DAVID A. T. EHRHARDT

Individualisation of Indigenous Title in New Zealand and the United States: Assimilation, Exploitation, and Bureaucratic Expansion.

LL.M. Research Paper
Indigenous Peoples and the Law (LAWS 546)

Law Faculty
Victoria University of Wellington

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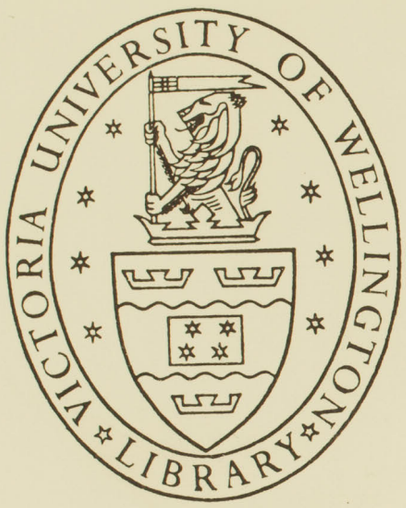
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CONTENTS

INDIVIDUALISATION OF INDIGENOUS TITLE IN NEW ZEALAND AND THE UNITED STATES: ASSIMILATION, EXPLOITATION, AND BUREAUCRATIC EXPANSION[1]

1. INTRODUCTION

In New Zealand and the United States indigenous peoples now own only a small portion of the land which was once entirely theirs. In both countries the indigenous population is now the single most disadvantaged group on many measures of social well-being. This is often attributed (at least in part) to the loss of land.

The most fundamental change in Maori and Indian land tenure was government-mandated individualisation of title. Both Indian and Maori land holdings were previously defined and controlled by indigenous law and custom: now they are held according to a system largely constructed by a colonial government.

Individualisation in New Zealand preceded that in the United States by around 20 years. In New Zealand title was individualised by a special Court, while in the United States the process was controlled by the Bureau of Indian Affairs, an executive body. Individualisation was standardised in the United States, with Indians getting plots of pre-determined size, while the New Zealand system was more flexible, with some attempt to relate the blocks awarded to actual holdings before individualisation.

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[1] I would like to thank the members of my LL.M seminar group, and Richard Boast our lecturer, for useful discussions of earlier versions of this paper. I also thank Justine O'Reilly for her invaluable criticisms and suggestions. Errors and ommissions are my responsibility.

The details of the process differed between the two countries, but their character, aims and effects were similar. This paper examines why the Governments of New Zealand and the United States decided to individualise indigenous title in the way they did. Three theories are examined:

- assimilation: the government believed that the social good would be best served by bringing the indigenous people into the European way of life, and believed that an important step in this process was transforming indigenous title along European lines;
- exploitation: settlers desired to use indigenous resources without the consent of the indigenous owners, and individualisation was designed to assist them;
- bureaucratic expansion: bureaucrats and judges influenced the development of the law and practice of individualisation, in order to maximise their own welfare.

Overview: the aim of this paper is examine how well the different theories explain the historical events in each country. Part 2 outlines the situation before individualisation in each country. Part 3 summarises the passage of the Acts allowing for individualisation, their implementation and affects. Parts 4 describes the theories of assimilation, exploitation, and bureaucratic expansion, which are then evaluated in Part 5. In Part 6 I present my conclusion. I find that a crude exploitation theory is not consistent with the evidence. The most likely explanation is that individualisation in both countries was the product of a compromise between land-hungry settlers, self-interested bureaucrats and judges, and

altruistic reformers influenced by the theological and anthropological theories of the day.

Disclaimer: this paper covers three possible explanations for the actions of the governments. It does not address the views or responses of the indigenous peoples, nor does it cover in detail the effects of individualisation on the indigenous society. Considerable work could be done here. In particular, the debate between Parsonson and Ballara about the effects of the Native Land Court on Maori society, could benefit from cross-fertilisation with McChesney's argument that individualisation of itself did not harm the American Indians.

2. THE SITUATION BEFORE INDIVIDUALISATION: UNITED STATES AND NEW ZEALAND

2.1 Indigenous peoples and settler governments

Before individualisation in either country, the main method of transferring land from the indigenous owners to the settlers was by treaty (in the United States) or deed (in New Zealand) between a tribe and the settler government. Typically these treaties or deeds involved the tribe ceding land to the government in exchange for money, goods, and guarantees of certain rights and reservations.

Readers will be familiar with the signing of the Treaty of Waitangi and the debate on the legal relations between the Crown and Maori in the period between in 1840 and 1860.

