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LAND, CUSTOM, AND IDEOLOGY 1870–1940: THE NEW ZEALAND CASE IN A GLOBAL CONTEXT

ABSTRACT

This article explores the ways in which ideologies relating to property and tenures changed in the later 19th and early 20th centuries. In the later 19th century utilitarian and classical liberal ideologies favouring individualist and anti-corporate policies began to lose ground to new approaches favouring collectivism and cultural relativism. This trend manifested itself in a variety of ways and in a number of different disciplines, but the most important shift occurred with the rise of relativist anthropology associated in particular with Franz Boas. The changing climate of opinion had significant effects in countries as diverse as the United States, Mexico, and New Zealand. The article takes a comparativist approach and examines developments in a number of countries, while paying particular attention to the New Zealand case. New Zealand was a country which had already developed a complex body of statutory law relating to indigenous tenures by 1900. It is argued that although the impacts of the new trends in anthropology and other disciplines were mixed in New Zealand, they were nevertheless significant and are shown most clearly in the legislation relating to Māori land development enacted in 1929 and associated in particular with Sir Āpirana Ngata. Various policy developments in New Zealand in the 1930s, however, meant that Ngata's vision for Māori landowners was only partially fulfilled. More generally the article is written from the perspective that it is important for developments in New Zealand to be understood in their international and intellectual contexts.

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Māori terms are explained in the text, but a basic glossary is set out in the Appendix.

I Introduction

In the 19th century new approaches to land and tenure swept the globe. Intellectually this trend was founded on a complex ideological heritage that reached full fruition in Europe in the late 18th and 19th centuries. Policies based on individualisation, freedom of contract, and the abolition of corporatist and ecclesiastical landholding were implemented everywhere — with very mixed effects. But this intellectual framework always had its competitors and its opponents. As the 19th century wore on, new approaches, as well as re-energised old approaches, increasingly gained ground. By the later 19th century anti-corporatist and individualist approaches to land and tenure were in full retreat before the onslaught of developments in anthropology, economics, and history. Of particular importance, as will be explored below, were trends in the new discipline of anthropology, especially with the work of Franz Boas in the United States, Boas being steeped in the intellectual traditions in his native Germany. The newly-emerging collectivism was not, however, confined to academia, but came to have significant impacts in the fields of policy and law, as had been the case with the classical liberalism of earlier decades. The links between the new thinking and law and policy can be seen in countries as diverse as Ireland, Scotland, Mexico, New Zealand, and the United States. These transformations are the subject of this article. It is necessary to begin, however, with the earlier liberal vision and its effects.

II Tenurial Revolution as an International Phenomenon

In 1873 two legal processes took place on opposite sides of the Pacific Ocean. The first occurred in the Soltepec (or Sultepec) region of central Mexico. Nieves Salvador, who lived in the village of San Simón Sosocoltepec, part of the *municipio* of Amatepec, made a land title application to the district administrator of Soltepec in which his village lay. Nieves declared that he had been born and brought up in his village and that he possessed a portion of land which had belonged to his ancestors since time immemorial. He stated also that he had the necessary documents to prove his title. The land in issue was a small plot split into two sections, one of which produced half a *fanega* of maize every year, and the other which was a small market garden. He stated that he wished to obtain legal title to this property under the provisions of the *Ley Lerdo*, a reforming statute of the Mexican parliament enacted on 25 June 1856. The district administrator forwarded the application on to the town council (*ayuntamiento*) of Amatepec so that an inquiry could be made into the application and a price determined. The mayor of Amatepec and the town secretary visited Nieves, inspected his land, and filed a report describing the boundaries and made an estimate that the land was worth 60 pesos. The details were sent to the district officials, and the administrator ordered that a title should be issued and allocated to Nieves Salvador as owner. The brief title document, just a single page, gave some brief details about Nieves as grantee, and the location, value and agricultural potential of the parcel.[1]

[1] See Frank Schenk, 'La Desamortización de los Tierras Comunales en el Estado de México (1856–1911): El Caso de Distrito de Sultepec' (1995) 45 *Historia Mexicana* 3, 3–5.

Also in 1873, half a world away from Mexico, the Native Land Court of New Zealand, sitting at the small country town of Foxton located on the west coast of the North Island to the north of Wellington, gave judgment relating to a block of land named Kukutauaki. The Court derived its powers from the *Native Lands Act 1865* (NZ).[2] The judgment is dated 4 March 1873 and is written out in longhand by the clerk of the court in the relevant minute book volume of the Native Land Court. The Court, comprised of two European judges and a Māori assessor named Hemi Tautari, ruled that Kukutauaki belonged principally to the Ngāti Raukawa tribe. A translation of the judgment was read out in the Māori language to those present in Court. The decision was controversial, and generated much discussion in the courtroom.[3] In accordance with the 1865 Act the block was vested in ten individuals as representative owners, who were now able to complete the tenurial transformation of the block by obtaining a Crown Grant. The relevant title documents can still be found in the records of the Native Land Court, and the evidence given in the case and the Court's decision are recorded in the Otaki Minute Books of the Native Land Court of New Zealand.[4]

Nieves Salvador, who was Nahua and whose first language was Nahuatl, and the Māori-speaking members of the Ngāti Raukawa, Muaupoko and Rangitane tribes assembled in the courtroom in Foxton had no awareness of one another. Māori land tenure is quite unlike Mesoamerican tenures. But they nevertheless had something in common, apart, that is, from the fact that they were all believing Christians (Catholic in the case of Soltepec, and Anglican in the case of Ngāti Raukawa). They were engaged in legal processes which were designed to radically change their land-holdings. The *Ley Lerdo 1856* and the *Native Lands Act 1865* (NZ) were different in many ways, but they reflected a common vision. At its heart was the view that customary tenures belonged to an earlier and archaic world and needed to be swept away in order to encourage prosperity and progress. This vision was, in short, an ideology — an ideology manufactured originally in Europe, and which by 1873 was affecting the lives of people on opposite sides of the Pacific Ocean.

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2 *Native Lands Act* 1865, 29 Vict 71.

3 *Kukutauaki* (1873) 1 Otaki MB 176, 176–8. The originals of the Court's judgments are recorded in the minute books of the Court, of which there are several thousand volumes, and which are arranged by Court district and region.

4 On the effects of tenurial change on the Māori people: see Richard Boast, *Buying the Land, Selling the Land: Governments and Māori Land in the North Island, 1865–1921* (Victoria University Press, 2008). On the history of Māori land and of the Native/Māori Land Court: see Richard Boast, *The Native Land Court: A Historical Study, Cases and Commentary, 1862–1887* (Thomson Reuters, 2013); Richard Boast, *The Native Land Court: Vol 2, 1887–1909: A Historical Study, Cases and Commentary* (Thomson Reuters, 2015); R P Boast, 'The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891–1912' (2014) 12 *New Zealand Journal of Public and International Law* 81. For a survey of New Zealand developments relating to indigenous land tenures written for a wider non-New Zealand readership: see Richard Boast, 'Individualization — An Idea Whose Time Came, and Went: The New Zealand Experience' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 145, 145–66.

As this example shows, New Zealand's tenurial revolution as exemplified by the Native Lands Acts of 1862[5] and 1865[6] and the establishment of the Native Land Court was not an isolated phenomenon. Strikingly similar policies can be found all around the Pacific rim at more or less the same time. The Native Lands Acts were driven by a particular ideology, one that arose from that array of ideas, ideals and rhetoric which, for convenience, we call 'liberalism'. One important ingredient of the complex liberal brew was a belief in the social and economic benefits of individual ownership of land. The law relating to land tenure in many countries in the 19th century strongly encouraged individual tenures and discouraged, penalised, or even abolished collective tenures. The newly independent Latin American republics are one example. The same is true of important changes that took place in the Kingdom of Hawai'i. Another example is allotment (individualisation) of reservation lands in the United States under the *Dawes Act of 1886*.[7] And New Zealand's tenurial revolution of the 1860s is certainly yet another example of this worldwide trend.

The ideological foundations for these policies emerged in Europe in the late eighteenth and early nineteenth centuries. In Britain freehold tenures had long been equated with liberty and progress, and customary tenures with despotism and poverty. As J G A Pocock puts it, 'it was the mark of a true "oriental despotism" that the subject possessed no free tenure, no property in his goods, and no law to protect either'.[8] The English-speaking world's version of Renaissance civic humanism, as it is put in a classic study of the Federalist era in the United States, came to rest on two main foundations, the right of citizens to bear arms and 'freehold property as the fundamental safeguard and guarantee of the citizen's independence of judgment, action, and choice'.[9] There was a continental version of the same ideas, an important component of liberal theory and practice in France, Italy, Spain and Spanish America. Common to both the British and continental variants both is the view that a free and enlightened society was one which respected and encouraged private property.

Remodelling land tenure became a core component of the liberal vision in the independent Latin American republics. As elsewhere in Latin America, Mexican history in the 19th century was dominated by a long struggle between Conservatives and Liberals. Immediately after Mexican independence 'a debate emerged for the first time concerning the best method for putting into place liberal policies for the disentailment of lay properties in the particular social and cultural context of rural

5 *Native Lands Act 1862* (NZ).

6 The current statute relating to Māori land is *Te Ture Whenua Māori Land Act 1993* [*Māori Land Act 1993*] (NZ). The Native Land Court, first provided for in the *Native Lands Act 1862* (NZ), is still in existence as the Māori Land Court (*Te Kooti Whenua Māori*).

7 25 USC 14(v) § 461.

8 J G A Pocock, *Barbarism and Religion, Volume Two: Narratives of Civil Government* (Cambridge University Press, 1999) 239.

9 Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (Oxford University Press, 1993) 9.

Mexico'.[10] The main Mexican statute was the *Ley Lerdo* or *Ley de Desamortización*[11] of 25 June 1856, based in turn on earlier laws in the Mexican states of Michoacán, Zacatecas and Guanajuato. This law was enacted by the liberal and anticlerical government dominated by Benito Juárez, and was not able to be given full effect due to the prevailing political chaos in mid-century Mexico. The *Ley Lerdo* was supplemented by a number of statutes which reflected the views of a group of highly placed technocrats within the Díaz regime after 1876, the so-called *Cientificos*, strong believers in economic liberalism. The statutes shared a common vision with the *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United Mexican States] ('*Mexican Constitution of 1857*'), a liberal and anti-clerical statement which employed a sophisticated discourse of individual rights, political equality, freedom of the press and the sovereignty of the people which in turn drew its inspiration from the French Revolutions of 1789 and 1830, the French *Code Civil* [Civil Code] of 1804, the *Constitución Política de la Monarquía Española promulgada en Cádiz a 19 de marzo de 1812* [Political Constitution of the Spanish Monarchy promulgated in Cádiz on 19 March 1812], and the *Constitution française de 1848* [French Constitution of 1848].

Church lands and communal Indian lands were seen as relics of the Spanish colonial empire and as obstacles to modernisation, and the period of the liberal reforms associated with the governments of Benito Juárez and Porfirio Díaz saw significant losses of Indian communal lands to private ownership during a period of rapid economic expansion. The process was, however, both complex and incomplete.

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10 Aurora Gómez Galvarriato and Emilio Kouri, 'La Reforma Económica: Finanza Públicas, Mercados y Tierras', in Erika Pani (ed), *Nación, Constitución y Reforma, 1821–1908* (Fondo de Cultura Económica, 2010) 101 (R P Boast trans).

11 Named after the Mexican Liberal politician Miguel Lerdo de Tejada. The principal target of the *Ley Lerdo* was the vast endowed lands held by the Church in Mexico. The great historian of Mexican liberalism is Jesús Reyes Heroles. See, eg, Jesús Reyes Heroles, *El Liberalismo Mexicano: Los Orígenes* (Fondo de Cultura Económica, 2nd ed 1974). On the period of 'the Reform' (*la Reforma*) see eg, Jan Bazant, *Alienation of Church Wealth in Mexico: Social and Economic Aspects of the Liberal Revolution 1856–1875* (Cambridge University Press, 1971); Richard N Sinkin, *The Mexican Reform, 1855–1876: A Study in Liberal Nation-Building* (University of Texas Press, 1979); François-Xavier Guerra, *Le Mexique: De l'Ancien Régime à la Révolution* (L'Harmattan, 1985); Jennie Purnell, 'With all due Respect: Popular Resistance to the Privatization of Communal Lands in Nineteenth-Century Michoacán' (1999) 34 *Latin American Research Review* 85; Emilio H Kourí, 'Interpreting the Expropriation of Indian Pueblo Lands in Porfirian Mexico: The Unexamined Legacies of Andrés Molina Enríquez' (2002) 82 *Hispanic American Historical Review* 69. The effects of the liberal *Reforma* on indigenous communities are now being studied by means of case studies: See, eg, J Édgar Mendoza García, *Municipios, cofradías y tierras communales: Los pueblos chocholtecos de Oaxaca en el siglo XIX* (Universidad Autónoma Metropolitana, 2011) (Chochotelco people, Oaxaca); Gabriel Fajardo Peña, 'La privatización de la tierra y problemas agrarios en la Huasteca potosina, 1870–1920' in Antonio Escobar Ohmstede and Ana María Gutiérrez Rivas (eds), *Entretejiendo el mundo rural en el 'oriente' de San Luis Potosí, Siglos XIX y XX* (Centro de Investigaciones y Estudios Superiores en Antropología Social, 2009).

Recent Mexican scholarship is now cautious about overstating the effects of the *Reforma* on the corporate lands of the Church and the Indian *pueblos.* Historians have emphasised the need for further research, the obstacles that the liberals faced in putting their plans into effect and the limitations of liberal theory itself, which tended to regard property rights as sacred. Also important are the distinctions between the various categories of communal lands, as not all types of communal properties were affected in the same way by the reforming statutes.[12] Liberalism left the properties of the existing landed elite untouched, contributing to the problem of unequal land distribution, a problem which was one of the causes of the great Mexican revolution which broke out in 1910.[13] A further difficulty was the weakness and constant indebtedness of the Mexican state: enacting statutes is one thing, putting them into effect is quite another. Mexico, moreover, is a vast and complex country, and the effects of the *Reforma* on the indigenous towns varied considerably, as is now becoming increasingly clear as the result of a proliferation of new regional and local studies of 19th century Mexico.[14] Notwithstanding all these caveats, however, it is certain that an important, if regionally varied, transformation took place in Mexico. Similarly complex, but nevertheless very real transformations occurred in the United States, the Spanish American republics, Hawai'i, New Zealand, Taiwan,[15] and many other countries.

