able to note that although the Islands were to be a 'free and independent state', in reality their sovereignty was limited. What made their sovereignty so limited, Wheaton stated, was not just their external status: the government of the Ionian Islands were 'not only obedient to the commands of the protecting power', but the Treaty was framed 'in such a manner as to materially abridge their internal and external sovereignty'.[56] In reality the internal rulers were not those of the Islands, but the Lord High Commissioner, who had the entire executive power, while also participating in the legislative process.[57] As Bayly has pointed out, it was a '[c]onstitution that gave the illusion of an independent government'.[58] It is on this (as it turned out) despotic regime that Torrens' model (and that of Busby before him) seems to be most closely modeled. However, while the protectorate over the Ionian Islands was imposed by the victorious powers at the end of the of the Napoleonic wars, Busby's model, and that of Torrens after him, relied on cession of sovereign rights over select areas of New Zealand by those *rangatira* who had collective sovereignty under the Declaration.

While both Torrens and Busby advocated a protectorate, their vision of the internal ordering of the protectorate was similar, but not identical. Both Torrens and Busby proposed internal models which relied on nominal Māori governance or joint governance: thus, to some extent, marrying British and Chiefly authority, at least in so far as the *rangatira* could provide the authority for governance that Britain lacked. Under Torrens proposal a provisional council of government was established, with the British Commissioner as President. That Commissioner would (as in the Ionian Islands) hold the executive power normally held by the Governor in a British colony.[59] The remainder of the Council was to be made up of British appointed officials (Bishop, Commissioner of Police, Commissioner of Education, Commissioner of Public Lands etc) and seven 'native chiefs'. At least one half of the Council was mandated to be Māori although, notably, they do not seem to have been intended to hold any executive positions. Other than the Bishop and the Commissioner of Instruction the President of the Council was to have the right to appoint all British members of the Council, and to remove them. The Māori members were to be elected by 'native Chiefs and Heads of Tribes'. The judiciary was similarly to be composed of both a British and Māori judge. The territory of the United Tribes was to be divided into districts and counties, each headed by an 'Arekee' [*ariki*] who would, with a Sheriff and a mixed race police force, maintain order. Finally, the proposal envisaged that at the end of the initial twenty one year period executive governance would transfer to a new modified British Parliamentary system, with two chambers, Māori and settler, and executive power vested in an elected *ariki.* Once elected the office became hereditary in the holder's family unless changed by an Act of the new Parliament. Finally, and perhaps rather oddly, the

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55 *Constitutional Chart of the United States of the Ionian Islands as passed on 2nd May 1817*. A copy can be found in RM Martin *Statistics of the Colonies of the British Empire* (London: Allen & Co, 1839) Appendix VII, 258.

56 Henry Wheaton, *Elements of International Law* (Boston: Little Brown, 1866), 55.

57 Richard H Dana (ed), *Wheaton's Elements of International Law* (3rd ed) (Boston: Little Brown and Co, 1866), 54-5.

58 Christopher Bayly, *Imperial Meridian: The British Empire and the World 1780-1830* (London/New York: Longman, 1989), 196-202.

59 'Outline of a Plan for establishing under the protection of the British Crown an Independent Native Government in the Islands of New Zealand', enclosure in Torrens to Stephen, 6 November 1838, cl VI.

proposal made provision for certain British subjects to attain the rank of Māori chief.[60] It was a detailed proposal which addressed almost every aspect of civic life.

In contrast to Torrens' proposal, Busby's was shorter on detail and somewhat less formal in style. Similarly, Busby also envisaged that a native council and executive authority could be established by senior Māori elected by the Congress with the sanction of the Resident.[61] However, less overt effort was made than by Torrens to give the proposal at least a veneer of maintaining genuine Maori authority. It is difficult to read Busby's proposal without being astonished by his hubris. Only 'simple and primitive' arrangements would be needed.[62] Busby admitted that 'in theory … the government would be that of the Native Chiefs, but in reality it must necessarily be that of the representative of the protecting power'. The Chiefs would meet at least annually and 'nominally enact the laws proposed to them'. This is because they 'could not be entrusted with any discretion whatsoever, in the adoption or rejection, of any measure which might be submitted to them'. Moral principle (if it existed at all among them) would give way to the temptation of personal consideration. This legislative body was designed as a training ground, rather than expecting any actual agency in their own governance – 'the congress will be a school', so that they could become 'conservators of the peace' in their own districts.[63]