In the United States, the federal Government adopted the British legal theory that it could acquire land by treaty, and by right of conquest in 'just wars'. After 1812, the Government adopted a policy of removing Indians

west of the Mississippi. Although initially removals were voluntary, later some were forced. During this period it was thought that separation between the Indians and whites could be permanent. The land west of the Mississippi was regarded as the Great American Desert, unfit for white habitation.[2]

Continuing settler hunger for land, however, pushed the frontier ever further west, so that some tribes (e.g. the Delaware) endured as many as four removals in a single lifetime. Westward immigration to California and Oregon, accelerated by the 1848 discovery of gold in California, increased the pressure to open the Indian territory between the eastern and western settlements.

In both countries, desire to open up the land for European settlement generated conflict between settlers and government on the one hand, and the indigenous owners on the other.

The New Zealand government and various Maori tribes were at war with each other in the 1860s. Even when the war was over, there was a 'New Zealand frontier': the 'autaki line' around the limits of the Maori-controlled King Country, an independent State two thirds the size of Belgium. Thus when individualisation started in New Zealand in the 1860s, much of the country was owned and controlled by Maori.

Similarly the 'American Frontier' was a military area. When individualisation started in the United States in the 1880s, much of the land west of the Mississippi was still Indian Country.

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[2] This section is summarised from Parker, L. Native American Estate: the Struggle over Indian and Hawaiian Lands, 1989 University of Hawaii Press pp 25-47.

2.2 Tenurial and economic systems

2.2.1 Overview

Despite the cultural differences between Maori and Indian (and indeed between different tribes within each country), there are similarities between the indigenous land tenure systems of each country.

'Ownership' of land connotes a bundle rights with respect to land, including the right to occupy the land, enjoy its fruits, exclude others from the land, and alienate it. In English law, the entire bundle of rights in any given block of land is generally held by one individual.

Among both Maori, and Indians, some of these right could be held by individuals or lower level collectives, while other rights were held by higher levels of collectivity. Thus title to the land, in terms of ability to cede or permanently alienate it, was generally held by the tribe, while rights to use, and exclude others from a given piece of land could be held by particular sub-groups, families, or individuals. These rights were often dependent on actual use or occupation. In many cases they could be bequeathed or exchanged by their owners, subject to the tribal over-right.[3]

Economic motivation in European society generally occurred at the individual or family level. Economic motivation and organisation among Indians and Maori occurred both at these levels and higher levels of collectivity.

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[3] Parsonson, A. "The Pursuit of Mana" in The Oxford History of New Zealand, Clarendon Press/Oxford University Press 1981 p 147; Asher, G. & Naulls, D Maori Land Planning Paper No.29, New Zealand Planning Council, PO Box 5066, Wellington 1987 p 5; Parker, L. Native American Estate: the Struggle over Indian and Hawaiian Lands, University of Hawaii Press 1989 pp 8-23; Cohen, F. Handbook of Federal Indian Law, 1942, 1986 reprint, Five Rings Corporation p 208.

2.2.2 Indian

In the United States, Cohen writes that,

"in the vast majority of cases Indian economic pursuits were carried on directly with individual rewards in view. ... agriculture was certainly but rarely a communal undertaking." [Cohen, F. Handbook of Federal Indian Law, 1942, 1986 reprint, Five Rings Corporation p.208].

On the other hand, sharing food and other necessities was common among many Indian groups, either directly by inviting families whose crops had failed to share in another family's harvest, or indirectly by communal access to food gathering areas.[4]

In some areas prior to individualisation, Indians (often those of mixed blood) were experimenting with European ways, including adopting farming, and modifying traditional rights and values to suit their changed circumstances. Many Indian groups were farming successfully.[5]

Property rights suitable for an agricultural economy were evolving. While legal title vested in the tribe, families' exclusive use of tilled or fenced land was recognised. Livestock was individually owned, and Government efforts to establish common herds in some instances were resisted. In farming areas, 5 - 15 acre blocks of the reservation were farmed by single families, while in ranching areas, individually owned herds were

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[4] Parker pp 25-47.

[5] Carlson L. "Land Allotment and the Decline of American Indian Farming" Explorations in Economic History 1981 pp 137-143

grazed on communal land.[6] The encouragement of Government agents was instrumental in promoting Indian farming, but contrary to the expectations of the agents and reformers, many successful farmers continued to embrace Indian culture.[7]

2.2.3 Maori

Maori enthusiastically engaged in trade up to the 1850s. Some iwi sold or mortgaged their land to finance iwi business ventures. These ventures included large-scale horticulture, pastoral and grain farming, milling, and ship ownership.[8] Economic motivation occurred at the individual, whanau, and higher levels.

Maori promoted a number of forms of land ownership, including individualisation.[9] Some Maori were legally sophisticated, and there was debate about the legal forms of land ownership most suited to iwi development.[10]

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6 Carlson pp 131-2

7 Carlson p 138

8 Wheeler B. Review of Maori Economic Development 1990, cited by permission of the Maori Development Corporation. p.13, Waitangi Tribunal Orakei Report, Department of Justice, Wellington, 1987 (Orakei) p.19, Firth, R. Economics of the New Zealand Maori, Parsonson p.153.