In Central America, for example, where there was also a long Liberal-Conservative struggle, there was similarly a decline in ecclesiastical and indigenous land-holdings in the 19th century. The process had significant effects in Guatemala, where land-holdings by the indigenous towns were still significant at the time of independence.[16] Rufino Barrios (president of Guatemala 1873–85) was one of a sequence of key Central American liberal presidents who were responsible for legislative changes that led to greatly expanded liberal programs to support the coffee industry and to otherwise implement a program of capitalist economic expansion. His counterparts were Rafael Zaldívar (1876–83) in El Salvador, Braulio Carrillo (1838–42) and

12 The classifications are too complex to be explored here. See generally Schenk, above n 1.

13 See generally Galvarriato and Kouri, above n 10.

14 See, eg, García, above n 11.

15 Land tenure in Taiwan under Qing and Japanese colonial administration is being investigated by Riuping Ye as a part of the Marsden research grant administered by the Royal Society of New Zealand. See Ruiping Ye, 'User Rights or Ownership: The Nature of Land Rights in Imperial China — Using Taiwan During the Qing Period as a Case Study (2014) 20 *New Zealand Association of Comparative Law Year Yearbook* 169.

16 On developments in Guatemala: see R M Carmack, *Rebels of Highland Guatemala: The Quiché-Mayas of Momostenango* (University of Oklahoma Press, 1995); Lowell Gudmundson and Héctor Lindo-Fuentes, *Central America, 1821–1871: Liberalism before Liberal Reform* (University of Alabama Press, 1994); W George Lovell, *Conquest and Survival in Colonial Guatemala: A Historical Geography of the Cuchumatán Highlands, 1500–1821* (McGill-Queen's University Press, 1992); Ralph Lee Woodward Jr, *Rafael Carrera and the Emergence of the Republic of Guatemala, 1821–1871* (University of Georgia Press, 1993).

Tomás Guardia Gutiérrez (1870–82) in Costa Rica, Marco Aurelio Soto (1876–83) in Honduras, and José Santos Zelaya (1893–1909) in Nicaragua. As in Mexico, tenurial 'reforms' in Central America were only one component of wide-ranging liberal economic policies, which included also the encouragement of foreign investment, labour controls, and the granting of concessions to create an infrastructure of railways and ports, designed particularly in the Central American case to encourage the growth of an export-based coffee industry.[17]

> The Liberal revolutionaries dispossessed traditional Indian communities, disestablished Church control over property, raffled off public lands, encouraged European immigration and foreign investment, developed ports and railroads, and forcibly recruited a largely unwilling rural population to work on their coffee estates.[18]

III Counter-Tendencies

There were, however, tensions and opposing currents within this liberal mind-set and in opposition to it. In England the ideal of the independent yeoman freeholder was an ancient one, an ideal which was linked to the classical republicanism that emerged in English political discourse in the 17th century and remained important in the 18th and 19th centuries. Freeholds and clear titles were not by themselves enough, as it was no less important to ensure that land did not fall into the hands of a rural ruling oligarchy. Enclosure posed the risk of land monopoly. As the wise legislators of the Roman Republic had done, it was argued, the state should take action to prevent undue land aggregation. Opponents of parliamentary enclosure in the 18th century, including Stephen Addington and Richard Price, drew on this complex rhetorical tradition to fortify their anxieties about declining rural population and a loss of yeoman independence.[19] There was a tension between an emergent liberalism emphasising property

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17 See Jeremy Adelman, 'Spanish-American Leviathan? State Formation in Nineteenth-Century Spanish America: A Review Article' (1998) 40 *Comparative Studies in Society and History* 391; Patricia Alvarenga Venturolo, 'La Expansión Cafetalera en El Salvador: Un Analysis de la Bibliografia Existente' (1994) 30 *Revista de Historia* 255; Yolanda Baires Martinez, 'El Café y las Transacciones Inmobiliarias en Costa Rica (1800–1850): Un Balance' (1986) 12–13 *Revista de Historia* 151; Dario A Euraque, *Reinterpreting the Banana Republic: Region and State in Honduras* (University of North Carolina Press, 1996), Lowell Gudmundson, *Costa Rica Before Coffee: Society and Economy on the Eve of the Export Boom* (Louisiana State University Press, 1986); Aldo A Laura-Santiago, *An Agrarian Republic: Commerical Agriculture and the Politics of Peasant Communities in El Salvador* (University of Pittsburgh Press, 1999); David J McCreery, 'Coffee and Class: the Structure of Development in Liberal Guatemala' (1976) 56 *Hispanic American Historical Review* 438; David McCreery, *Rural Guatemala 1760–1940* (Stanford University Press, 1994).

18 Jeffery M Paige, *Coffee and Power: Revolution and the Rise of Democracy in Central America* (Harvard University Press, 1997) 14.

19 See S J Thompson, 'Parliamentary Enclosure, Property, Population, and the Decline of Classical Republicanism in Eighteenth-Century Britain' (2008) 51 *Historical Journal* 621.

rights and liberal political economy with a pervasive distrust of large estates, the distrust typically combined with an idealisation of the independent yeoman. This tension was reflected in British colonies such as New Zealand, where many of the land policies of the Liberal government after 1891 were strongly influenced by an earlier yeoman ideal: an ideal which coincided with the Liberal government's claims to represent 'the people' and its pursuit of 'close settlement' (the latter term implying hostility to large estates). The intensity of debate in New Zealand over such pivotal issues over the restoration of Crown pre-emptive purchasing of Māori land in 1894 or whether land purchased from Māori by the state should be Crown-granted in freehold or leasehold needs to be understood against a longer and complex process of debate about land, wealth and national well-being which reaches far back into the history of the British Isles, and indeed into the classical world.

A particular context for the debate was the enclosure of the commons in the British Isles. The principal objective of enclosure was to convert common lands and the stripbased open fields of the old manorial system into compact surveyed holdings 'enclosed' by hedgerows, and is generally seen by economic historians as a fundamental component of England's 'agricultural revolution'.[20] The process began in the 16th century and gained rapid momentum from 1790–1820. There was a long literary tradition reflecting on agricultural improvement, exemplified by Walter Blith's (1605–54) *The English Improver,* a work that depicts the new enclosed landscape as more beautiful and picturesque than the great open arable fields of the old manorial system, an aesthetic judgment which not all contemporaries would have accepted.[21] As Ian Waites has shown, the older landscape can be seen in the paintings of famous artists such as Stubbs, Gainsborough and Constable, as well in the works of lesser-known landscape painters such as Paul Sandby, John Varley and William Turner of Oxford.[22] Enclosure and its effects reverberated through English literature in the 19th century, most of all in the poetry of John Clare (1793–1864) who saw its effects as little less than catastrophic.[23] Whether enclosure was beneficial, and, if so, to whom, is the subject of one of the most prolonged debates in English historiography.[24] It was controversial at the time, and was widely resented by those sectors of English and Scottish rural society that had most to lose from it. These controversies were familiar to the Victorian settlers of New Zealand and other British

20 Leading texts are J D Chambers and G E Mingay, *The Agricultural Revolution 1750–1880* (Batsford, 1969); Mark Overton, *Agricultural Revolution in England: The Transformation of the Agrarian Economy 1500–1850,* (Cambridge University Press, 1996). For a different emphasis: see J M Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge University Press, 1993).

21 Anne Janowitz, 'Land' in Iain McCalman (ed), *An Oxford Companion to the Romantic Age: British Culture 1776–1832* (Oxford University Press, 1999) 152.

22 See Ian Waites, *Common Land in English Painting, 1700–1850* (Boydell Press, 2012).

23 On Clare: see Jonathan Bate, *John Clare: A Biography* (Farrar, Straus and Giroux, 2003); John Goodridge, *John Clare and Community* (Cambridge University Press 2013).

24 See generally Neeson, above n 20.

colonies.[25] On the whole New Zealanders saw enclosure as having made most people in England and Scotland landless, the very antithesis of the kind of society migrants wanted to create in the Antipodes.[26] This did not, however, make them enthusiasts for a recreation of manorial tenures in New Zealand. The desired goal was freeholds, or secure leaseholds, but available to all rather than to a few.

In the later 19th century a new mood began to take hold all around the world regarding the relationship between the state and private property rights. The causes of this new way of thinking about land and tenures are uncertain, possibly arising from the failure of enclosure to generate rural prosperity, or perhaps as an idealisation of rural life as a contrast to the squalor of industrial cities. It now became an article of faith amongst British agrarian historians, as Joan Thirsk has explained, that small holdings were preferable to large estates.[27] There was a shift in direction away from private property and clear titles, and a growing emphasis on the 'social function' of property.[28] This concept is associated with the French jurist Leon Duguit, who argued that the state's primary purpose was to provide for social needs, and that the state's protection of private property rights was conditional on property performing its 'social function'. In the early 20th century this concept was incorporated into a number of important constitutional documents, including art 153 of *Die Verfassung*

25 On the links between rural dissent in England and migration to New Zealand see especially Rollo Arnold, *The Farthest Promised Land: English Villagers, New Zealand Immigrants of the 1870s* (Victoria University Press, 1981).

26 There were many articles in New Zealand newspapers referring to the injustices caused in England by enclosure in particular instances: see, eg, 'Landlordism is Doomed', *Bay of Plenty Times* (Tauranga), 28 October 1889 (referring to the *Holmesfield Enclosure Act 1820* (NZ)). Acts of protest against enclosure were still continuing in Britain in the 1880s and 1890s, and these protests were reported in detail in the colonial press: see, eg, 'Asserting Common Rights', *Timaru Herald* (Timaru), 5 December 1894, 4 (referring to protests in Flintshire). On other occasions newspapers commented on the risks of landlessness and land monopolisation that enclosure had aggravated: see eg, 'Land Nationalization', *Colonist* (Nelson), 18 October 1882, 4; 'Warning to the Colonies', *Timaru Herald* (Timaru), 21 June 1907, 2 (reporting views of the English Land Nationalisation Society). Newspapers in New Zealand were generally supportive of Lloyd George's budget in 1910 and dismissive of attacks on it by the House of Lords, sometimes pointing out that some of the leading opponents of the new land tax had unjustly profited from enclosure in England: see 'Our Ruined Peers', *Auckland Star* (Auckland), 29 January 1910, 13 (referring to the Duke of Portland). Radical newspapers such as the *Māoriland Worker* naturally strongly disapproved of parliamentary enclosure in England, thus reflecting longstanding English radical tradition: see, eg, 'Landlordry in the 16th Century', *Māoriland Worker* (Wellington), 15 November 1922, 15. There is scope for further research on attitudes to enclosure in New Zealand and her sister colonies of Victoria and South Australia.

27 See Joan Thirsk, 'The Content and Sources of English Agrarian History after 1500' (1955) 3 *Agricultural History Review* 66, 67.

28 See generally Thomas A Ankersen and Thomas Ruppert, '*Tierra y Libertad:* The Social Function Doctrine and Land Reform in Latin America' (2006) 19 *Tulane Environmental Law Journal* 69.

des Deutschen Reichs [Constitution of the German Reich] ('*Weimar Constitution*') and art 27 of the *Mexican Constitution of 1917*.[29]

IV The New Anthropology

Changing approaches to indigenous land tenures lie deep in Western intellectual history. New Zealand's Native Lands Acts of the 1860s reflected a deep faith in the benefits of individual property ownership, reflecting in turn assumptions deriving from the European Enlightenment regarding free tenures, the stages of human history, and universal reason. But not all European thought ran in these kinds of currents, and especially not in Germany.[30] The crucial link between the German critique of the Enlightenment and modern anthropology is Franz Boas (1858–1942) who became professor of anthropology at Columbia University in 1899. Boas is widely regarded as the founder of American academic anthropology. He is the link between his own students (who include Ruth Benedict, Margaret Meade, Edward Sapir, Alfred Kroeber, Melville Herskovits, and Manuel Gamio) and those German intellectuals who over several decades constructed the intellectual tradition in which Boas was educated, notably Wilhem and Alexander von Humboldt, J G Herder, Karl Ritter, Theodore Waitz, and Adolf Bastian.[31]

German social thought was richly diverse, but it was in general highly relativistic, emphasising the complexity and variety of humanity and the individuality of cultures. Cultures were enclosed above all by languages; learning new languages meant an individual could 'acquire numerous *Weltanschauungen* by virtue of the different psychological structures inherent in various languages'.[32] German scholars such as Waitz and Bastian and the 'anthropogeographer' Friedrich Ratzel (1844–1904) shared 'a historicist viewpoint that was embedded in Counter-Enlightenment assumptions', and insisted 'on viewing the plurality of cultural phenomena as the

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29 Cited in ibid 100–101. Ankersen and Ruppert observe that '[a]lthough the 1917 Mexican Constitution did not use the phrase "social function" the concept is clearly implicit': at 101.

30 See Julia Liss, 'German Culture and German Science in the *Bildung* of Franz Boas', in G W Stocking (ed), *Volksgeist as Method and Ethic: Essays on Boasian Ethnography and the German Anthropological Tradition* (University of Wisconsin Press, 1996) 155, 155–84.

31 On Boas: see Matti Bunzl, 'Franz Boas and the Humboldtian Tradition: From *Volksgeist* and *Nationalcharakter* to an Anthropological Concept of Culture', in G W Stocking (ed), *Volksgeist as Method and Ethic: Essays on Boasian Ethnography and the German Anthropological Tradition* (University of Wisconsin Press, 1996) 17, 17–78. One historian of anthropology who has the deepest reservations about the Boasian tradition (and especially about its legacy) is Derek Freeman: see Derek Freeman, *Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth* (Australian National University Press, 1983).

32 Bunzl, above n 31, 34.

products of complex historical processes rather than eternal natural laws'.[33] The essence of this tradition was the need to study cultures and languages holistically. Boas, who was Bastian's pupil, was steeped in these intellectual tendencies, and following a period of intensive fieldwork in the Arctic he took these ideas with him to the United States.

When Boas took up residence in New York, American anthropology was still positioned within the evolutionist tradition originating in Britain. Anthropological evolutionism — not the same thing as Darwinism, or 'social Darwinism' — is most closely associated with Edward Burnett Tylor, whose orientation was on the whole positivist and utilitarian.[34] Another evolutionist was Henry James Sumner Maine, a brilliant Cambridge-trained classicist who was admitted to the bar in 1850, served as a legal official in India, and who published his *Ancient Law* in 1861, a classic of legal history which famously focused on the (supposedly) universal historical transitions from 'status to contract'.[35] In the United States the most prominent evolutionists were Lewis Henry Morgan, John Wesley Powell, and Daniel Garrison Brinton. Morgan was a successful lawyer and businessman who subsequently devoted himself to ethnographic scholarship, producing his famous book *Ancient Society* in 1877.[36]

Evolutionist anthropology sees cultures as progressing through developmental stages. Not all societies, however, moved from one stage to the next. It was pivotal to cultural evolutionism that societies around the world did not evolve at the same rate, and that some remained entrapped in an arrested state of development, especially where they remained in isolation and cut off from ideas diffusing from elsewhere. There would be, according to the theory, isolated groups who had remained in a state of 'animism', who were therefore said to be interesting because they practised the original or most primitive form of religion from which most societies had progressed. To take another example, the rules relating to the degrees of relationship within which one can marry were believed to have evolved 'primitive promiscuity', a no-holds-barred (literally) state of affairs which evolved by a series of defined steps into the complex rules of modern Western countries. The latter, according to this standpoint, had travelled furthest from the original state of 'primitive promiscuity' while other societies remained supposedly comparatively close to it in a state of arrested development.[37] Boas, however, rejected evolutionist anthropology in favour of a vision of universally complex and equally interesting cultures existing side by side. Australian

33 Ibid 52.

34 See George W Stocking Jr, *After Tylor: British Social Anthropology 1881–1951* (University of Wisconsin Press, 1995) 79.