Busby was upfront that under his plan the Chiefs would become, as he put it, 'little more than an instrument in the hands of the British Resident'. He was of the opinion Chiefs had little real rank and that this plan would be for them an 'acquisition rather than a surrender of power'.[64] Therefore, according to Busby, the small salary and the distinction of the employment would ensure their devotion to the British Resident.[65] Busby thought that they would be so pleased with the position and salary that there would not be the slightest concern of 'any law which should be submitted to the chiefs being unpalatable to them'.[66] A council of settlers could advise and 'give hearty support' to the Resident.[67] Busby's apparently genuine belief that Māori were simply not suited to governance was the likely reason for the lack of any real detail in his plan as to institutions. He averred that that New Zealand had a lack of 'material' for institutions and as such could only look to the protecting state to provide them. The result was that 'whatever laws His Majesty's Government should consider suitable for the protection and control of the King's subjects would be proposed to, and as of course, become Acts of the Legislature of New Zealand. Whatever courts of Judicature His Majesty might deem necessary would be established under the same sanction'. As a marginal comment by an official at the Colonial Office noted, 'this is the real point'.[68]

We can only speculate that Torrens' suggestion of a protectorate – if not Busby's – was

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60 Ibid cl VI. The reasons for this final part of the proposal are unclear. Although one could cynically note that any settlers who attained the rank of Māori chief would perhaps then be eligible to also be appointed to some of the civic positions reserved for Māori.

61 Busby to Colonial Secretary New South Wales, 16 June 1837, TNA, CO209/2, fol. 342.

62 Busby to Colonial Secretary, 16 June 1837, fol. 342.

63 Busby to Colonial Secretary, 16 June 1837, fol. 341.

64 Busby to Colonial Secretary, 16 June 1837, fol. 343.

65 Busby to Colonial Secretary, 16 June 1837, fos. 341-2.

66 Busby to Colonial Secretary, 16 June 1837, fol. 342-3.

67 Busby to Colonial Secretary, 16 June 1837, fol. 345-6.

68 Busby to Colonial Secretary, 16 June 1837, fol. 344.

motivated by the rejection of the *Bill for the Provisional Government of New Zealand* some six months before. While, as outlined above, various concerns about the Bill had been raised in Parliament, many of them had in common that the Members objected to the purchase of sovereignty and interference with the independence of Māori. This was particularly so where those actions were by private individuals. Torrens' proposal was little better. It still assumed that Commissioners would be delegated prerogative powers to negotiate with Māori, although the accompanying enclosure to the plan recognised perhaps that this was not particularly palatable to the Crown, and reluctantly gestured towards a compromise where the Crown took responsibility for some of these matters.[69] Even if in reality a protectorate model would have effectively compromised Māori sovereignty and shifted law-making power to the British (something about which Busby was quite forthright), Torrens may have hoped that the protectorate model made this at least appear more acceptable. Unlike Busby's plan, under Torrens' it appeared that sovereignty remained, at least nominally, vested in Māori. Britain were not taking sovereignty nor sole jurisdiction: they were responding to an invitation. As always, however, the devil was in the detail, and the extensive powers that the Company wished given to their Commissioners, especially over land and finance, was unlikely to ever make the proposal attractive to the Crown.

IV. 'Humanitarian' Thinking

Proposals such as Torrens not only dovetailed with the desire of the Colonial Office to regulate contact between British subject and indigenous peoples, but with the broader aims of strategies of protection and amelioration which were of increasing concern in the wake of the 1837 Report of the Select Committee on Aborigines (British Settlements) (the 'Buxton Report').[70] The idea of amelioration had originated in the mid-eighteenth century in Barbados and Jamaica, and had been primarily economically focused and connected to the regulation of labour. Ameliorating the living condition of slaves (and particularly of women slaves) could drive up birth rates, lower death rates, thereby cutting the costs of producing sugar and increasing output.[71] In the 1820s amelioration became the focus of the anti-slavery lobbyists in London. Abolitionists sought to promote tighter imperial control over the conditions of slaves and the use of legislation to regulate slave labour, in particular seeking to limit the

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69 Lyell to Grey, 28 December 1838, TNA, CO209/3, fol. 318.