9 Parsonson p.153, Ballara, A "The Pursuit of Mana? A Re-evaluation of the Process of Land Alienations by Maoris 1840-1890" p.534.

10 Orakei p.40-42

3. INTRODUCTION OF INDIVIDUALISATION

3.1 New Zealand

Individualisation in New Zealand was done by the Native Land Court. This was provided for in the Native Land Act 1862, which contemplated informal, local Courts, with extensive Maori input. It started operation in Kaipara, on the initiative of John Rogan, Land Purchase Officer for the area. Local chiefs formed a panel of Assessors to determine title. According to a contemporary newspaper report they were,

> "well suited to the important task they had to perform. They well know that all responsibility will fall on themselves should they award certificates to any but the rightful owner - hence the examinations are extremely minute, and well and ably conducted." [The Daily Southern Cross, 30 June 1864].[11]

The Government officially proclaimed the Act in operation in December 1864, and appointed Judges and Assessors in three districts.

The appointment of F.D. Fenton as Chief Judge in January 1865 meant the end of the informal, local Courts before they had a chance to really start. He reorganised the Court along the lines of the Supreme Court, with formal procedures, and no requirements for local representation or expertise.[12] In 1865 Parliament passed a new Act, ratifying the more formal, Europeanised Court Fenton had established.

The Native Land Act 1865 provided that Maori who claimed an interest in a piece of land could apply to the Court for the award of a legal Crown

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[11] Ward, A. a show of justice, University of Auckland Bindery, New Zealand 1973 p 180.

[12] Ward p.180.

grant [s.21]. On such an application, the Court was required to hold a public sitting [s.22] to ascertain "the right title estate or interest of the applicant and of all other claimants to or in the land..." [s.23]. The Court would award the block to up to ten people. Blocks larger than 5,000 acres could be awarded to a tribe as a whole, although in practice the Court seldom did this. Blocks could be subdivided if the owners wished [s.24].

Because the Court heard only the evidence and claims presented to it, owners who did not appear before the Court could be dispossessed by rival claimants or co-owners who did go to the Court. This judicial dispossession was exacerbated by the practice of awarding blocks in which more than ten people had an interest, to ten only as absolute owners.

It was largely in response to these problems that Parliament passed the Native Land Act 1867. This Act required the Court to make the awardees of the block representatives for other people interested in the land, with all owners' names to be recorded [s.17]. The Court under Chief Judge Fenton, however, claimed to have discretion over whether to apply s.17, and continued to award land to ten owners only.[13] In further response, Parliament passed the Native Land Act 1873, requiring the Court to list all the owners of the land on a memorial of ownership, and demanding the consent of all owners for any sale.

Today, almost all Maori land has been individualised by the Court. The Court (renamed the Maori Land Court) still exists and determines disputes and other matters arising from Maori land.

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[13] Ward p.216.

3.2 The United States

Congress passed the General Allotment (Dawes) Act in 1887. This had been preceded by a number of Acts individualising Indian land in particular areas, for example the Omaha Severalty Act 1882. The Dawes Act created a uniform system for individualising Indian land across the country, to be administered by the Bureau of Indian Affairs (BIA, often referred to as the Indian Office). The system was applied to successive Indian lands, at the discretion of the BIA.

The Act provided for a grant of 160 acres to each family head, with 80 acres for each single person over 18 years of age and to each orphan under 18, and 40 acres for other single persons under 18. Once the Act was applied to any reservation, the residents had four years to select their allotment from the available blocks. If the Indians did not select their land in this time, officials would award them a block.

The allotments were held in trust by the government for 25 years after their award. During this time the land could not be alienated or encumbered. At the end of the 25 year period, the allotment matured into a full fee simple. At the same time, citizenship was to be conferred upon the allottees. The Act also provided that other Indians who had abandoned their tribes and adopted "the habits of civilised life" would be made citizens.[14]

In 1891 the Act was amended so that all members of a tribe would receive a uniform 80 acres. This was intended to provide better for children, women without husbands, etc. Leasing of land for up to 3 years by Indians who were unable to work it themselves was also allowed,

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[14] Cohen pp.207-208.

subject to prior approval by the Secretary of the Interior. The apparent aim was to allow Indians who could not make a living from farming to nevertheless survive on income from their land, while the need for the Secretary's approval was designed to protect Indians from exploitation.[15]

Initially the leasing exception was applied cautiously. Over the following decades, however, restrictions on alienation were progressively loosened, both through changing administrative practice, and through further legislative amendments.[16] For example, the Burke Act 1906 allowed the Secretary of the Interior to terminate the trust period (in other words, allow full alienability) "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs...".