35 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (John Murray, 1861). On Maine: see especially R C J Cocks, *Sir Henry Maine* (Cambridge University Press 1988).

36 Lewis Henry Morgan, *Ancient Society* (Henry Holt & Co, 1877). On Morgan: see John M Conley and William M O'Barr, 'Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law' (1993) 27 *Loyola of Los Angeles Law Review* 41, 42–4.

37 Stocking, *British Social Anthropology*, above n 34, 17–34.

Aboriginals were no less modern than Belgians or Argentinians, merely different. According to G W Stocking, Boas was largely responsible for creating the modern anthropological term 'culture' (as we would speak of 'Māori culture' or 'Polynesian cultures'), a usage that did not exist in 1900, when the term 'culture' still carried the sense only of refinement, education, and manners (a 'cultured' person).[38] Through his own prestige and through his own distinguished students, Boasian thought came to dominate anthropology in the United States, and, indirectly, in other countries as well. Anthropology became perceived as the study of cultures, preferably based on intensive fieldwork.

Meanwhile British social anthropology, following a similar trajectory, moved from evolutionism to 'functionalism'. The movement in the United States and in Britain, according to Stocking, was distinct but generally similar:

> While the history of ethnographic method, like that of anthropological theory, was to follow a somewhat similar course under Boas in the United States than it did after Tylor in Great Britain, it was in the longer run a convergent evolution, marked by many similar phases.[39]

According to Stocking, by the later 19th century a number of people engaged in studying indigenous groups in British colonies were already beginning to deviate somewhat from the evolutionist path.

Stocking gives particular emphasis to the emergence of ethnographic fieldwork as the principal characteristic of modern British anthropology. Much of this fieldwork was carried out in the southwestern Pacific, by R H Codrington in Melanesia, Baldwin Spencer and Frank Gillen in central Australia, Alfred Haddon and W H R Rivers in the Torres Strait region, and Bronisław Malinowski in the Trobriand Islands.[40] At first fieldworkers operated within the evolutionary paradigm, but as time went on and as the published results of fieldwork began to accumulate, Tylorian evolutionism came to be seen as increasingly tired and outmoded. The final step in the British development was the emergence of 'functionalism', associated with Bronisław Malinowksi and his students — many of them, as it happens, from Australia and New Zealand. A cultural anthropology bridge linked Australasian universities, especially the University of Sydney, with the school of anthropology at the London School of Economics where Malinowski held court.[41] Functionalism allowed indigenous societies to be seen synchronically and valuable in themselves, in much the way as did Boasian cultural relativism. Legal policies designed to facilitate groups to move from lower to higher stages on the evolutionist scale, the Native Lands Acts and *Dawes Act of 1886* being clear examples, no longer seemed to make any sense. By 1950 the emphasis on culture and environment, backed at an international level

38 See George W Stocking, 'Franz Boas and the Culture Concept in Historical Perspective' (1966) 68 *American Anthropologist* 867.

39 Stocking, *British Social Anthropology*, above n 34, 86.

40 Ibid 87–115, 233–297.

41 Ibid 407–8.

by UNESCO, had become entrenched virtually everywhere and reigned unchallenged until the complex controversies over sociobiology that began around 1975.[42]

V Ireland and Scotland

The perceived importance of Ireland as a precedent, cautionary tale, and anti-model is impossible to exaggerate. Irish issues were pivotal in British politics after the Acts of Union 1800.[43] Irish dramas and disasters were a staple of the British press, and of the presses in the colonies as well. The tribulations of Ireland were a central drama in the English-speaking world, and a ready-made frame of reference in practically any side of any policy debate. Critics of the confiscation of Māori land in New Zealand pointed to Irish history as a dreadful warning of the folly of such a course, while opponents of the Māori King movement liked to describe it as a 'Land League', an unfriendly term usually reserved Irish rural combinations, redolent of burned haystacks and maimed cattle. Moreover, many migrants to New Zealand, unsurprisingly, *were* Irish, from both sides of the sectarian divide.[44] A number of New Zealand politicians were Irish, including two prime ministers (Ballance and Massey, both of them Ulster Protestants) and others, such as Sir George Grey, knew the country only too well.

In the decades immediately before the Famine, Ireland had presented a singular example of a rural society where the formal legal boundaries of estates, tenancies and sub tenancies bore little relationship to the customary geography of villages, hamlets, and townlands (*baila*).[45] Customary and legal geographies failed absolutely to connect. Following the catastrophe of the Famine of 1847–8, the 'Great Hunger' (*an Gorta Mór),* the issue of Irish tenures was the subject of endless commissions,

42 On which, see, eg, Ullica Segerstråle, *Defenders of the Truth: The Sociobiology Debate* (Oxford University Press, 2000).

43 *Union with Ireland Act 1800*, 39 & 40 Geo 3, c 67; *Act of Union (Ireland) 1800*, 40 Geo 3, c 38.

44 On the Irish in Australia and New Zealand: see Patrick O'Farrell, 'The Irish in Australia and New Zealand' in W E Vaughan (ed), *Ireland Under the Union 1801–1970* (Oxford University Press, 1989) 661, 661–81; Patrick O'Farrell, *The Irish in Australia* (New South Wales University Press, 1986); Patrick O'Farrell, *Vanished Kingdoms: Irish in Australia and New Zealand: A Personal Excursion* (New South Wales University Press, 1990).

45 See generally L M Cullen, 'Economic Development' in T W Moody and W E Vaughan (eds), *A New History of Ireland: Eighteenth-Century Ireland 1691–1800* (Clarendon Press, 1986) vol 4, 159; J H Andrews, 'Land and People, c 1870' in T W Moody and W E Vaughan (eds), *A New History of Ireland: Eighteenth-Century Ireland 1691–1800* (Clarendon Press, 1986) vol 4, 236; T W Freeman, 'Land and People, c. 1841' in W E Vaughan (ed), *Ireland under the Union 1801–70* (Clarendon Press, 1989) 242; James S Donnelly Jr 'Landlords and Tenants' in W E Vaughan (ed), *Ireland under the Union 1801–70* (Clarendon Press, 1989) 332; J C Brady, 'Legal Developments, 1801–79' in W E Vaughan (ed), *Ireland under the Union 1801–70* (Clarendon Press, 1989) 451.

investigations, and inquiries. One important focus of the debate on Irish tenures was the 'Ulster custom', a custom which had two main components. Tenants in Ulster were, firstly, reasonably free from eviction provided they paid their agreed rents, and, secondly, had a right of 'free sale': they could sell their occupational right to a new tenant provided the latter was acceptable to the landlord. Outgoing occupiers could do this — this being the key point — even when they did not have a formal lease. The 'custom' also benefited incoming tenants, who acquired a secure right without the risk of harassment or violent retribution, all too common in the case of those who took up occupational rights following evictions in the rest of Ireland. In fact, the Devon Commission of 1843 believed that tenant-right was mostly 'a mere life insurance or purchase of immunity from outrage'.[46] This is at best a partial view. Other theories are that Irish tenants believed that mere occupation of the soil, whether held by a formal lessee or not, created a property right which landlords were prepared to respect, at least in Ulster. Alternatively it has been argued that the custom of tenant right was actually useful to landlords because arrears of rent could be deducted from the money paid to the outgoing occupier by the purchaser.[47] The custom was encapsulated in the so-called 'three F's': fair rent, fixity of tenure, and free sale. It had no formal legal foundations, either statutory or in the Common Law (if anything, the 'custom' ran contrary to ordinary tenancy law: leasehold contracts made no provision for any of the 'three F's'). In effect tenants had a customary property right in their leaseholds which they could sell for valuable consideration. Most importantly, the 'Ulster custom' provided a mechanism for compensation for improvements, either at the expense of the incoming tenant or the landlord. As a result of the Ulster custom, so it was thought, tenants in Ulster were better off than those in the other three provinces of Ireland, and for this reason Ulster was somewhat more prosperous and stable than the rest of the country. Whether this was actually the cause of Ulster's (in fact highly relative) stability and prosperity is less important than the fact that it was widely believed.[48]

Myth or reality, it was hoped by law reformers that one solution to Irish tenurial complexities might be to extend the Ulster custom by statute to the rest of the country, notwithstanding the origins of the custom in historical factors peculiar to Ulster. A first step was to give legal effect to the custom in Ulster itself. Irish issues were a major preoccupation of Gladstone's Liberal government which took office in 1868. Having first dealt with the vexed question of the disestablishment of the (Anglican)

46 Devon Commission, *Digest of Evidence Taken Before Her Majesty's Commissioners of Inquiry into the State of the Law and Practice in Respect to the Occupation of Land in Ireland* (1847) vol 1, 2 quoted in Timothy W Guinnane and Ronald I Miller, 'Bonds without Bondsmen: Tenant-Right in Nineteenth Century Ireland' (1996) 56 *Journal of Economic History* 113, 113.

47 Ibid.

48 Some historians argue that what really mattered in Ulster was not the Ulster custom but rather the opportunities that textile manufacturing provided for people to make at least some money by weaving and spinning at home: see Kerby Miller, *Emigrants and Exiles: Ireland and the Irish Exodus to North America* (Oxford University Press, 1985) 40.

Church of Ireland, Gladstone decided it was time to deal with Irish land matters. He invested enormous effort in an Irish Land Bill, finally enacted in 1870 after extended debate in both the House of Commons and the House of Lords. The legislation, enacted as the *Landlord and Tenant (Ireland) Act 1870*,[49] gave statutory force to the Ulster custom, and also provided for limited rights of purchase by tenants: the right of purchase was given effect to by the famous 'Bright clauses', named after the Liberal politician John Bright.[50] Section 1 of the Act provided:

> The usages prevalent in the province of Ulster, which are known as, and in this Act intended to be included under, the denomination of the Ulster tenant-right custom, are hereby declared to be legal, and shall, in the case of any holding in the province of Ulster proved to be subject thereto, be enforced in manner provided by this Act.[51]

As has been shown in an important article by Clive Dewey, an important context for Gladstone's 1870 statute was the development of historical jurisprudence in England, Scotland and Ireland in the 1860s.[52] In particular, Gladstone appears to have been strongly influenced by a historical study of Irish tenures by George Campbell published in 1869.[53] Dewey is very illuminating on the debate within the Liberal Party generated by Gladstone's proposed Bill. Gladstone came to believe that freedom of contract no longer had any practical meaning in Ireland, given rural population pressure and Irish underdevelopment. The proposed Bill unsurprisingly generated a 'hail of *laissez faire* criticism',[54] both within Liberal ranks and from Disraeli's Tories, but Gladstone persisted and the legislation was successfully enacted.

The 1870 Act was not very successful and did not generate much gratitude amongst Irish voters, and for the other three provinces of Ireland was irrelevant. Yet giving legislative force to a tenurial custom which breached sanctity of contract was a remarkable step, and a departure from the political economy of earlier decades that had emphasised property rights and the sanctity and freedom of contracts. The Ulster custom had stood quite outside the ordinary framework of landlord and tenant law.

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49 *Landlord and Tenant (Ireland) Act 1870*, 33 & 34 Vict, c 46.

50 On the political context: see Richard Shannon, *Gladstone: Heroic Minister 1865–1898* (Allen Lane, 1999) 77–85.

51 *Landlord and Tenant (Ireland) Act 1870*, 33 & 34 Vict, c 46, s 1.

52 Clive Dewey, 'Celtic Agrarian Legislation and the Celtic Revival: Historicist Implications of Gladstone's Irish and Scottish Land Acts 1870–1886' (1974) 64 *Past & Present* 30.

53 George Campbell, *The Irish Land* (Trübner and Co, 1869). According to Dewey this book was published at a pivotal moment 'just after the revival of agrarian agitation had destroyed the free-trade consensus, and just before the Liberal Party acquired a new settled policy': Dewey, above n 52, 56. Campbell had earlier worked as a settlement officer in the Punjab, where he had developed an interest in the impacts of free trade ideologies on Indian customary tenures (at 56–7). India was a pivotal context for debate on land, law, and tenure at this time.

54 Dewey, above n 52, 60.

Now it had been legalised, at least in Ulster. Gladstone's legislation was a 'relegation of political economy to outer space'; twenty years earlier such a proposal 'would have encountered polite incredulity'.[55] A later Liberal Irish land Bill in 1881 extended the Ulster custom to the whole of Ireland.

There were some parallel developments in Scotland. In 1883 Gladstone's Liberal Government, largely in response to crofter protest in Skye and other areas, set up the Napier Commission (Royal Commission on the Crofters and Cottars of Scotland) ('*Crofters Commission*') to review the circumstances of the impoverished Scottish crofters. The protests arose from 'the attempts by highland landlords to exploit the absolute property rights conferred on them by land laws originally devised to regulate the lowland agrarian system'.[56] The protests became so widespread and on such a scale that the government became seriously concerned that Irish-style rural activism was now spreading to the Scottish highlands and islands. To deal with the situation Gladstone appointed a Royal Commission to inquire into the crofters' grievances. The royal commission was chaired by Lord Napier, formerly of the Indian Administrative Service; other members included Professor Donald MacKinnon of Edinburgh University and Alexander Mackinnon, who were both influential in the field of Celtic studies and two large landholders, Cameron of Lochiel and Sir Kenneth Mackenzie, '[a]greement between the two factions was impossible'.[57] An influential role in the reviews and debates about the plight of the crofters was played by the Highland Land Law Reform Association. The result was the *Crofters' Holdings (Scotland) Act 1886*,[58] which protected crofters by granting security of tenure, provided for rights of compensation in the event of removal, recognised the distinctive nature of Gaelic customary tenures, and provided for arbitration by a Crofters Commission.[59] The legislation was modelled on the *Land Law (Ireland) Act* of 1881[60] which had extended the Ulster custom to the whole of Ireland. The 1886 *Crofters' Act* only went some way to redressing the grievances of the crofters and Scottish historians have debated its effectiveness and objectives. But the legislation does show that laissez-faire and mid-century political economy were now no longer in vogue in quite the same way as before.

Colonial newspaper readers were well aware of these developments on the Celtic fringes. The political agitation in the Scottish Highlands, the grievances of the

55 Ibid 63.

56 Ibid.

57 Ibid 64.

58 *Crofters' Holdings (Scotland) Act 1886,* 49 & 50 Vict, c 29 ('*Crofters' Act*').