70 Ward, 'The Politics of Jurisdiction', 76; *Report from the Select Committee on Aborigines (British Settlements); with the minutes of evidence, appendix and index*, GBPP 1837 VII (425). For some of the now extensive literature on 'humanitarianism' in this period, and the work of the Committee, see Alan Lester and Fae Dussart, *Colonization and the Origins of Humanitarian Governance: Protecting Aborigines Across the Nineteenth Century British Empire* (Cambridge: Cambridge University Press, 2014), particularly 78ff; Zoë Laidlaw '"Aunt Anna's Report": Buxton's Women and the Aborigines Select Committee 1835-1837', *Journal of Imperial and Commonwealth History* 32 (2004): 1-28; Charles Swisland 'The Aborigines Protection Society, 1837-1909', *Slavery and Abolition: A Journal of Slave and Post-Slave Studies* 21 (2000): 265-280; Tony Ballantyne "Humanitarian Narratives: Knowledge and the Politics of Mission and Empire" *Social Sciences and Missions*, 24 (2011): 233-264; Alan Lester 'Thomas Foxwell Buxton and the Networks of British Humanitarianism' in *Burden or Benefit: Imperial Benevolence and Its Legacies*, Helen Gilbert, Chris Tiffin eds., (Bloomington: Indian University Press, 2008), 31-48; Seliha Belmessous *Assimilation and Empire: Uniformity in French and British Colonies, 1541-1954* (Oxford: Oxford University Press, 2013).

71 R Dunn, *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624-1713* (London: Jonathan Cape, 1972).

unchecked power of masters to punish their slaves. Some colonies had passed their own Acts, seeking to stave off metropolitan control.[72]

While 'amelioration' and 'protection' were hardly set concepts, they originated in, and had a tight connection, to labour. The initial legal framework for amelioration was the Order in Council of 10 March 1824 (sometimes called the *Code Noir*), which applied to Trinidad (a former Spanish colony).[73] As a colony ruled under the prerogative, and therefore with no local assembly, Trinidad was the ideal location to implement new strategies for amelioration. This was not the first, nor the last, time that Trinidad was chosen as the 'nursery' for the implementation of various colonial projects.[74] The 1824 Code was heavily influenced by, if not based on, the Spanish slave code of 1789: the *Cedula Real* (also known as the *Code Noir*).[75] Over the next decade, similar reforms were implemented in other Caribbean colonies.

The Select Committee on Aborigines in British Settlements handed down a number of broad recommendations, intended to apply across the Empire, as well as some specific recommendations for particular colonies. Although of course not technically British settlements, both information on, and recommendations for the South Seas Islands was included. The Committee concluded that intercourse with the British in the region had led to murder, misery and contamination.[76] For Buxton, then, it was the need to protect Indigenous peoples from the adverse consequences of British colonization, and the consequent duty to provide for their improvement, which was of most importance. Much of the Report, therefore, focuses on the need to civilise through Christianisation and education, on the evils of liquor, the problems of settler violence and issues to do with the rights of Indigenous labour forces.

However, while amelioration in the context of slavery had been tightly connected with labour - the powers of masters over slaves and the regulation of labour contracts imposed on newly freed slaves - 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. Although the final report of the Select Committee did make a number of recommendations with respect to labour contracts, and on the need for schools, and on the prohibition of sales of liquor to indigenous peoples, in the context of the Australian colonies and the Pacific Islands it was crime which captured the Committee's attention. 'Amelioration' was also taking on more strongly assimilatory overtones, although this is less evident in the Committee's Report than in subsequent literature. Although the Recommendations themselves were short on detail, a number of those giving evidence to the Committee gave detailed suggestions. Further, the Report spurred a flurry of proposals by societies and individuals for the amelioration and protection of the Indigenous peoples of the Empire. Many of these took the form of, or included as a component of broader governance structures, proposals for exceptional laws.

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72 Lauren Benton, Ford Ford, 'Magistrates in Empire: Convicts, Slaves, and the Remaking of Legal Pluralism in the British Empire', in *Legal Pluralism and Empires, 1500-1850*, Lauren Benton, Richard J Ross, eds. (New York: New York University Press, 2013), 173-198, 175.

73 Appendix to Report of Commissioners of Enquiry on the Colony of Trinidad, TNA, CO318/69, fos. 226-236.

74 On this see Claudius Fergus, 'The *Sieta Partidas*: A Framework for Philanthropy and Coercion during the Amelioration Experiment in Trinidad 1823-1834' *Caribbean Studies* 36 (2008): 75-99, in particular at 79.