In 1914 the Secretary for the Interior adopted the practice of issuing fee patents (i.e. terminating the trust) to Indians who had not asked for them, and even to Indians who had asked that the trust be maintained, so long as the bureaucracy was satisfied that the Indian was competent. In 1919 the Secretary sped things up further by assuming that Indians of less than half blood were competent.[17]

In 1934 the Indian Reorganisation Act (Wheeler-Howard Act) ended allotment, and extended indefinitely the trust period for existing allotments.[18]

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15 Cohen pp 212-213.

16 Cohen pp 213-4.

17 These practices (which were discontinued in 1921) are now the subject of breach of trust actions against the federal government, seeking not only money damages, but also a return of the land to Indian trust status, and the ejectment of current landowners. Lafave, L. 1984 "South Dakota's Forced Fee Indian Land Claims: Will Landowners be Liable for Government's Wrongdoing?" 1984 South Dakota Law Review 59 pp 59-102.

18 McChesney, F. "Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets" The Journal of Legal Studies June 1990 pp 306-7.

3.3 Results of individualisation

Over the period of individualisation the total amount of Indian land held fell by around two thirds, from 138 million acres in 1887, to 48 million acres in 1934. Nearly half of the remainder was desert or semi-desert.[19] Between 1860 and 1891, Maori land ownership fell almost 50%, from 21.4 million acres to 11.1 million acres.[20] It is reasonable to conclude that most of this land was sold after having been through the Native Land Court.[21] In both countries, the loss of land was associated with depopulation, ill health, and social disharmony in the indigenous communities.[22]

The ownership of the remaining indigenous land in both countries was seriously fragmented through the application of European inheritance systems to individualised land.

In the United States, the problem was created by Section 5 of the Dawes Act, which provided that succession to allotments would be determined "according to the laws of the state or territory where such land is located." This ousted the tribal descent rules, which were apparently well-defined, and substituted legal confusion and (since few Indians made wills) the laws of intestate succession. In New Zealand, the Court held in Papakura[23] that on intestate succession, individual interests in land were to be divided equally among the offspring of the deceased.

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19 Cohen p.216.

20 Asher & Naulls (Appendix).

21 Three million acres were confiscated, of which around half was later returned [Asher & Naulls, Annex]. Apart from that, the main cause of alienation was sale, following grant of title by the Land Court.

22 M. Sorrenson "Land Purchase Methods and their Effect on Maori Population, 1865 - 1901" Journal of the Polynesian Society 1956.

23 Judgement on the Papakura Block,New Zealand Gazette, 1867 p 189 per Rogan J.

The result was that land which under indigenous rules would have passed to one or two offspring, was divided among a greater number. In time, it would be re-divided among the offspring of the second generation of owners, and so on, creating ever smaller and more uneconomic interests. This fragmentation remains one of the most serious impediments to economic use of Indian and Maori land.

Individualisation had considerable cultural costs. Ballara argues,

> "after the passing of the Native Land Act in 1862 European institutions became impossible to ignore. Land in these new circumstances ceased to be only the turangawaewae, the ancestral home of the people, sustaining them with its various resources, ... the land acquired also a capital value, and a number on an ordnance survey map. This process constituted an attack on Maori values ..."[Ballara, A. "The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maoris, 1840-1890" p.531]

In the United States Parker writes that,

> "Indians did not consider land a commodity to be sold or bought in the market place - they did not value land as a piece of real estate, and placed no commercial value on it." [Parker pp 8-11]

suggesting that the individualisation of land was culturally inappropriate.

Overall, individualisation had a serious adverse effect on Maori and Indians. The Tainui Maori Trust Board told the Waitangi Tribunal that,

> "Individualisation of title in relation to land has been a burning issue amongst all tribes since the Treaty was signed." [Submission of the Tainui Maori Trust Board to the Waitangi Tribunal hearing at Ahipara, March 1987 [quoted in Royal Commission on Social Policy, April Report Vol.III p.198]]

While "Among specialist in Indian law and history, apparently no one has a good word for the allotment experience."[24]

4. THEORIES OF INDIVIDUALISATION

There is agreement that the actual historical process of individualisation was disastrous for the indigenous people of both countries.[25] Why did the United States and New Zealand Governments impose it?

4.1 Assimilation

4.1.1 The United States

Hoxie, in his book A Final Promise[26], argues that the Dawes Act was the major piece in a grand project to reshape Indian society, and to draw Indians into the main stream of modern life. The influences shaping the project, according to Hoxie, were developments in anthropological thought, and a kind of constitutional zeitgeist.