59 The Commission was replaced by the Scottish Land Court, established originally by the *Small Landholders (Scotland) Act 1911,* 1 & 2 Geo 5, c 49 and which applied to all of Scotland. The Court is still in operation under the *Scottish Land Court Act 1993* (UK) c 45, the *Crofters (Scotland) Act 1993* (UK) c 44, and related legislation. The Scottish government has been operating a comprehensive land reform program since 2007. As well as the crofts, in the strict sense, there are also nearly 500 000 hectares of crofters' common grazing areas still extant in the Scottish Isles and Highlands.

60 *Land Law (Ireland) Act 1881*, 44 & 45 Vict, c 49.

crofters, the Crofters Commission, the legislation of 1886 and, more generally, the bitter memories of the Highland clearances were well-traversed subjects in New Zealand and were the subject of a great deal of newspaper comment. Given the amount of Scottish settlement in the country this is hardly surprising. John McKenzie, Liberal Minister of Lands, himself from Ross and Cromarty, one of the seven crofter counties, was intensely aware of the dramatic events in Scotland.[61] The newspapers also reported plans to assist the crofters to migrate to Canada and to New Zealand.[62]

VI Customary Law and Collectivism

Systematic study of customary law emerged in Germany within the context of a much-studied conflict between 'Romanists' and 'Germanists' as to whether Roman or German local custom was the true national law of the German people. The high priest of the Romanist school was Friedrich Carl von Savigny (1779–1861), who believed that German national legal tradition was embodied in the teachers of Roman law in German universities (that is, in himself and his Romanist scholarly colleagues). Savigny's stance had a certain logic deriving from the constitutionalist traditions of the old Holy Roman Empire 'of the German Nation'. As a recent study has argued, the Roman law of Germany emanated from a 'Rome of many ages', a 'Rome that extended over millennia and included popes and modern emperors as well as the ancients'.[63] Savigny contended also that the proper spokesmen and representatives of this great body of law, what might be called German-Roman law perhaps, were not judges or practitioners but the teachers of law in the universities: 'The continued dominance of Roman law followed, in turn, from the postulate that scholars were the representatives of the nation'.[64] Or, as Laurens Winkel puts it, 'Savigny and the Historical School regarded the jurist as the sole interpreter of the Volksgeist.'[65] Roman law was 'truly a Weltrecht, a law of world civilization, and had

61 See Tom Brooking, *Lands for the People? The Highland Clearances and the Colonisation of New Zealand: A Biography of John McKenzie* (Otago University Press, 1996) 271–2. On Scottish migration to New Zealand: see Brad Patterson, Tom Brooking and Jim McAloon, *Unpacking the Kists: The Scots in New Zealand* (McGill-Queen's University Press and Otago University Press, 2013).

62 See, eg, 'The Hebrides Crofters: Landlords Refuse to Give Way', *Marlborough Express* (Blenheim), 14 January 1888, 2; 'Crofter Immigration', *Ashburton Guardian* (Ashburton), 28 August 1888, 2 (reporting that 'Dr McDonald, hon. treasurer of the Crofters Aid Society, is organising a deputation of crofters to visit Australia and New Zealand for the purpose of raising funds for immigration purposes'); 'Settlement of Crofter', *Nelson Evening Mail* (Nelson), 15 August 1891, 2 ('England will settle 6000 crofters, all Naval Reserve Men, at Vancouver, as the nucleus of a force in the Pacific').

63 James Q Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton University Press, 2014) 15.

64 Ibid 124. The classic article on Savigny in English is: Hermann Kantorowicz, 'Savigny and the Historical School of Law' (1937) 53 *Law Quarterly Review* 326.

65 Laurens Winkel, 'Roman Law and its Intellectual Context' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 9, 14.

firmly established itself in Germany'.[66] It was a great and civilised construction, dependent on scholarship to explain and develop it.

The complexities of the great debate about Roman law in Germany, so important in the history of the development of the *German Civil Code*,[67] cannot be followed here. What is of more significance to the argument of this chapter is the emergence of the 'Germanist' counter-trend to professorial Romanism. Prominent legal Germanists included Jakob Grimm (1785–1863), A L Reyscher (1802–80),[68] Georg Beseler (1809–88),[69] and Otto Friedrich von Gierke (1841–1921). The Germanists became interested in legal history, and especially in the history of medieval Germany: steeped in 'a kind of mystical scholarly medievalism typical of the romantic era' they were 'pioneers in the study of medieval legal systems'.[70] Jakob Grimm, famous as a linguist and, together with his brother Wilhelm, as a collector and publisher of fairy stories, came in fact from a legal background: his father was a lawyer and Jakob graduated in law from the University of Marburg. That Grimm both wrote legal history and collected folk tales is instructive. As Patrick Wormald has pointed out, Grimm's interest in ancient Germanic law came from a belief that law, like myth, arose from the spirit (*geist*) of a particular people. The connection between such notions and European Romanticism are 'obvious enough'.[71] But the connections with philology and linguistics are, in Wormald's view, no less important.[72] The Germanist legal historians, to quote Wormald again, 'concocted a system of Germanic law, by boiling up evidential ingredients from allotments as diverse as Tacitean Rome and Snorre Sturlasson's Iceland'.[73] But they also explored contemporary Germany in a scholarly search for authentic German custom. In 1839 the Germanist scholars set up their own journal, probably the first anywhere devoted to the study of customary law, the *Zeitschrift für Deutsches Recht und Deutsche Rechtswissenschaft*, and soon after started organising congresses of Germanist legal scholars, 'the great focuses of opposition to Roman law — focuses also of ferment leading to the Revolution of 1848'.[74] While in Spain and in Latin America liberals were republicans and legislators in the French-Jacobin tradition, in Germany they tended to be romantic nationalists interested in customary law. The *Civil Code*, as finally promulgated in

66 Ibid.

67 *Bürgerliches Gesetzbuch* ('*BGB*'), which came into force on 1 January 1900.

68 Law professor, member of the Frankfurt parliament, author of a three-volume study of Württemberg private law (1837–42).

69 Beseler was a Prussian jurist and liberal, member of the Frankfurt parliament, who championed a 'people's law' as opposed to the 'jurists' law' of the Roman law professors.

70 Whitman, above n 63, 123.

71 Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century: Volume I: Legislation and its Limits* (Blackwell, 1999) 11.

72 Ibid.

73 Ibid 11–12 (emphasis altered).

74 Whitman, above n 63, 207.

1900, was in fact largely based on Roman-law concepts as distilled and analysed by a later generation of Romanist scholars, but the scientific study of customary law pioneered by nationalist liberals of 1848 continued to be important

One of the most influential of the 'Germanist' legal historians was Otto von Gierke, best known for his work on the legal history of associations (*Genossen* or 'fellowships'). Von Gierke was from the Prussian city of Stettin (now Szczecin) and studied law in Berlin, where he was taught by Georg Beseler, one of the leading 'Germanists' of the generation of 1848. Von Gierke is a key figure, enormously influential in his time, and who continues to attract widespread interest.[75] In 1887 he succeeded to Beseler's chair, and it was to Beseler that he dedicated his scholarly tour de force, *Das deutsche Genossenschaftsrecht*, published in four volumes from 1868–1913.[76] Von Gierke was a critic of the *German Civil Code* (*BGB*) of 1900, finding it much too Roman and insufficiently German for his liking; what he most detested about it was its liberal individualism and antipathy towards collectives. His famous book is a legal history of collectives from the Middle Ages to the present, including guilds and craft guilds, city leagues (including the Hanseatic League), rural communes, representative estates, rural fellowships, joint-stock companies, and producers' co-operatives. (He had a rich historical field to work with: indeed, few polities in world history can have been so intricately corporatist as the Holy Roman Empire.) For von Gierke (as Antony Black puts it), guilds 'were important partly as a Germanic substratum in a rapidly Romanising society, but also because they along with other groups embodied the fundamental human value of *Genossenschaft* (fellowship-comradeship as well as just association)'.[77] Von Gierke believed that the development of Roman law, which tended to see associations as having no legal existence without the express permission of the state, had had undesirable consequences for the free development of associations in Germany. He did not believe that such bodies were legal fictions (essentially the German-Romanist position), but rather that they were actually existing juristic entities, different from individuals on the one hand or from the state on the other, and that they derived the existence and corporate status from the agreement of their

75 In English the principal historian of Gierkian communalism and fellowship is Antony Black: see Antony Black, *State, Community and Human Desire; A Group-Centred Account of Political Values* (Wheatsheaf, 1988); Antony Black, 'The Individual and Society' in J H Burns (ed), *The Cambridge History of Medieval Political Thought c 350–c 1450* (Cambridge University Press, 1988) 588, 588–606; Antony Black, *Guild and State: European Political Thought from the Twelfth Century to the Present* (Transaction Publishers, revised ed, 2003). In the German-speaking world the key modern historian in the communalist tradition is Peter Blickle, who has sought to re-interpret the Reformation in Germany in communalist terms: see Peter Blickle, *Communal Reformation: The Quest for Salvation in Sixteenth-Century Germany* (Humanities Press, 1992); Peter Blickle (ed), *Resistance, Representation and Community* (Oxford University Press, 1997).

76 For an English translation: see Antony Black (ed), *Community in Historical Perspective* (Cambridge University Press, 1990).

77 Black, *Guild and State*, above n 75, xxiv.

members rather from authorisation by the sovereign.[78] He saw such institutions as an essential bulwark between the individual and the state, and he thought that these 'associations' and 'fellowships' constituted a specifically German contribution to the history of liberty. Von Gierke was an important contributor to the collectivist zeitgeist of the first half of the 20th century. His influence on the English-speaking world was significant, partly because of a connection with the English legal historian F W Maitland (1850–1906), who was fluent in German and who translated some of Von Gierke's works into English. Von Gierke's legal historical work was also of great interest to the so-called 'guild socialists' in Britain, who included in their ranks (with varying degrees of commitment) Arthur Penty, J A Hobson, R H Tawney, L T Hobhouse and G D H Cole. Guild socialism attracted widespread interest in Australia and New Zealand as well.

Another component in this rather eclectic array of ideas, books and policies were some new tendencies in British economic and social history, associated particularly with and John and Barbara Hammond (*née* Bradbury) (1872–1949 and 1873–1961) and R H Tawney (1880–1962). Their work was associated with a broader trend which, as Stefan Collini puts it, 'understood economic rationality as the operation of systematic selfishness'.[79] Other contributors to this particular discourse included Arnold Toynbee, J A Hobson, and Sidney and Beatrice Webb, who together propounded a vision of the Industrial Revolution 'not just as a catastrophe for certain classes, but also … as establishing a quite new form of civilisation, one driven by the narrow and unchecked pursuit of profit'.[80] Such writers rejected 19th century political economy as exemplified by Bentham and Ricardo. Instead they idealised English rural society in the centuries before the industrial and agricultural revolutions and saw both as destructive of a relatively stable and prosperous peasant agrarian culture founded on custom and usage.

VII Developments in Latin America and the United States in the Early 20th Century

The new mood was also important in Latin America and the United States. It was especially important in Mexico, where the spectacular artistic and cultural legacy of the great pre-Columbian civilisations had always been a powerful presence. Mexican liberals had 'dismissed the Aztecs as mere barbarians and viewed contemporary

78 Ibid 18–19. Black argues that Roman law as developed by the Medieval jurists was not quite as hostile to guilds and associations as von Gierke believes: 'Despite what Gierke says, they … went some way towards accommodating Germanic tradition'.

79 Stefan Collini, 'The Literary Critic and the Village Labourer: 'Culture' in Twentieth-Century Britain' (2004) 14 *Transactions of the Royal Historical Society* 93, 97. On Tawney: see Lawrence Goldman, *The Life of R H Tawney: Socialism and History* (Bloomsbury, 2013).

80 Collini, above n 79, 98. This group probably in turn derives much of its inspiration from Ruskin, William Morris and Matthew Arnold, reaching back in turn into English Romanticism.

Indians as a hindrance to their country's modernisation'.[81] But by the early decades of the 20th century the mood had shifted towards a strong identification with the pre-Columbian past as the foundation of Mexican identity; this cultural reversal could also involve a defence of communal land ownership.[82] The Mexican revolution of 1910–20 had an enormous impact on the development of *indigenismo* not only in Mexico but in Latin America as a whole. In the Mexico of President Lázaro Cárdenas, president from 1934–40, and as exemplified by such cultural icons such Manuel Gamio, Diego Rivera, and Frida Kahlo, this renewed interest in indigenous collectivism produced a cultural climate which was very receptive to re-establishment of collective tenures in the form of the government's *ejido* program.

In the United States the key figure is John Collier, who can be said to be the most important single figure in the history of federal Indian law in the United States. He exemplified a new era in federal Indian policy and was the chief architect of the *Indian Reorganisation Act 1934* ('*IRA*').[83] Collier had earlier led an attack on the allotment system originally introduced into the reservations by the *Dawes Act of 1887*.[84] He founded the American Indian Defence Organization in 1923 and always opposed assimilation. In 1933 President Franklin D Roosevelt took the step of appointing Collier to the position of Commissioner of Indian Affairs, placing federal Indian administration under the control of one of its most prominent critics. Collier and his officials, including legal scholar Felix Cohen, immediately began work on the legislation enacted as the *IRA* the following year. The *IRA* was a milestone in American legal history and many of today's Indian governments were established under it, although it must also be conceded that the legislation has attracted some recent criticism.[85] Wilcomb E Washburn, however, has written that 'Collier's work

81 David Brading, 'Manuel Gamio and Official Indigenismo in Mexico' (1988) 7 *Bulletin of Latin American Research* 75, 75.

82 Ibid 76–7.

83 On Collier: see Lawrence C Kelly, *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform* (University of New Mexico Press, 1983); Kenneth R Philp, *John Collier's Crusade for Indian Reform, 1920–1954* (University of Arizona Press, 1977); E A Schwartz, 'Red Atlantis Revisited: Community and Culture in the Writings of John Collier' (1994) 18 *American Indian Quarterly* 507. For an attempt to assess developments in the United States in the Collier-Cohen years from an Antipodean standpoint: see R P Boast, 'Felix Cohen and the Spanish Moment in Federal Indian Law: A Study in Law, Politics and Historiography' (2008) 39 *Victoria University of Wellington Law Review* 419.

84 *Dawes Act of 1887*, 25 USC 9 § 331–354 ('*General Allotment Act of 1887*').