75 Ibid, 81-84.

76 *Report from the Select Committee*, 14.

One of the specific concerns of the Committee was the problem of unruly British subjects and a lack of law and order on the frontier. In particular, in the South Seas runaway convicts were labelled the 'pests of savage as well as civil society'.[77] Similarly the runaway sailors, the crews of whaling vessels and traders were acting in a reckless and immoral manner when at a distance from the restraints of justice'.[78] According to the report, not just in New Zealand, but around the Empire, there was a need to bring both British subjects and Aborigines to justice for crimes committed against each other, the Committee noting that 'beyond the frontier justice is feebly administered'.[79] The Committee did not, however, have much to offer as a solution. In the end, they simply reiterated that 'in the case of offences committed beyond the borders, British subjects are amenable to colonial courts'. As far as the problem of crimes by Indigenous groups against British subjects they simply concluded that it would be best to concur with the tribes 'in devising some simple and effectual method of bringing to justice such of their people as might be guilt of offences against the Queen's subjects'.[80]

While there is little doubt that the Report influenced some subsequent British policy – one well-known example being the appointment of Protectors of Aborigines in the Australasian colonies – the problem with the report was that many of its recommendations were short on detail and practically and legally difficult to implement. Nor were many of the recommendations particularly new. The Committee seemed unaware, for example, that had the answer, for example, to the limits of extra territorial jurisdiction and the problems of crime and protection been simple the Colonial Office would undoubtedly already have crafted some solution. The 1830s was characterised by the increasing frustration of both the Colonial Office and the Foreign Office caused by their inability to do exactly this. A series of attempts in the 1830s to legislate for extra-territorial jurisdiction in a number of key locations across the Empire had all largely failed (either because they were constitutionally invalid or because as a matter of practicality they did not adequately address the problem).[81]

The need to stem crime and violence was also key for Torrens. Without it the plans for systematic colonisation would undoubtedly fail. The legal form of his proposal – treaty and protectorate – was designed to provide a constitutionally valid model that dealt with the limits of extra-territorial jurisdiction and therefore provided a basis for the imposition of legal order. His proposal, however, recognised the need to go beyond this. Most of the key concerns of the Select Committee are addressed, at least briefly. Torrens could not have been unaware of the fact that any governance proposal would be unacceptable if it did not provide for protection and amelioration. The 1838 Model was not Torrens' first encounter with the political need to provide strategies for these when considering systematic colonisation – that had been in the context of South Australia and his role with the Colonisation Commission.

In both 1834 and 1835 Buxton had spoken to the House of Commons on British treatment of the indigenous inhabitants of the Empire. On the second occasion he gained the agreement of the House to form the Select Committee on Aborigines in British Settlements. As Attwood notes, in the wake of Buxton's second address Grey, the Secretary of State for War and the Colonies wrote to the South Australian Commissioners noting Buxton's speech and inviting

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77 Ibid, 14.

78 Ibid.

79 Ibid, 79.

80 Ibid, 80.

81 See, for example, *Act to Regulate Trade to China and India* 3 & 4 Will IV, c 93 (1833); *Cape Punishment Act* 6 & 7 Wm IV, c 57 (1836). In the context of New Zealand see McHugh 'A Pretty [Gov]ernment'.

the Commissioners' attentions to the subject of what measures might be taken in the colonies to secure to the natives the protection of their rights and to promote the spread of civilisation among them.[82] He further notes that, as a result, over the next few months the Commissioners were careful in various forums to 'speak the language of humanitarianism'.[83]

Later in 1835 the Colonisation Commission approached the Colonial Office to issue legal instruments required to give effect to parts of the *South Australia Act*.[84] In its reply the Colonial Office made reference to the need to draw boundaries for the Province and the question of whether they 'might embrace in its range numerous tribes of people whose proprietary title to the soil we have not the slightest ground for disputing…'.[85] The South Australian Colonisation Commission (or particularly its President, Robert Torrens) interpreted Grey's reply as requiring that the Commission draw up a plan to respect Aboriginal title to land.[86] As a result, a response was drawn up by several commissioners, including Torrens, which focused on protecting aboriginal rights to land, and pointing out the practical and legal problems of so doing.[87] All of this was to little point. What was wanted was not a plan to protect aboriginal rights to land, but one which would, consonant with the Buxton Report, make provision for basic protection and amelioration, such as appointing a protector of aborigines. Some weeks later the South Australian Commission sent a document to the Colonial Office entitled 'Proposed Arrangements for Securing the Rights of the Aborigines Appointing a Protector with Particular Functions'.[88]