Lewis Henry Morgan "easily the country's most respected anthropologist", published his major study Ancient Society in 1877. This codified his influential ideas that all human societies develop through three stages:

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24 McChesney p.307.

25 Although there is debate about whether individualisation of title is inherently harmful to the interests of Maori and Indians, see especially McChesney.

26 Hoxie, F. A Final Promise: the Campaign to Assimilate the Indian, 1880-1920, 1984 University of Nebraska Press, p 17.

savagery (roughly equivalent to hunter-gatherer), barbarism (the start of settled agriculture), and civilisation. Vital in this progression was the transformation of property relations from communal to individual.

In this intellectual climate, the question, naturally, was whether it would be possible to hasten a culture's development through these stages. John Welesly Powell, a disciple of Morgan and head of the Bureau of Ethnology, thought it was. He advocated "a condensation of the social evolutionist blueprint: separate Indians from their homes and their past, divide their lands into individual parcels, make them citizens, and draw them into American society."[27]

Another of Morgan's disciples, Anne Fletcher, went out to put the theory into action. She visited and studied the Omahas of Nebraska, and returned to Washington in 1881 with signatures from 53 tribespeople (out of a total of 1,121) asking for part of the reservation to be sold to finance the development of individual homesteads on the rest. Congress obliged with the Omaha Severalty Act 1882, one of the prototypes for the Dawes Act.[28]

The first stage in this blueprint was the intended transformation of Indians into a race of farmers. The size of the plots awarded was the same as those given to white settlers under the Homesteads Act. Government agents on the reservations sent anxious reports, recording the Indians' progress as agriculturalists. [29]

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27 Hoxie p.24.

28 Fletcher returned to Nebraska to supervise allotment among the people she had studied, and later did the same for groups of the Winnebagos and Nez Perce [Hoxie pp 25-29].

29 Carlson "Land Allotment and the Decline of American Indian Farming"

According to Hoxie, the drive for assimilation was part of a reaction to the break-down of divisions in American society after the Civil War. As society became more complex and interdependent, the social segregation of all groups (including Indians), was no longer tenable. A new social ideology was needed to preserve nationhood in a diverse society. This was provided by drawing on the Republican constitutional ideals of freedom and equality before the law.

Official and open discrimination against Catholics, Chinese, and Blacks, continued, and was politically popular among the majority. The Indians were a relatively small minority, living in isolated areas. The settlers who might have approved of discrimination against Indians had little political representation. Indian policy provided a low cost way for Republican ideology to make good. "Assimilated natives would be proof positive that America was an open society, where obedience and accommodation to the wishes of the majority would be rewarded with social equality."[30]

The coupling of social evolutionism with the ideal of equality before the law made a programme of Indian cultural advancement, through the gift of individual property rights and United States citizenship, appear progressive and humanitarian. It was believed the natural result of this project would be complete assimilation of the Indians to civilised white Anglo-Saxon Protestant culture. The taking of 'surplus' Indian lands for white settlement could be easily justified in this schema by the return gift of full membership of a modern society, and by the fact that title to the remaining lands would be more secure than it had been.

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[30] Hoxie p.34.

4.1.2 New Zealand

While the New Zealand political and social context was quite different, the basic concept of native progress through assimilation prevailed in both countries. The Hon. Henry Sewell told the House of Representatives

> "The other great object [of the Native Lands Act] was the detribalisation of the Maoris - to destroy, if possible, the principle of communism which ran through the whole of their institutions, upon which their whole social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system." [IX New Zealand Parliamentary Debates p.361 (1870)][31]

The idea of a linear cultural evolution, with the indigenous people as savages, and settlers as civilised, was equally influential in New Zealand. Richmond (a former Native Affairs Minister) told Parliament that the settler's desire for land

> "... could not be properly called greed. It was not individual wealth he was grasping; he was indulging in the healthy wish for the spread of civilisation." [NZ Parliamentary Debates 1864-6 p 349][32]

As in the United States, the enlightenment and assimilation of Maori was to be done by land individualisation and the gift of equality before the law.[33]

The exact form assimilation was to take was less clear in New Zealand than in the United States. There was some attempt to establish Maori as

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31 Waitangi Tribunal Orakei Report (Wai-9), 1987, Department of Justice, Wellington p.30 (cited as Orakei).

32 in Ward p.187.

33 Ward pp 183-185.

farmers, with Native Department Officers introducing them to new skills and crops. This was never the overriding concern that it was in the United States, however, and initial failures by officialdom to interest Maori in farming strengthened the notion that they should become labourers and tradespeople.[34]

Chief Judge Fenton's explicit and publicly stated aim was to transform the highest ranked Maori into a sort of gentry, and the rest into a class of landless labourers.[35] This was popular among humanitarians and in the press, the feeling being that Maori would be better off if they could be prevented from living in communal sloth, and be made to work for a living.[36]

Thus while the rhetoric of individualisation in the United States was firmly based on establishing each Indian securely on his or her own plot of land, the logic of assimilation in New Zealand pointed toward separating most Maori from their land altogether.