85 Critical interpretations include: Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (University of California Press, 1980); Lawrence C Kelly, 'The Indian Reorganization Act: The Dream and the Reality' (1975) 44 *The Pacific Historical Review* 291. For vigorous defences see Clayton Koppes, 'From New Deal to Termination: Liberalism and Indian Policy, 1933–1953' (1977) 46 *The Pacific Historical Review,* 543; Elmer R Rusco, 'John Collier: Architect of Sovereignty or Assimilation?' (1991) 15 *American Indian Quarterly* 49; Wilcomb E Washburn, 'A Fifty-Year Perspective on the Indian Reorganization Act' (1984) 86 *American Anthropologist* 279.

as commissioner of Indian affairs is probably the most impressive achievement in the field of applied anthropology that the discipline of anthropology can claim'.[86] Collier was well aware of the new mood of *indigenismo*, land reform, and socialism emanating from Mexico, and was an open admirer of Cárdenas and his policies, including building up the labour unions, agrarian reform, and nationalisation of the petroleum industry. (American business leaders and conservatives were notably less enthused about any of these policies, needless to say, nor were they fond of the *IRA*.) Collier was also personally friendly with Manuel Gamio, a former pupil of Franz Boas and a prominent archaeologist and anthropologist in Mexico and a leader of Mexican *indigenismo*.[87] Gamio and Collier were both 'indigenists' in the sense that they were personally committed to community life and to the values and ethics of indigenous peoples as a counterweight to what they perceived as the selfish individualism of the modern world. Indians had the right to their own forms of cultural expression, but it was more than that: those cultures embodied ethical ideas which were valuable in their own right. They were something that modernity could learn from.

Thus, in the 1930s both Mexico and the United States pursued a similar antiassimilationist path in indigenous policy. This was a significant policy reversal for both countries, driven in both countries by progressive 'indigenist' officials: Gamio in Mexico and Collier and Felix Cohen in the United States. Policies in both countries shared a rejection of earlier liberal models of individualising tenures and favoured a return to collectivist communal tenures. The connection between trends in cultural anthropology and practical impacts in law and policy, at least in the case of these countries, seems clear. The New Zealand case is more complex.

VIII The New Zealand Case: Anthropology and Legal Studies

Obviously New Zealand was an isolated country at some remove from intellectual developments in Germany and the United States. It was, on the other hand, closely linked to Britain, beyond doubt a leading metropolitan culture, where new trends in anthropology, historiography, and policy were not only received but which was also where to a significant extent they had originated. New Zealand, moreover, had a substantial indigenous population and a long tradition of lawmaking in the fields of indigenous tenures. Issues of law, custom, and tenure were a matter of great practical importance in New Zealand. It is likely that any revalorisation of indigenous cultures and tenures internationally must have had repercussions of some kind in New Zealand.

To fully trace the connections between the trends discussed in the first part of this article with New Zealand's own intellectual culture and legal and policy developments in the area of Māori land law is something which, it must be admitted, requires

86 Washburn, above n 85, 287.

87 Gamio is listed, along with Felix Cohen, Nathan Margold, Harold Ickes and others, in the acknowledgments to: John Collier, *Indians of the Americas* (Mentor Books, 1947).

much more research and thought. The history of New Zealand's intellectual culture is not well developed generally, which does not help matters. Nevertheless, some connections certainly do suggest themselves. The most obvious parallels lie in the area of Māori land development after 1929, where the pivotal role was played by the Māori politician Sir Āpirana Ngata, who had degrees from Canterbury University College in law and political science, was connected to a number of leading anthropologists and was a scholar and author in his own right. If anyone in New Zealand is a counterpart to John Collier or Manuel Gamio, that person is Ngata. It is argued below that the real point of convergence between the renewed collectivism of the 20th century and trends and developments in New Zealand lies in Ngata's ideas, policies and programs in the early 1930s.

There was no immediate shift of New Zealand Māori land law in the direction of a greater receptivity towards indigenous custom around the turn of the century: in some respects the situation was quite the reverse. Section 33 of the *Native Land Act Laws Amendment Act 1895* (NZ) deprived *ohāki* (Māori customary death-bed declarations as to inheritance and other matters) of any legal effect. Section 84 of the *Native Land Act 1909* (NZ) provided that Māori customary title could not prevail against the Crown. Section 133 of the same statute provided that Māori wills had to be executed in the same manner as wills by Europeans, and s 161 stipulated that adoption of children by Māori custom was without 'any force or effect'.[88] In the same vein, marriages according to Māori customary law were abolished by s 190 of the 1909 Act: 'Every marriage between a Native and a European shall be celebrated in the same manner, and its validity shall be determined by the same law, as if each of the parties was a European'.[89] Moreover, although Māori *iwi* and *hapū* were clearly collectivities, and might have been perceived by von Gierke and his followers as such, Māori descent groups had no legal personality in New Zealand law and could not bring proceedings in their own right (for example in trespass).[90] Nonetheless, the new collectivist and relativist mood was not without its impacts on New Zealand law. While the 1909 Act was in some respects hostile to custom, it did on the other hand make provision for new forms of Māori collectivities. Section 317 greatly expanded the provisions allowing the Native Land Court to incorporate owners, an important recognition that the robust individualism of the earlier statutes in some respects had had its day. Collectivities were acceptable to the legislature, even if Māori customary law was not.

While Māori studies is a thriving academic field today, it was not always so. For many years examinations for degrees for the University of New Zealand were set and marked in England, which had stifling effects on curricular development in the University's four constituent colleges. As Oliver Sutherland puts it:

> With curricula determined and examinations set and marked in Britain, the university had no place for the sort of ethnological studies of [Elsdon] Best and

88 *Native Land Act 1909* (NZ) s 161(1).

89 Ibid s 190.

90 *Nicholson v Kohai* (1909) 28 NZLR 552 (Chapman J).

> the others and, intellectuals all, they were left to work in the museums, libraries and government departments, outside the academic mainstream.[91]

On the other hand, it must be recognised that in the early decades of the 20th century anthropology, especially cultural anthropology, was a new discipline everywhere and had to struggle for academic recognition even in Britain, Germany, and the United States.[92]

The absence of courses in Māori and Polynesian languages, archaeology and anthropology at the University of New Zealand did not mean that these subjects attracted no interest in New Zealand; it only meant that these fields were largely — but not entirely — pursued outside the university. Elite colonial families such as the Beethams of Brancepeth station in the Wairarapa or the Meinertzhagens of Waimarama simply transplanted upper-class English intellectual life to a New Zealand context: this could include the pursuit of interests not only in botany, ornithology and archaeology, but also the study of the Māori language.[93] This amateur-scholarly tradition was continued into the 20th century by such scholars as Elsdon Best and Edward Tregear and through the Polynesian Society. The Society's journal, *The Journal of the Polynesian Society*, published material on linguistics, Polynesian origins, mythology and material culture but also to some extent on cultural anthropology and sociology.[94]

Academics interested in Māori issues, such as John Macmillan Brown (1845–1935) and Ivan Sutherland (1897–1952), had to teach in other fields — practically everything in Macmillan Brown's case and psychology in Sutherland's. New Zealand anthropologists like Sir Peter Buck (Te Rangi Hīroa), Felix Keesing and Raymond Firth had to pursue their careers overseas. No chair of anthropology in New Zealand was established until 1949, Auckland University College being the first to take this step. This was well behind Australia, where the first chair in anthropology in that country was established at the University of Sydney in 1926. The Sydney position was taken by A R Radcliffe-Brown, high priest of functionalism, who had studied under Haddon and Rivers at Cambridge, and then had taught at Cape Town before moving on to Australia.[95] The Australian Ralph Piddington, first professor of anthropology at Auckland, had in turn studied under Radcliffe-Brown at Sydney and Malinowski at the London School of Economics. Piddington played an instrumental role in securing

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91 Oliver Sutherland, *Paikea: The Life of I L G Sutherland* (Canterbury University Press, 2013) 147.

92 As Stocking points out, even by Malinowski's time anthropology was a 'still marginally institutionalized discipline' even in Britain: Stocking, above n 34, 291.

93 On the intellectual culture of Brancepeth station in the Wairarapa and the Beetham family: see Lydia Wevers, *Reading on the Farm: Victorian Fiction and the Colonial World* (Victoria University Press, 2010). The family owned books in the Māori language and were on close terms with the Māori aristocracy of the neighbouring district: at 51–7.

94 On the Polynesian society: see M P K Sorrenson, *Manifest Duty: The Polynesian Society over 100 Years* (Polynesian Society, 1992).

95 On Radcliffe-Brown at Sydney see Stocking, above n 34, 340–52.

the appointment of Bruce Biggs to teach Māori at university level in 1951. Amongst those who studied anthropology at the postgraduate level at Auckland in the 1950s and 1960s are Joan Metge, Anne Salmond, Hirini Moko Mead and Hugh Kawharu, all of whom played an important role in the modern Māori renaissance. In this way one can construct an intellectual genealogy connecting some of New Zealand's most important anthropologists and ethnohistorians of recent times to Haddon and Rivers via Piddington, Radcliffe-Brown and Malinowski.

The history of legal education in New Zealand is another subject that needs to be more thoroughly researched, most particularly in terms of the content of what was actually taught. Since for a number of decades law examinations, like those of all other university subjects, were set and marked in London, the close affiliation between British and New Zealand legal education can be assumed. By around 1900, trends in British legal education had become highly positivist and analytical, based on a decontextualised study of cases and statutes; the wider historical vistas provided by the works of Sir Henry Maine had been abandoned and were seen mainly as a curiosity and he had few real disciples.[96]

The only law book of more than local importance published by a New Zealand lawyer in the first half of the 20th century was John Salmond's *Jurisprudence*, first published in 1902 while he was a professor at the University of Adelaide.[97] The book was widely praised in its day, and Maitland, no less, regarded it as 'liberal and liberating'.[98] The book is characterised by a fixation on technical classifications (supreme and subordinate legislation; declaratory and original precedents; authoritative and persuasive precedents; wrongs, duties and rights; elements of legal rights; proprietary and personal rights; legal and equitable ownership; possession in law and in fact; corporations aggregate and corporations sole; and so forth). Salmond writes of the logical structure of the Common Law, or more exactly imposes a logical structure upon it. Even at the time not everyone found this satisfactory. In a letter to Oliver Wendell Holmes, Harold Laski remarked that '[i]f you look at Salmond or Holland whose names are repeated in rebuttal in a tone of reverent ecstasy, you read a dull body of formal definitions so made as to evade all the essential problems involved' and Holmes essentially agreed.[99]

96 See R C J Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge University Press, 1988) 183–95.

97 John William Salmond, *Jurisprudence: Or The Theory of the Law* (Stevens and Haynes, 1902). See Alex Frame, *Salmond: Southern Jurist* (Victoria University Press, 1995) 54–71.

98 H A L Fisher, *Collected Papers of Frederic William Maitland* (Cambridge University Press, 1911) vol 3, 429, cited in Frame, above n 97, 71.

99 Letter from Harold Laski to Oliver Wendell Holmes, 22 December 1924 in Mark de Wolfe Howe (ed), *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935* (Oxford University Press, 1955) vol 1, 691, cited in Frame, above n 97, 70.

Salmond believed that 'it is in and through the state alone that law exists'[100] and his discussion of custom as a source of law is mainly focused on the restrictive rules of the courts of common law as to when a custom may be given effect to. Although entitled *Jurisprudence*, the book is not a work of legal philosophy and is almost wholly focused on English law, with some scattered references to Roman law and German and French legal writing. It is essentially an analytical distillation of the main distinctions of English law: indeed, it can basically be seen as an attempt to create a theory of English law.[101] Moreover Salmond wrote *Jurisprudence* as an English lawyer, not as an Antipodean one, and one searches it in vain for any discussion of New Zealand's own legal and historical circumstances. Indeed, the book is not a historical treatment in any sense.

In his biography of Salmond, *Southern Jurist*, Alex Frame has examined Salmond's treatment of corporations as a key to Salmond's juristic thinking.[102] Salmond opts for the Pandectist and Roman understanding of corporations as legal fictions. Clearly he is aware of von Gierke and his ideas about corporations and collectives, but he is unenthusiastic:

> The doctrine that corporations are *personae fictae*, though generally received, has not passed unchallenged. Attempts have been made in recent years, especially by German jurists, to establish in place of it a new theory which regards corporate personality as a reality, and not a fictitious construction of the law. [103]

'Savigny and Windscheid', writes Salmond, 'are representative adherents of the older doctrine', and it is certainly this 'older doctrine' that Salmond prefers.[104] A corporation, he writes, is 'a very real *thing*, but it is only a fictitious *person*.'[105] Every corporation 'involves in the first place some real person or persons whose interests are fictitiously attributed to it, and in the second place some real person whose acts are fictitiously imputed to it.'[106]

The purpose of this discussion is not to criticise Salmond's understanding of corporations but to underscore the point that Salmond was in no sense an enthusiast for collectivism or for customary law. He cannot be written off as an Austinian positivist — Salmond does not particularly emphasise that laws are commands from

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100 Salmond, above n 97, 184.

101 See A W B Simpson, 'The Salmond Lecture' (2008) 38 *Victoria University of Wellington Law Review* 669.

102 See Frame, above n 97, 68–71; John H Farrar, 'Salmond and Corporate Theory' (2008) 38 *Victoria University of Wellington Law Review* 925.

103 Salmond, above n 97, 350.

104 Ibid 351.

105 Ibid (emphasis in original).

106 Ibid.

the sovereign — but his approach is certainly formalist and analytical.[107] In no sense, then, was Salmond a conduit of the new collectivist ideas gathering force in the early decades of the 20th century. He was, rather, a supporter of the enlightened state and a product of the 'new liberalism' of the late 19th century. Anthropology, moreover, was clearly a subject of no interest to Salmond; and it can be assumed that he did not think that anthropology had anything to contribute to the understanding of law, certainly a question on which reasonable people can differ. His stance towards Māori issues is something of a piece with this stance. He believed that the enlightened state had responsibilities towards Māori, but this was to be achieved within a framework of well-designed legislation, rather than by means of the common law or a revitalised collectivism.[108]

However, Salmond should not necessarily be seen as merely a reflection of the views of all New Zealand lawyers. Practitioners and judges working in the Māori sphere had other approaches. It is very striking that it was Land Court judges such as Frank Acheson and Norman Smith who studied Māori customary law and wrote books and articles about it, not legal academics.[109] Judge Acheson, certainly, was well-informed about contemporary thinking in the fields of anthropology and the study of customary law, and even applied this scholarship in some of his judgments. This judicial interest arose, of course, from their daily engagement with Māori customary law in the Native Land Court, which was undoubtedly a Court that saw itself as professionally engaged with the field. Despite New Zealand possessing, with the Native Land and Appellate Courts, specialist tribunals that applied — in a way — Māori customary law, and despite New Zealand exporting similar institutions to the Cook Islands and Niue, Māori customary law and the jurisprudence of the Native Land Court seems to have attracted little interest in the law schools. That was partly because the Court's jurisprudence was invisible; another reason was probably because the Native Land Court was not a prestigious body. Judgments of the Native Land Court were not even reported in the *New Zealand Law Reports.* The impact of new books such as Llewellyn and Hoebel's *The Cheyenne Way* on law teaching appears to have been slight.[110] On the whole the teaching of law in New Zealand was highly conservative, and firmly oriented towards British models until the 1950s when the presence of such distinguished professors as James Williams and Robert

107 On the relationship between Salmond and Austin see P G McHugh, 'Sir John Salmond and the Moral Agency of the State' (2008) 38 *Victoria University of Wellington Law Review* 743.