It may be, therefore, that a lesson was learned. Any proposal for New Zealand needed, as had been the case in South Australia, to address amelioration and protection in some way. This was likely only reinforced by the handing down of the Buxton Report between Torrens' South Australian experience and the drafting of the New Zealand proposal. In fact, the proposal at least addressed many of the concerns of the Report. It paid attention: churches and schools were to be established under the management of the Bishop and Commissioner for Education assisted by local missionaries; and lands were to be set aside as Native Reserves, under the control of a Native Commissioner for Public lands. Exceptional laws were proposed for Māori. Unlike the British, who were to be governed by English law, they would be subject to a new, provisional code, as close as practicable to English law, but enacted by the Māori Chiefs, although once enacted it could be altered by the Council under the delegated authority of the Chiefs. These laws were to be enforced by a military force, composed of British and Māori.[89] The notable absence is a Protector of Aborigines, one of the key recommendations of the Committee, and one of the few to be actually implemented. By 1837 the Colonial Office has

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82 Attwood, 'Returning to the Past, 62, quoting from Grey to Colonisation Commissioners, 17 July 1835, TNA CO 396/1.

83 Ibid.

84 *South Australia Colonisation Act* 4 & 5 Wm IV, c 95 (1834).

85 Grey to Torrens, 15 December 1835, TNA, CO13/3 quoted by Attwood, 'Returning to the Past', 64.

86 For suggestions as to how why Grey's response was interpreted in this manner see Attwood, 'Returning to the Past', 67-73.

87 Attwood, 'Returning to the Past', 71.

88 South Australian Colonisation Commission, 'Proposed Arrangements for Securing the Rights of the Aborigines Appointing a Protector with Particular Functions', TNA, CO13/4; Attwood, 'Returning to the Past', 75; Ward 'Politics of Jurisdiction', 66.

89 Outline of a Plan for establishing under the protection of the British Crown an Independent Native Government in the Islands of New Zealand', enclosure in Lyall to **Gleneg**, 28 December 1838, cl VI.

already appointed Protectors for the colony of New South Wales.[90] Perhaps Torrens felt a protector was unnecessary given the intention to appoint Māori police, judges and magistrates.

Conclusion

In the first half of the nineteenth century, policy initiatives, and more particularly the institutions through which they were to be implemented, were constrained by a framework of broad constitutional principle. Colonial administrators, particularly those in London, took the framework of imperial constitutional principles seriously – however unsystematic or ambiguous those principles might actually have been. Of course ambiguity was not always a problem, particularly for Imperial authorities or even for private proposals such as that of Torrens.[91] Ambiguity could allow for significant flexibility in policy design: legal forms, such as 'sovereignty' and 'protectorate' were malleable and could be deployed for political advantage. They connoted no final form. A protectorate, underpinned by treaty allowed a sufficient basis for a constitutionally possible solution to the need to impose law and order, and one which fell short of the acquisition of sovereignty – at a time when the Colonial Office was only just coming around to view that that was necessary with respect to New Zealand. Nevertheless, broad and ambiguous as the constitutional framework of the Empire was, where principles could be identified the authorities took them seriously. There were limits to the ways in which forms such as sovereignty and protectorate could be deployed. They were not infinitely malleable. The rules on extra-territorial jurisdiction placed one hard limit on the development of governance models.

In the end, Torrens model is a plan drafted within, and in response to, the strictures of British imperial law, with an eye to the concerns of an humanitarian lobby at its apogee of influence. As noted above, it is unclear that Torrens and the Company ever actually thought that they would receive a charter and the go ahead to undertake systematic colonisation. Such an ambitious model of joint governance may have reflected its position as a bargaining chip, rather than as genuine plan for legal relations between races. Models such as Torrens', however, demonstrate the extent to which stakeholders in colonial ventures in the nineteenth century understood the rules of Imperial Constitutional law. Torrens' plan was by no means the only one crafted within its strictures. They understood the rules arguably somewhat better than those of us who comment on them today.

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90 Glenelg to Gipps (Governor, New South Wales), 31 Jan 1838, GBPP (526), 4.

91 Damen Ward 'Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and Lloyd's Case' *Victoria University of Wellington Law Review* 41 (2010), 381-402, 388.