4.3 Exploitation

Individualisation did not produce the hoped for social and economic development of indigenous peoples in either the United States or New Zealand. Some recent writers have argued that this was never its real intention. They argue that individualisation as just one incident in the long history of exploitation of indigenous resources by European colonisers.

Parker, in her book Native American Estate,[37] portrays the entire course of white-Indian relations as driven by settler land-hunger, sated and

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[34] Ward p.258.

[35] Ward pp 213-216.

[36] e.g. Ward p.214.

legitimised by federal force, treaty, and statute.

In this vision, first the bulk of the land was taken in exchange for reservations, then allotment took the 'surplus' reservation land in exchange for individual plots, and finally the allotments were lost when the restrictions on alienation were lifted, leaving Indians with virtually nothing.[38]

A similar story is told in New Zealand. Asher & Naulls write in Maori Land,

> "Detaching the Maori from their lands through legal means was slower, but in the long run was to prove just as sure" [Asher, G. & Naulls, D. Maori Land Planning Paper No.29, 1987, New Zealand Planning Council, PO Box 5066, Wellington, p.28]

In her article "The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maoris 1840-1890",[39] Ballara asserts that European land acquisitions did have a 'fatal impact' on Maori, and that the Native Land Court was one of the worst culprits. She states

> "The legislators were aware that they were building into the land registration system inequities which would result in excessive land loss to Maori landowners." [Ballara p.536]

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37 Parker, L. Native American Estate: the Struggle over Indian and Hawaiian Lands, 1989 University of Hawaii Press.

38 Cohen p.216.

39 Ballara, A. "The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maoris, 1840-1890".

European traders took the land in settlement of debts the Maori owners had run up, and at times falsified the books or used other underhand practices. Land was sold to meet the survey and other costs associated with bringing land before the Court. Perhaps worst of all, the system allowed disputed land to be brought before the Court, awarded to the claimant, and promptly sold, even though someone else had a better claim to it. This 'maelstrom of uncertainty'[40] was a major factor prompting sales.

Similar underhand practices and speculation were implicated in purchases of Indian lands.[41]

This vision of individualisation as exploitation is grounded in modern anthropological theory: theory developed partly in response to the failure of the allotment system which earlier anthropologists advocated.

Anthropologists discarded their assimilationist cultural diffusion models as the Indian population remained isolated from the American mainstream, contrary to their predictions.[42] A new school of anthropologists adopted the increasingly influential set of dependency/ under-development/ core-periphery/ world-systems models associated with Baran, Frank and Wallerstein.[43]

These theories emphasise the importance of imperialist colonial centres in the underdevelopment of colonised peripheries. The colonising society is

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40 Ballara p 319

41 Cohen p.209.

42 Snipp, M. "The Changing Political and Economic Status of the American Indians: from Captive Nations to Internal Colonies" American Journal of Economics and Sociology April 1986 45 pp 145-157 p.148.

43 Snipp p 149-151

assumed to develop by extracting resources from the indigenous society, which is consequently underdeveloped.

Generalising this theory to the United States and New Zealand, it is argued that the development of the modern sector in those countries was fed by the exploitation of indigenous land. Individualisation was part of the exploitation. The result was impoverishment and underdevelopment of Maori and Indian culture. The present disadvantaged status of Indian and Maori is consistent with this theory.

Turning to the evidence of historical intent, it is clear that some of the important figures involved in individualisation in New Zealand did see it, as primarily or in part, as a means to allow settlers access to Maori lands on advantageous terms.

FitzGerald (Native Minister for part of 1865) "frankly stated that the Bill was a compromise, and in bringing it forward 'he had to give up some of the views he had held'. In other words he was surrendering to speculator pressures."[44]

Whitmore, an erstwhile Civil Commissioner, suggested that McLean,

> "Close all bargains with Natives so as to be as little hurt by [the] new Native Land Act and when it is proclaimed get hold of all you can." [Whitmore to McLean, early 1865, McLean MSS., 414, no.3][45]

Lewis, who was McLean's private secretary and later Under-Secretary of the Native Department[46] finally admitted,

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44 Ward p.185, citing Parliamentary Debates, 1864-6, p.370

45 in Ward p.185.