108 On Salmond and legal issues relating to Māori: see Frame, above n 97*,* 108–32; R P Boast, 'Sir John Salmond and Māori Land Tenure' (2008) 38 *Victoria University of Wellington Law Review* 831; Mark Hickford, 'John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920' (2008) 38 *Victoria University of Wellington Law Review* 853.

109 Norman Smith, *Native Custom and Law Affecting Native Land* (Māori Purposes Fund Board, 1942). See also Grant Young, 'Judge Norman Smith: A Tale of Four "Take"' (2004) 21 *New Zealand Universities Law Review* 309.

110 Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1941).

McGechan at Victoria and Julius Stone and Geoffrey Davis at Auckland began to lift New Zealand legal education out of the doldrums. Nevertheless, it was not until the 1980s that courses on Māori land law and Māori customary law finally emerged in the country's law faculties, 20 years after courses on federal Indian law began to make an appearance in the law schools of the United States.

In short, then, the new anthropology was not without effect in New Zealand, but its impact was blunted as the institutional framework was so limited, with no university anthropology or Māori studies anywhere in the country and with a tertiary system stiflingly yoked to the United Kingdom. There was scholarship, of a sort, written on Māori land and custom by the judges of the Māori Land Court, however, and there is no reason to denigrate it, or assume that the judges were unread in anthropology. In the legal academy, such as it was, the development of new fields of inquiry in legal studies in the United States appears to have little impact until after the Second World War.

IX The Age of Sir Āpirana Turupa Ngata

In New Zealand the period from 1910–53 was dominated by the compelling figure of Sir Āpirana Turupa Ngata of Ngāti Porou,[111] beyond any doubt Māoridom's most important leader of modern times. It is not possible to do justice to Ngata's long and complex career in this article, and there are in any case a number of studies available, most of which, however, are limited in the sense that they portray him as a Māori, rather than as a national, politician.[112] Ngata's ideas were strongly influenced by the ideological currents of the day in the fields of anthropology and economics.

Ngata was an intellectual, a lawyer, a Liberal (in the sense of belonging to the Liberal party), and a moderniser. He was conservative in some ways (especially in the fields of culture and the arts) and radical in others (economic development, notably). Born in 1874, Ngata was from Ngāti Porou, an *iwi* that had managed to retain much of their tribal estates and who were determined to develop and administer their own lands. His father, Paratene Ngata, was an important Ngāti Porou leader and Native Land Court Assessor. Ngata went to Te Aute College, the prominent Anglican Māori boys' college, when he was nine. He received an excellent education there at the time of the headmastership of John Thornton, formerly a CMS missionary in India, who believed strongly that Māori boys should have the opportunity to attend university and enter the professions. The school, writes Sorrenson, had a 'powerful and enduring influence' on Ngata, as well as his lifelong friend and colleague, Sir Peter Buck

111 Ngāti Porou are an important Māori *iwi* (tribe), of the North Island East Coast region north of Gisborne.

112 See Ranginui Walker, *He Tipua: The Life and Times of Āpirana Ngata* (Viking, 2001). See also M P K Sorrenson (ed), *Na To Hoa Aroha: From Your Dear Friend: The Correspondence between Sir Apirana Ngata and Sir Peter Buck 1925–1950* (Auckland University Press, 1986–88) vol 1, 9–40.

(Te Rangi Hīroa).[113] Ngata went on to Canterbury University College in Christchurch where he became the first Māori to gain a degree at a New Zealand university (a BA in political science in 1893); he afterwards went on to obtain an LLB. Canterbury University College at this time was dominated by the imposing presence of John Macmillan Brown, whose range of interests and enthusiasms included Polynesian ethnography.[114] After graduation Ngata practised law for some years. He appeared in a number of cases in Gisborne, a storm centre of complexity and drama over Māori land matters that had few equals in the country, and indeed appeared on occasion for his own *iwi* (tribe), Ngāti Porou, in the Validation Court.[115] He became a member of Parliament in 1905 in the last years of the Liberal government. He played an important role in the construction of the *Native Land Act 1909* (NZ).

The Liberal Party lost power in 1912 and Ngata was in opposition for many years. He played a prominent role in the Māori war effort in the First World War, an issue on which Māori opinion was much divided. After the war Ngata played an important role as counsel representing the owners in the vast and complex Urewera[116] consolidation scheme in the early 1920s, and did his best to protect the interests of the owners in this whole calamitous affair.[117] Thanks to his friendship with the like-minded Reform politician Gordon Coates, who replaced Herries as Native Minister in 1921, Ngata's influence began to grow significantly. In 1929, following the general election of 1928 and the startling United (that is, Liberal) Party victory, Ngata became Native Minister. In 1929 Ngata prepared new legislation providing government funding for Māori land development, probably the most important policy initiative relating to Māori land in modern times.[118]

Ngata was essentially a Victorian, a believer in hard work, effort, thrift and living a healthful, moral and Christian life. More particularly he had many attitudes in common with the Liberal party leaders of the 1890s, especially their beliefs that cities were corrupting and that the best place to live was in the countryside, working in the fresh air, contributing to New Zealand's export industries and at a safe distance from taverns, racecourses, billiards parlours and dancehalls. Ngata knew an enormous amount about New Zealand's primary industries and about the social and economic

113 Sorrenson, above n 112, 13. Under Thornton, Te Aute 'was developed as the seminary of a Māori elite'.

114 On Macmillan Brown: see Cherry Hankin, 'Brown, John Macmillan 1845–1935, University professor and Administrator' in Claudia Orange (ed), *Dictionary of New Zealand Biography* (Bridget Williams Books, 1990–2000) vol 2, 57, 57–9. Hankin describes him as 'perhaps the outstanding university teacher in New Zealand before 1900': at 58.

115 Walker, above n 112, 79. According to Sorrenson, Ngata was articled to the Auckland-based firm of Devore and Cooper: Sorrenson, above n 112, 18.

116 Te Urewera is a large inland region lying between the Bay of Plenty and the North Island East Coast; the principal *iwi* based there is the Tuhoe, but there are a number of other groups located there.

117 On Ngata's role in the Urewera consolidation: see Walker, above n 112, 196–8.

118 *Native Land Amendment and Native Land Claims Adjustment Act 1929* (NZ) s 23.

circumstances of the Māori people. He must have been very persuasive, given that he managed to sell his great land development project both to his political colleagues and to a wary Māori public.

In an important article, Graham Butterworth has argued that Ngata had five main policies that he pursued between 1921 and 1934.[119] These were: first, settling outstanding historic Māori land issues (examples being the Waikato and Taranaki confiscations, Crown purchases of Ngai Tahu lands in the South Island in the 19th century, and long-standing legal claims to the beds of navigable lakes); secondly, a cultural program of reviving and preserving Māori poetry, art and music;[120] thirdly, advancing the work of the Anglican Church; fourthly, educational programs of a number of kinds; and fifthly, the promotion of Māori land settlement. These policies interlinked and formed part of a single program. Ngata believed that Māori could have things both ways: it was possible for Māori to modernise economically but to continue to be themselves culturally. Ngata disliked Māori political or religious separatism, and had little time for community religious leaders such as Rua Kenana Hepitipa (1868–1937) of Tuhoe[121] or W T Ratana (1873–1939) of Ngāti Apa. Nonetheless Māori should stay in their tribal homelands and work their own lands. Staying at home was the key to the twin goals of modernisation and cultural autonomy. This was not only a Māori vision. Rural utopianism was a hallmark of New Zealand Liberalism generally. Liberals thought the countryside was good for everybody; Ngata agreed and thought that it was especially good for Māori. To Liberal beliefs that cities were morally corrupting and unhealthy, and that a progressive society should be built around rural close settlement was added Ngata's assumption that only in the countryside could Māori retain their cultural autonomy, or their 'individuality' as he often put it. To move away from home would put Māoritanga (Māori cultural values, 'Māori-ness') at risk. (As things have turned out, Ngata's fears were misplaced.[122]) As G V Butterworth has put it, 'land development for Ngata — like the Ratana Church and the Kingitanga for their supporters — had overtones of a doctrine of faith rather than a wholly rational policy'.[123]

Ngata was an intellectual who valued research in the fields of contemporary sociology and cultural anthropology. He was a close friend and lifelong correspondent of Sir Peter Buck (Te Rangi Hīroa), New Zealand's most famous anthropologist — himself Māori — who spent much of his career in the United States. He was also close

119 G V Butterworth, 'A Rural Māori Renaissance? Māori Society and Politics 1920 to 1951' (1972) 81 *Journal of the Polynesian Society* 160.

120 On Ngata and Māori music: see Mervyn McLean, *Māori Music* (Auckland University Press, 1996) 337–41. On Ngata and Māori art: see Roger Neich, *Painted Histories: Early Māori Figurative Painting* (Auckland University Press, 1993) 117–19; Rangihiroa Panoho, *Māori Art: History, Architecture, Landscape and Theory* (Bateman, 2015) 138–72.

121 Principal Māori *iwi* of the Urewera region.

122 See Richard Hill, *Māori and the State: Crown-Māori Relations in New Zealand/ Aotearoa, 1950–2000* (Victoria University Press, 2009) 2.

123 Butterworth, above n 119, 171.

to Ivan Sutherland, who taught at Canterbury University College. A literature on contemporary Māori society first began to emerge in the 1920s, partly as a component of Ngata's program of Māori cultural and economic revitalisation. It took a Māori politician to initiate support for research on contemporary Māori social anthropology — as opposed to the somewhat the backward-looking literature on traditional lore, fishing methods, ancient legends, mythology, migrations and so on characteristic of the earlier era of S P Smith, Tregear, and Elsdon Best. The obvious reason for the persistence of this older style of scholarship was that it was generally assumed that Māori people were going to merge into the general population and Māori culture would vanish: 'Poorly known aspects of Māori culture were to be salvaged before they had been replaced by European civilisation'.[124] But Ngata was looking to the future, not the past, and knew it was important to gain an informed understanding of contemporary Māori society. It can sometimes be forgotten that he was an intellectual in politics with a serious commitment to supporting contemporary social research.[125] He played a pivotal role in establishing the Māori Ethnological Research Board in 1923, the Māori Purposes Fund Board in 1924, and the Māori Arts and Crafts Council in 1931. The Māori Ethnological Research Board was established to support research on Māori society and culture, but this now included contemporary Māori and Pacific sociology and ethnography written by people with academic training. The Board helped with the publication costs of monographs and scholarly conferences.

Ngata was a scholar and an academic in his own right. His personal scholarly interests lay mostly in the field of Māori literature, and he collected and edited numerous Māori *waiata* (poems, songs, compositions) from all over the country, later published as supplements to the *Journal of the Polynesian Society* from 1958–1990 under the title of *Nga Moteatea* [The Songs]. *Nga Moteatea*, recently republished in five massive volumes by Auckland University Press, is essentially a work of literary appreciation, a testament to Ngata's feeling for the richness of Māori literature and the beauties and subtleties of the Māori language. However Ngata also made himself familiar with modern social research on Māori, supported and encouraged it, and at times made use of it in his own work, as for instance in his utilisation of Raymond Firth's work in his (Ngata's) report to parliament on Māori land development in 1931.[126] Ngata was also an author in the field of social anthropology, and published an article on anthropology and the government of 'Native races' in the Pacific in the *Australasian Journal of Psychology and Philosophy* in 1928.[127] Interestingly, Ngata took the opportunity to express a few reservations about aspects of contemporary scientific anthropology:

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124 Toon van Meijl, 'Historicising Māoritanga: Colonial Ethnography and the Reification of Māori Traditions' (1996) 105 *Journal of the Polynesian Society* 311, 322.

125 For example, there is no discussion of this aspect of Ngata's work in Atholl Anderson, Judith Binney, and Aroha Harris, *Tangata Whenua: A History* (Bridget Williams Books, 2014).

126 Sutherland, above n 91*,* 152.

127 Apirana Ngata, 'Anthropology and the Government of Native Races in the Pacific' (1928) 6 *Australasian Journal of Psychology and Philosophy* 1.

> There is a tendency perhaps in modern science to magnify the importance of terminology; a tendency in ethnographers to work on skeleton charts, such as are outlined in 'Notes and Queries in Anthropology' and to measure the quality of their work by the detailed filling of those charts. Much superficial work has been done under this guise. The temptation to make the material observed conform to the principles connoted by the terminology of the charts could not always be resisted. Races under observation are thus often credited with mental and other qualities they never possessed; or more is read into their sociology than the facts warrant.[128]

Ngata therefore certainly knew of the new cultural anthropology, supported it, made use of it and indeed contributed to it.

X Collectivism and Individualism in New Zealand

By 1909 the problems posed by crowded Māori land titles were beginning to be understood, and the minds of many were exercised by the issue of what to do about it. There were two main options on offer by this time, incorporation and consolidation. The two are quite dissimilar. Consolidation simply means swapping undivided land interests around in order to 'consolidate' individual or family blocks. It is not a solution which challenges individualisation as such. Ngata saw consolidation as useful, provided it generated family farms. 'Consolidation', wrote Ngata in 1931, 'is the most comprehensive method of *approximating the goal of individual or, at least, compact family ownership.*'[129] Consolidation was not a goal in itself, but a means to an end, and the end, for Ngata, was always that of encouraging Māori to become farmers. Land development grew out of consolidation and was always linked to it, as the desired end of a consolidation scheme was typically the creation of a number of 'improved' farming units, preferably dairy farms if soil, climate and topography allowed. Consolidations merely offered an interim solution: a generation or two later, the exercise would have to be repeated.

Incorporation, however, was a more interesting and innovative kind of solution to the crowded title problem. Incorporations are collectivist. They give legal form to a community of owners. As idealised by Ngata, incorporations worked by turning land blocks into a kind of community project: the community worked the land under the eye of a salaried manager, drew salaries, remained at home, and earned profits

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128 Ibid 2. *Notes and Queries on Anthropology* was a manual of anthropological practice and questionnaire first issued by the British Association for the Advancement of Science in 1874, later taken over by the Royal Anthropological Institute and regularly updated.

129 Apirana T Ngata, "Native Land Development" [1931] AJHR G10 at ii, quoted in T J Hearn, 'Land Titles, Land Development, and Returned Soldier Settlement' in Te Rohe Pōtae (Report Wai 898 #A69, Crown Forestry Rental Trust, December 2009) 23 [1.5] (emphasis added).

according to the value of their shareholdings. They were a much more modern and contemporary kind of solution, consolidations being more conservative.

By 1900 or thereabouts, as seen, individualisation had become discredited all over the world, or at least new ideas about land and tenures were in the ascendant. That this was having an impact in New Zealand can be seen from a close examination of the reports prepared by Sir Robert Stout and the young Āpirana Ngata during their joint commission of inquiry into Māori lands and land tenure from 1907–08. In December 1907 the commissioners were on Ngata's home terrain in the Waiapu region, where they attended various meetings and discussions at Ngata's home Waiomatatini. Following the meetings, in January 1908 Stout and Ngata crafted at Rotorua a remarkable report which illustrates perfectly the themes of this article.[130] It is hard to know whether it was Ngata or Stout who was the principal author, and in a sense it does not really matter: Ngata and Stout, one Māori, the other Pākehā (non-Māori New Zealander), thought along similar lines.

The context of the discussion was Māori incorporations. They were, wrote Stout and Ngata, very suitable organisations for Māori, 'a communal people'.[131] The report, however, suggests that Māori land incorporations could be a useful model for *Europeans* and could indeed offer possibilities for more cohesive and culturally richer rural settlement. Instead of Māori being urged to adopt European individualism, Pākehā were being invited by Stout and Ngata to think seriously about Māori collectivism. Also noticeable is a sense that New Zealand might be blazing a trail for other countries to follow in an era of 'social experiments', even to the extent of harmonising the interests of 'capital' and 'labour' (wishful thinking, no doubt). There could be no clearer illustration of the collectivist impulses analysed above:

> This system of incorporation is new to our Dominion, and has not, so far as we know, been adopted in any part of the world dealing with farming pursuits. It is a union of capital and labour, for the labour on the incorporated blocks is almost wholly supplied by the landowners or their relatives. In these days, when so many social experiments are being tried, this system merits consideration and careful watching.[132]

There was no reason why the benefits of this new kind of rural social organisation — so it was perceived — should be confined to Māori:

> There is nothing we know of that could hinder it being adopted by Europeans. If ten, twenty, or thirty families of colonists were to obtain a block of land either

130 Robert Stout and A T Ngata, "Native Lands and Native-Land Tenure: Interim Reports of Native Land Commission on Native Lands in the Waiapu County" [1908] AJHR G-00i.

131 Ibid 3.

132 Ibid.

> by purchase or on *perpetual lease*,[133] and to manage it as the Māoris manage these incorporated blocks, perhaps a higher village life might be led and true altruistic communities formed. For under this system labour is paid at the current rates, and the holder of what may be called the 'stock' or 'capital' gets the profits; but, as the holders of the 'stock' are also the workers, they reap not only the reward, but the profit of their labour. Further, the settlers would not live apart on separate farms, but their houses would be close to each other, and thus there would be a better social life than in many country districts.[134]

Living in the country had its drawbacks. It could be culturally sterile and rather boring:

> The drawback to country life is often the want of a village or town life, the absence of social intercourse, and the lack of art, music, and literature that are common to most towns. How is country life to be made more popular?[135]

Something like the Māori incorporation could help perhaps, and prove more durable than other kinds of rural Utopian experiments that had been tried and failed in the United States and other countries, the commissioners thought. It is impossible to imagine a high Victorian liberal like Francis Dart Fenton, the first Chief Judge of the Native Land Court and author of the *Native Lands Act 1865* (NZ), writing something like this.

Ngata disliked doles and social welfare benefits, and believed them to be bad for Māori people. The state should certainly assist, but in Ngata's view it should assist Māori collectively, not individually. There was always something of the kibbutz and the commune about Ngata's program. John Collier and Felix Cohen in the United States, Manuel Gamio in Mexico, and Sir Āpirana Ngata in New Zealand were all intellectuals in government who idealised the collectivist values of indigenous peoples and who also worked hard to alleviate their economic plight in their respective countries. (Ngata, however, was the only one who was indigenous himself.) It was an integral part of Ngata's vision that the schemes had to be community initiatives utilising the traditional leadership. The state should advance loan monies, provide technical and financial advice and help with training, but at the end of the day the schemes were meant to be Māori initiatives. The development schemes were not only, or merely, an economic policy. As G V Butterworth has put it:

> Ngata's schemes had never been intended to be cold bloodedly economic. Rather he had sought to make Māori farming the economic basis of a renewed Māori

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133 According to Professor Hamer, Stout 'opposed the sale of land by the state' and was 'a strong advocate of state leasing, and frequently advocated taxing the unearned increment': David Hamer, 'Stout, Robert 1844–1930, Lawyer, Politician, Premier, Chief Justice, University Chancellor' in Claudia Orange (ed), *Dictionary of New Zealand Biography* (Bridget Williams Books, 1990–2000) vol 2, 484, 485.

134 Robert Stout and A T Ngata, above n 130, 3–4 (emphasis added).

135 Ibid 4.

> tribal life which was to include those manners and customs (modified where necessary) that fostered Māoritanga. The development of tribal lands would enable the retention of a political, social and economic life centred on the carved meeting house and marae.[136]

The schemes were one component of an ambitious program of social, economic, and cultural renewal. Ngata hoped that his land development project would make Māori people more virtuous: it might improve levels of domestic hygiene and perhaps, it was hopefully imagined, even reduce alcohol consumption. Such initiatives, wrote Ngata in 1931, 'would fail to produce enduring results unless they centered round and assisted in an industrial development based *principally on the cultivation of land*'.[137] There could be no more revealing expression of Ngata's deepest convictions, drawn from his own life and cultural background, but also from the rural Arcadianism which was such a fundamental part of Liberal party ideology and which itself had a long genealogy in both New Zealand itself and in Britain. There was no room in Ngata's vision for the likes of one Matene Mita, whose letters I discovered buried in one of the Native Land Purchase files, who wanted to sell his land interests to the Crown so he could move to Rotorua and open a billiards saloon.[138]

Ngata could not have set up the schemes without the support and backing of the United (Liberal) government of which he was a member. It is hard to find, on such literature as exists, any explanation as to why Ngata's cabinet colleagues were prepared to fund the schemes and to continue to do so as the country slid into depression. Why did they? It was not a policy likely to win support from Pākehā voters. Admittedly the four Māori seats were not unimportant in a finely-balanced parliament. But there must have been other reasons. No doubt a principal reason for Cabinet support is that the schemes, as noted above, represented a further state-controlled stage of the grasslands revolution, which meant more butter, cheese and frozen lamb for export to Britain. But there were, to revert to the main theme of this article, wider trends at work. Ngata's legislation was just one part of a wider package of land development legislation enacted in 1929. Legislation was simultaneously enacted aimed at facilitating land settlement and development by Māori *and* Pākehā. This ambitious combined program can be interpreted as the United government's continued commitment to the ancient dream of close rural settlement as a cure for all social and economic ills. Many of the provisions of s 23 of the *Native Land Amendment* and *Native Land Claims Adjustment Act 1929* (NZ) parallel those of the *Land Laws Amendment Act 1929* (NZ) enacted at the same time. The first, Ngata's legislation, was aimed at Māori, and the second at Pākehā. The *Land Laws Amendment Act*, which implemented the non-Māori program, set up a Land Development Board,

136 Butterworth, above n 119, 175.

137 Apirana T Ngata, "Native Land Development: Statement by the Hon. Sir Apirana T Ngata, Native Minister" [1931] AJHR G-10 at vii, quoted in Ashley Gould, *Māori Land Development Schemes: Generic Overview* (Report, Wai 1200 #A67, Crown Forestry Rental Trust, 2004) 41 (emphasis added).

138 Boast, *Buying the Land, Selling the Land*, above n 4, 10, 415.

chaired by the Minister of the Lands, assisted by advisory committees.[139] The legislation was aimed at developing unoccupied Crown lands for settlement, conferring wide powers on the Minister of Lands to achieve this goal, just as Ngata's legislation conferred equally sweeping powers on himself. The legislation was thus aimed at supporting and funding both Māori and Pākehā rural communities. The success, or lack of it, of the non-Māori component of the project remains unstudied, but it does not seem to have resulted in anything of enduring significance.

Ngata's 1929 legislation was subsequently incorporated into the *Native Lands Act 1933* (NZ), an update and revision of the *Native Lands Act 1909* (NZ). The 1933 Act is thus a near-contemporary of the *Indian Reorganisation Act* of 1934 in the United States. The New Zealand legislation, unlike the American, did not provide a mechanism by which indigenous descent groups as such could become incorporated bodies. On the other hand, New Zealand law had long allowed individual owners of particular blocks to incorporate, and the 1929/1933 legislation provided for an elaborate system of state-assisted Māori land development founded on Ngata's vision of rural-based cooperative effort.

Yet there were deep inconsistencies in Ngata's project, which perhaps go to the very heart of the limitations of the newly-fashionable collectivism emerging in the early decades of the 20th century. It was all very well for John Collier and others like him to idealise the collectivism and communalism of the Pueblo peoples of New Mexico and Arizona. Those very peoples somehow had to make a living within the aggressively modernising and capitalistic society of the United States. In the case of the development schemes in New Zealand, Ngata explicitly sought to involve Māori in New Zealand's dairy industry, a highly capitalised form of business activity based on the production and industrial production of perishable products and their bulk export across the world to the United Kingdom.[140] Ngata did not seek to challenge New Zealand's grasslands revolution or its export-based dependency economy, and sought only to ensure that Māori participated in it and shared in its economic benefits. Whether they could simultaneously do that and also remain a virtuous and culturally self-sufficient rural people remained to be seen. Dairy farming, with its remorseless routines, pressing timetables, high start-up costs and close integration with exporters, vets and other rural specialists is a challenging form of economic

139 *Land Laws Amendment Act 1929* (NZ) s 6.

140 Given the long-standing and continuing importance of dairying to the New Zealand's economy, the lack of a developed historiography on the economic, social, political, and environmental consequences of this vast industry (or on its ability to influence policymakers and law-makers) is very striking and very surprising. No comprehensive history of the industry exists, and the industry seems completely uninterested in commissioning academic histories of itself. This is marked contrast to the highly developed literature on (for example) the coffee industry in Central America. In Costa Rica, for example, the coffee industry plays a somewhat similar structural role to the dairy industry in New Zealand, being based largely on producer cooperatives and for export, and which has had social, political, and environmental consequences in Costa Rica no less significant than dairying in New Zealand. See generally Paige, above n 18.

activity for a 'communal people'. New Zealand's dairy farms tended to be family farms, wives and children supplying unpaid labour to keep the farm going and build up capital.[141] For Māori to become dairy farmers a veritable social revolution was needed as well as an economic one. Another problem was that the burgeoning Māori population combined with the diminished Māori land base meant that there simply was not enough land for the whole Māori people to become farmers, any more than this was a realistic option for the rest of the population of the country. In the long run the project could never have been realised. Before this became apparent, however, Ngata's great vision ran aground on the rocks of a much more specific crisis: departmental maladministration.

XI The 1934 Commission

In 1934 Ngata's administration of the Native Department was minutely inquired into by a Commission chaired by David Smith, a Supreme Court judge. The other members were John Alexander, a lawyer, D G Johnston, an accountant, and L W Nelson, 'of Whangarei, Farmer'.[142] In assessing the 1934 Commission and its report it is important to bear in mind that Smith was a well-informed person with a reputation as a humane and thoughtful judge. Before his admission to the bench in 1928 he had acquired much experience in working for Māori. Smith had represented the Māori claimants before the Sim Commission on confiscated lands in 1927, where he had successfully pressed the case that the Waikato and Taranaki confiscations were wholly unjustified. On that occasion Smith had rested part of his argument on the Treaty of Waitangi and argued that the confiscations were contrary to the 'honour of the Crown'.[143] By no means, then, was Smith without experience of the Māori world nor could he be said to be unsympathetic towards Māori aspirations.

The terms of reference for the 1934 Commission were to inquire into 'the administration of the Departments of Government concerned with the administration of Native Affairs', 'the schemes now in operation' and 'the funds which are available to the Māori people, the purposes for which they may be applied or should be applicable, and whether they might be used more effectively'.[144] The report, at

141 No one who has ever had the experience of milking a herd of cows, as this author has (once — and once was enough) would ever romanticise dairy farming. For a graphic picture of the working lives of women and children on New Zealand's dairy farms: see Claire Toynbee, *Her Work and His: Family, Kin and Community in New Zealand 1900–1930* (Victoria University Press, 1995) 42–61.

142 Royal Commission of Inquiry into Native Affairs, Parliament of New Zealand, "Report of the Commission on Native Affairs" [1934] AJHR G-11 at 1.

143 See Mark Hickford, 'Strands from the Afterlife of Confiscation: Property Rights, Constitutional Histories and the Political Incorporation of Māori, 1920s' in R P Boast and R S Hill (eds), *Raupatu: The Confiscation of Māori Land* (Victoria University Press, 2009) 169, 169–204.

144 Royal Commission of Inquiry into Native Affairs, Parliament of New Zealand, above n 142 at 1.

194 closely-printed pages, whatever else may be said of it, is a major document and is a mine of information on the development schemes and their funding, and of the functions of the Māori Land Boards, the Native Trustee, and the Native Department. The commissioners met first in Wellington in March 1934 and held meetings in Auckland, Whangarei, Rotorua, and Gisborne; they also visited many of the schemes to inspect their operation and inquire into their financial management. There were 147 witnesses leading to a typescript of evidence 2 167 pages long. There were a significant number of Māori complaints to the Commission, especially about the operations of the Native Trustee — complaints which the Commission on the whole supported strongly.

Ngata gave evidence to the Commission at Wellington on 3 July 1934, and also handed in a prepared statement covering a number of matters before the inquiry. Ngata was questioned closely, as he must have been expecting. One key issue explored was the lack of planning for the project. Judge Smith observed to him that:

> it would seem to me that you felt here was a chance, long awaited for, to develop Native land: you went at it with tremendous energy and enthusiasm and it may be that explains to some extent the lack of apparent planning for development from the land settlement point of view. [145]

Ngata's response was 'quite probable'.[146] Ngata was questioned at length about the lack of reporting on the progress of the schemes, and various problems with particular schemes. Professor Ivan Sutherland of Canterbury University College, the closest thing New Zealand had at the time to a full-time university-based anthropologist, also gave evidence to the Commission. Sutherland, who 'was deeply upset at Ngata's predicament'[147] gave evidence because he wanted to. He was strongly supportive of Ngata, who he knew well, and of the schemes. There was an interesting exchange between Sutherland and Smith as to whether it was possible for Māori to simultaneously become effective participants in the modern economy while at the same time retaining their traditional culture, which was really the fundamental issue at stake. In doing so Smith relied on a somewhat selective quotation from Raymond Firth's *Economics of the New Zealand Māori* to suggest that the former Māori communal system could not now be revived, while noting that Ngata himself and Felix Keesing (author of *The Changing Māori,* published in 1928)[148] were of a different view. Sutherland said that he thought it was certainly possible for Māori to participate in the development project and at the same time retain their traditional culture (this combined aspiration, of course, was integral to the whole development scheme project as Ngata conceived it).