46 Ward p.281.

> "the whole object ... was to enable alienation for settlement. Unless this object is attained, the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside." [Appendix to the Journal of the House of Representatives, 1891, sess. II G-1 p.145][47]

In the United States, according to Cohen in his major Handbook of Federal Indian Law,[48] the leading proponents of allotment were inspired by 'the highest motives'. However he also notes a minority report of the House Indian Affairs Committee on an earlier version of what became the Dawes Act stating,

> "The real aim of this Bill is to get at the Indian lands and open them up for settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his land and occupy them. ... If this were done in the name of greed it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him more like ourselves, whether he will or not, is infinitely worse." [House Report No. 1567, May 28, 1880. 46th Congress, 2nd session 10][49]

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47 in Ward p.182.

48 Cohen, F. Handbook of Federal Indian Law, 1942, 1986 reprint, Five Rings Corporation, p.208.

49 in Cohen p.209.

Without direct admissions from the supporters of individualisation in the United States, the evidence is less certain, but it likely that in both countries the desire to obtain indigenous lands for settlement more easily than before, and with less regard for the wishes of its owners, was a significant motivating force.

4.4 Bureaucratic expansion

4.4.1 United States

The most recent theory explains the history of allotment in the United States by the self-interest, not of an entire imperialist nation, but of one small part of that nation, the bureaucrats in the Indian Office. The central thesis of McChesney's article "Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets",[50] is that

> "Only one hypothesis, growth of BIA [Bureau of Indian Affairs] budgets, is demonstrably consistent with all chronological phases of Indian land privatisation." [McChesney p.300]

McChesney argues that while settlers and politicians benefited at different times from different aspects of the Dawes Act, the people with the strongest and most enduring interest were the bureaucrats.

McChesney follows Niskanen[51] and other economists of the 'public choice' school in assuming that bureaucrats maximise their own utility, and that bureaucratic budgets are a proxy for that utility.

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50 McChesney, F. "Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets" The Journal of Legal Studies June 1990 pp 297-335.

51 Bureaucracy and Representative Government (1971)

The history of the Act, including features which remain inexplicable in other theories, are explained as contributing to the bureaucratic drive for increased funding. First the initial decision to introduce allotment increased the workload of the BIA, since they did the allotting. Immediate alienability might have suited the white settlers, or indeed the assimilationists better, but the 25 year trust period gave the BIA an extra load of administrative work.

When alienation was freed up, each lease or early termination of the trust period required bureaucratic approval, further increasing the demands on the Bureau. The speed up of allotments, too, required increasing bureaucratic resources.

The fragmentation of estates through succession increased the BIA's administrative workload. For example, in the recent case of Hodel v Irving [481 United States at 713],[52] the Supreme Court commented on the fact that the tract of land in question was worth $8,000, produced $1080 in annual income between the 439 owners, and cost the BIA $17,600 annually to administer.

Initially, increasing allotment required an increases in the BIA's budget, but in time decreases in Indian land holdings would decrease the BIA's work. There would come a time when BIA budgets could only be protected by halting allotment and alienation. This accounts for the administrative slow down in the 1920 s, and eventual repeal of the Act in 1934. With allotments frozen, the passage of Indian land from bureaucratic control could be halted, and the work of the BIA preserved.

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[52] quoted in McChesney p.324.

Looking at changes in the BIA budget, McChesney finds that it jumps by 20% when allotment was introduced, and again by 20% when it was terminated. Fairly sophisticated econometric tests of the relationship between the BIA budget and legislative changes, show a significant positive correlation.[53]

4.4.2 New Zealand

No comparable work has been done on the budgets of the Native Land Court organisation. What research there has been on the incentives facing the Native Land Court operatives has focused on the views and actions of Chief Judge Fenton. The evidence is broadly consistent with a bureaucratic expansion theory.

Ward states that land legislation was heavily influenced by Fenton's efforts "to gain for himself and his Court as much influence over Maori policy as possible."[54]

Contemporary descriptions are of a Court more concerned with its own prestige and power than anything else. Te Wheoro, a former Land Court Assessor, wrote

> "It would appear, when a block was going through the Native Land Court, as if the land was owned by the court itself, and not by the litigants." [Appendix to the Journal of the House of Representatives, 1885, G-1, p 29][55]

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53 McChesney pp 327-334.

54 Ward p.251.

55 in Ward p.255.

The change from the Court proposed in the original Native Land Act 1862 to that eventually established by the 1865 Act is a clear case of bureaucratic empire building.

Fenton himself had first suggested the principle embodied in the 1862 Act, namely that local Chiefs should meet with local Magistrates to work out land boundaries in their area.[56] When he was appointed to the Court himself however, he immediately set about elevating the position of the Court, and himself with it.

Under the 1862 Act the Court was to be run by part-time[57] local magistrates [s.5]. In the 1865 Act they became full time Judges with nation-wide jurisdiction, on an annual salary of 600 pounds [s.7] plus travelling allowances [s.9]. The Court itself became a Court of Record [s.5] with powers to punish for contempt. All magistrates under the 1862 were formally equal: under the 1865 Act, Fenton became a Chief Judge on a salary of 800 pounds annually.