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145 Evidence to Royal Commission of Inquiry into Native Affairs, Parliament of New Zealand, Wellington, 3 June 1934, 1993 (Smith J), quoted in Gould, above n 137, 152.

146 Ibid.

147 Sutherland, above n 91, 238. Sutherland gives an excellent and fair-minded account of Ivan Sutherland's presentation to the Smith Commission: at 238–247.

148 Felix M Keesing, *The Changing Māori* (Board of Māori Ethnological Research, 1928).

The report found that the Native Department was more or less in a state of administrative and financial chaos as it struggled to deal with the pressures caused by the development scheme program. There was no suggestion, however, that the schemes were misconceived as such, or that the program should be closed down. The commissioners were critical not only of Ngata but also of senior departmental officials, the Māori Land Boards, and especially of the Native Trustee. But the core problem was Ngata's interference in departmental administration and financial management, which the Commission found was in breach of basic principles of public administration:

> The foregoing system of departmental control and check makes no provision for the intrusion of the Minister in charge of a Department into the administration of that Department. This is so because a Minister of the Crown is expected to be concerned with departmental policy and not with departmental administration … It will be seen at a later stage of our Report that the Native Minister did interfere in the administration of the Native Department in important branches of its activity, and that he did so with unfortunate results.[149]

Probably the key paragraph in the report was this one:

> Allowance may be made for the Native Minister's impatience of 'red tape' in the Native Department when it was carrying on a farming activity. Allowance may also be made for the fact that the Under-Secretary [Jones] and the Chief Clerk [Shepherd] were not sufficiently experienced administrators for the new work and were too compliant. But their compliance suited the Minister's methods — it was, no doubt, difficult for them to resist him — and the situation was briefly this: that the Minister substantially interfered in a system which was not designed to receive him and there was a paramount influence retarding the usual checks applied by the Public Service Commissioner and Treasury with the aid of Audit; that he increased the field work beyond all reasonable limits, having regard to the staff which he provided or permitted for the clerical work necessarily created by such field work; and that, when he knew the accounting system was not functioning as it should, he failed to take any reasonable steps and even resisted the steps taken and the helpful suggestions made by others.[150]

The report, released on 29 October 1934, was shattering, personally and politically, and Ngata immediately resigned. The release of the report, Ngata's resignation, and Forbes' acceptance was a political sensation. This becomes apparent from newspaper coverage, which tended to emphasise the reliability and attention to detail of the report.[151] Ngata's resignation letter, addressed to Forbes, was widely published in the media. It read as follows:

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149 Royal Commission of Inquiry into Native Affairs, Parliament of New Zealand, above n 142 at 48.

150 Ibid 56 [304].

151 'Conduct of Department: Severe Criticism of Minister: Report by Royal Commission', *Auckland Star* (Auckland), 1 November 1934, 9.

> Dear Sir, — I hereby tender my resignation as Native Minister and Minister of Cook Islands and as a member of the Executive Council representing the Native race. In doing so I desire to thank you and my colleagues in the Ministry for the consideration and courtesy that have always been extended to myself and especially for the good will manifested towards the Māori people. I shall be glad to render all the assistance I can, as one of the Māori members, to the Government and the country to prevent any misunderstandings arising and to make smooth the administration of Native Affairs. — Yours sincerely,
>
> A T Ngata.[152]

Ngata was never to regain political office.

How should the Commission and Ngata's resignation be understood? One interpretation is to see the Commission as an exercise in fanatical nit-picking motivated by an ulterior design to sabotage Ngata's efforts. This is more or less Ranginui Walker's analysis in his 2001 biography of Ngata. He describes the Commission as a 'witch hunt against Ngata' and indeed as 'the last hurrah of colonialism'.[153] Ashley Gould, who has read all of the evidence given at the inquiry, more cautiously remarks that the report 'failed to reflect the subtle Māori perspective given in evidence'.[154] Certainly much of the report does seem to be nit-picking, especially in its minute investigation of ministerial expenditure on toll calls and hiring cars. On the other hand, the Commission was set up by the government of which Ngata was himself a prominent member, and there seems to be no evidence that Ngata's ministerial colleagues were out to destroy him politically. It is hard to see why they should want to, or how such a strategy could prove politically advantageous to the embattled government. A personal crusade by Smith also seems hard to credit, although there is evidence that Smith and Ngata had somewhat different philosophical approaches towards Māori autonomy and economic management. Prominent and well-informed people such as Sir Peter Buck, Professor Ivan Sutherland, and the Waikato Māori leader Te Puea Herangi thought that Ngata had been treated very unfairly, and that he should be reinstated as Native Minister.

Much more research needs to be done on this episode, including a thorough analysis not only of the report itself, but also of the thousands of pages of evidence and documentation and on the whole political context of the inquiry. If a guess at the true position may be hazarded, it is that the report was excessively rigorous in what in what it demanded of Ngata and his staff, but that on the other hand it is probably the case that Ngata did cut corners, interfered too much in departmental administration and failed to devote proper attention to ensuring that an adequate administrative infrastructure was in place to support the schemes. Ngata was attempting to pull off an amazingly ambitious program to rescue Māori from rural poverty, but he made the

152 'Native Minister: Sir A.T. Ngata Resigns: Mr. Forbes's statement: Welfare of Māoris', *Evening Post* (Wellington), 1 November 1934, 14.

153 Walker, above n 112, 295, 300.

154 Gould, above n 137, 150.

mistake of rushing ahead too far and too fast. Moreover, the general economic and political situation must always be remembered. The schemes were launched during the great depression of the early 1930s, which the government reacted to by cost-cutting and retrenchment of the public sector. Ngata had the misfortune to launch his scheme of connecting Māori to New Zealand capitalist agri-business with a great crisis of international capitalism. Ngata's departmental under-secretary was Chief Judge Shepherd, who, in another cost-cutting measure, had been made simultaneously departmental head, Native Trustee and Chief Judge of the Native Land Court. The strain on him, as on Ngata himself, must have been appalling. The schemes ended up as a very large affair run by too few overworked people. In these circumstances it is not surprising that the project got out of control.

A more important issue, however, is that of the long-term consequences of the 1934 Commission and Ngata's resignation. These were significant. For one thing, there was to be no further Minister of Māori Affairs until Matiu Rata obtained the position in the 1972–75 Labour Government. Although both the National and Labour governments persisted with the development schemes after 1934 they became essentially a bureaucratic exercise run by government officials. Ngata's holistic vision of a prosperous rural people making a living in the countryside by participating in New Zealand's grassland economy while at the same time reviving their communal culture and its artistic and cultural traditions was abandoned. After the Second World War, the national policy settings were re-set to encourage Māori to move from the countryside to the cities and to new industrial towns such as Kawerau and Tokoroa. Arguably the impetus of the new collectivism in New Zealand, exemplified to some extent in Ngata's program, received a check in 1934 before it had an opportunity to become entrenched, but whether Ngata's long-term vision was actually achievable has to be seriously doubted. This is another way of emphasising that the program was ideological as much as it was economic, and that sooner or later it would have foundered in any case. The post-war programs of encouraging Māori to move to the cities was in fact more realistic, and notwithstanding its social and cultural costs, arguably a more reliable way to improve Māori economic well-being.

XII Conclusions

The Jacobin legacy of the French revolution, with its deification of the enlightened state comprised of free (male) citizens governed rationally by a centralised republic coexisted with another, equally French, cultural legacy: that of Rousseau, of European romanticism and the romantic cult of the *bon sauvage.* If the former, and its English Lockean and Benthamite equivalents, were the dominant trends in the 19th century, the counter-tendency was still there, lurking beneath the liberal culture of individualism, rationalism and republican virtue. Romanticism and relativism were especially influential in Germany. Towards the end of the 19th century, born in part from the failures of the liberal dream, the counter-trend started to increasingly make its presence felt.

In the late 19th and early 20th century this led in some countries to a tendency to idealise the mores and values of indigenous cultures and even towards a re-assessment of

traditional varieties of tenure. In Britain there was also a growing belief in the virtues of peasant proprietorship and a critique of parliamentary enclosure, evidenced by the influential historical studies of English rural history by R H Tawney and the Hammonds, who have in turn influenced Marxist historians of the post-war era such as Christopher Hill and E P Thompson. British policy-making was affected as well (as in Ireland and Scotland). It is certainly the case that ideas of the social value of land and a belief in the moral and social values of the family farm (as opposed to the great estate) had an impact in New Zealand. Although academic anthropology was slow to become established in New Zealand, this did not mean that Boasian and functionalist anthropology was without effect in that country.

No exact equivalent of the *Indian Reorganisation Act* was ever enacted in New Zealand. However collectivist approaches to land management do underpin the provisions of Ngata's 1929 legislation, which were duly incorporated into the *Native Lands Act 1933* (NZ). Policy developments in the Māori land sphere were influenced to a significant extent by the new collectivist mood rapidly gaining ground all around the world in the first half of the century. As in Mexico and the United States, collectivist thought had significant effects on policy and law. Just as with New Zealand's original Native Lands Acts, which reflected the political economy of their day, new policies in the first half of the 20th century were no less linked to the cultural and intellectual zeitgeist. More generally, the evolution of the law relating to Māori and Māori land in New Zealand derives not only from trends and developments peculiar to New Zealand, but also from broader cultural and intellectual trends. It is with Ngata and his programs that the new mood is seen most clearly.

This article has concentrated on the late 19th and early 20th centuries. The collectivist mood remained important in New Zealand, as indeed it did elsewhere. Ngata's land development program was continued and expanded by the Labour Government which ruled New Zealand from 1935–1949. Following the Second World War, however, there was — as in the United States[155] — something of a return to individualism and assimilation, seen for example in the *Māori Affairs Amendment Act 1967* (NZ), which made a number of highly unpopular changes to the statutory Māori land tenure system. Since then, collectivism has returned. As a result of Māori politicisation and protest in the 1970s and 1980s the current statute relating to Māori land (*Te Ture Whenua Māori Act 1993* (NZ)) is strongly protectionist, aimed at preserving the remaining corpus of Māori land in Māori ownership. The remaining corpus of Māori freehold land is treated by the legislation in some ways as a possession of the entire

155 Felix Cohen's personal reaction to shifts in federal Indian policy in the 1950s emerges very clearly from his own writings. See Felix S Cohen, 'The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy' (1953) 62 *Yale Law Journal* 348. Cohen fought a number of battles with Dillon Myer, formerly responsible for the relocation of Japanese-Americans during the war, who became head of the Bureau of Indian Affairs in May 1950. Under Myer's leadership the Bureau embarked on a controversial policy of termination of tribal status and the Indian New Deal era came to an end. On Cohen and Myer: see Dalia Tsuk Mitchell, *Architect of Justice: Felix S Cohen and the Founding of American Legal Pluralism* (Cornell University Press, 2007) 249–70.

Māori people, and alienating such land or changing its status to general title is made deliberately difficult. The Waitangi Tribunal, established by statute in 1975 to inquire into Māori claims against the Crown, has evolved into a powerful and influential body which has had significant impacts on policy and (as it is essentially an inquiry into history) also on historiography and the nation's self-understanding.[156] Although claims to the Waitangi Tribunal are lodged by individuals, in effect claims are collectivist, brought by *iwi* and *hapū*, with the Crown cast in the role of a defendant in what are essentially civil proceedings before a standing commission of inquiry. The state has negotiated and settled numerous Māori historic grievances over the last 20 years, returning land and paying cash to new forms of Māori collectivities ('post-settlement government entities'). Collectivism seems now to reign supreme. However, in what seems to be a return to earlier styles and ideas, a new Māori Land Bill (Te Ture Whenua Māori Bill) is before Parliament, which provides for very different policy settings from the existing 1993 Act and which is underpinned by rhetoric of owner empowerment and freedom of choice. Whether the new Bill will be enacted in its present form remains to be seen. The oscillation of policy appears to be continuing.

156 The historiographical debate in New Zealand has now become very wide-ranging, perhaps especially because J G A Pocock has been a contributor to it. See J G A Pocock, 'Tangata Whenua and Enlightenment Anthropology' (1992) 26 *New Zealand Journal of History* 28; J G A Pocock, 'Law, Sovereignty, and History in a Divided Culture: the Case of New Zealand and the Treaty of Waitangi' in J G A Pocock, *The Discovery of Islands: Essays in British History* (Cambridge University Press, 2005) 226–55; J G A Pocock, 'The Historian as Political Actor in Polity, Society, and Academy' in J G A Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press, 2009) 217, 217–38. Some other contributions to a proliferating literature are P G McHugh, 'Tales of Constitutional Origin and Crown Sovereignty in New Zealand' (2002) 52 *The University of Toronto Law Journal* 69; Giselle Byrnes, *The Waitangi Tribunal and New Zealand History* (Oxford University Press, 2004); Michael Belgrave, 'The Tribunal and the Past: Taking a Roundabout Path to a New History' in Michael Belgrave, Mereta Kawaru, and David Williams (eds), *Waitangi Revisited: Historical Perspectives on the Treaty of Waitangi* (Oxford University Press, 2005) 35, 35–55; Michael Belgrave, *Historical Frictions: Māori Claims and Reinvented Histories* (Auckland University Press, 2005); R P Boast, 'Recognising Multi-Textualism: Rethinking New Zealand's Legal History' (2006) 37 *Victoria University of Wellington Law Review* 547; Jim McAloon, 'By Which Standards? History and the Waitangi Tribunal' (2006) 40 *New Zealand Journal of History* 194; Giselle Byrnes, 'By Which Standards? History and the Waitangi Tribunal: A Reply' (2006) 40 *New Zealand Journal of History* 214; David V Williams, *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, 2011); Mark Hickford, 'Looking Back in Anxiety: Reflecting on Colonial New Zealand's Historical-Political Constitution and Laws' Histories in the Mid-Nineteenth Century' (2014) 48 *New Zealand Journal of History* 1.

Appendix

Māori terms are explained in the text, but a basic glossary is set out here:

hapū — small to medium-sized descent group, sub-tribe, section of tribe, clan. The same word also means ‘pregnant’.

iwi — large descent group, sometimes translated as ‘tribe’, some of which can been very large (over 100 000 people). The same word also means ‘bones’.

Māoritanga — Māori culture, lifeways, worldviews (literally ‘Māori-ness, state of being Māori).

Ngāti — tribal prefix conveying the idea of a plurality given before the name of an *iwi* or *hapū* (as in Ngāti Toa, Ngāti Raukawa etc).

Pākehā — non-Māori New Zealander. The word is widely used by non-Māori New Zealanders to describe themselves.

take — (the final ‘e’ is pronounced) — root of title, cause of action (especially in the Native/Māori Land Court), has idea of root, stump, base, foundation.

Ture — law, statute.

Whenua — land, also means ‘afterbirth’.