Fenton proposed a Native Reserves Bill in 1869, which would have given the Court power to set up and administer reserves and made the Court trustee for the interests of Maori minors. This would have significantly increased the Court's workload. Parliament however suspected that Fenton's 'reforms' were motivated more by self-aggrandisement than by altruism.[58] The Native Reserves Bill was never passed.

Other factors, though, are harder to explain with an empire-building theory. Section 17 of the 1867 Act, requiring the Court to determine all the owners of a block and register their names and interests, appeared to

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56 Ward p.180.

57 Ward p.180.

58 Ward p.251.

increase the Court's workload, especially since provision was made for the owners to apply to the Court for partition of the land at a later date. Contrary to a budget-maximising theory, however, Fenton refused to apply s.17, or even inform Maori of its existence.[59] Similarly the 1873 requirement to list all owners on a Memorial of Ownership superficially fits an expansionist theory, but in fact was brought in to thwart Fenton's insistence on awarding blocks to only ten owners absolutely, and Fenton did his best to undermine this Act also.[60]

It may be that promoting his own vision of society was at least as important as maximising the Court's budget to Fenton. His mix of twisted altruism and self interest was summed up by a colleague writing to McLean

> "That man's life is one constant scheme [;] what might once have been Utopian enthusiasm has turned into scheming for self-advancement & specious toadying" [Drummond Hay to McLean c. 1870 McLean MSS 257 no.14][61]

Alternatively, Fenton's resistance to any changes protecting Maori rights or slowing alienation may have come from his desire to retain the support of the majority of settlers and influential land speculators, (it certainly had this effect)[62] or indeed with an eye to his own future land deals. On retirement from the Court, he was largely responsible for the acquisition of Ngati Whakuae lands and the development of the township of Rotorua.[63] It was Fenton who suggested that the Orakei block (incorporating Bastion

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59 Orakei p.35.

60 Ward pp 255-6.

61 in Ward p.217.

Point) be developed as part of Auckland, and it has been speculated that in doing so he was seeking further employment for himself.[64] The fewer complications in alienation, the easier and more profitable such deals were likely to be.

In conclusion, much of the evidence concerning the process of individualisation in New Zealand is consistent with a theory of judicial self-interest.

5. EVALUATION OF THE THEORIES

5.1 Bureaucratic[65] expansion

It is striking that each major legislative change in the United States increased the Indian Office's budget. Equally, there is little doubt that the form of individualisation in New Zealand was greatly influenced by Fenton's pursuit of his own interests. Nevertheless, there is much that remains unexplained by this theory.

Most importantly, it cannot answer the fundamental question of why individualisation was introduced. Before individualisation commenced, there were no bureaucrats with an interest in promoting it.

The Bureau of Indian Affairs already existed, and the men appointed to the Land Court were involved in Government work with Maori, before individualisation. These officers must have had many budget increasing projects available. The BIA could have redoubled its efforts in supplying rations, giving farming advice, or negotiating sales. The Civil

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62 Ward p.217.

63 Ward p.288, Orakei p.48.

64 Orakei p.48.

65 I use the term 'bureaucratic' to include judges, unless the context indicates otherwise.

Commissioners and Resident Magistrates who were appointed to the Court in New Zealand could have worked on extending British criminal law to Maori communities, or co-operated to strengthen local runanga, to give but a few examples. If we want to know why, out of all these projects, individualisation was pursued with such vigour, a bare budget maximisation theory does not help.

The correlation which McChesney finds between BIA budgets and individualisation does little to flesh out the details of causation. McChesney tells us that,

> "every important change in federal Indian policy was justified as expediting the ultimate disappearance of the Indian Office." [McChesney p.303]

but finds that in fact every change increased the BIA's budget. Were the Indian Office bureaucrats Machiavellian liars? Or was the contradiction between their words and acts mediated by a justificatory ideology?

The evidence about New Zealand is based on reports of ideas and motivations. This raises questions about historical causation. The elevation of the Land Court seems directly attributable to Fenton. Would it have remained a local and low key institution were it not for him, or are the forces of bureaucratic expansion ubiquitous and independent of personality? The Act of 1867 and 1873 appeared to increase the Court's workload, but were promoted by McLean of the Native Department to curb the Court's power. Was this simply a clash of personalities, a genuine desire to protect Maori on McLean's part, or a struggle for supremacy between rival bureaux which would have happened regardless of the people and issues involved?

Similar questions could be asked in the United States context.

To understand the causes of individualisation, we want to know what the people involved actually thought, and how this affected their actions. In New Zealand we have evidence that the key bureaucrat was motivated largely by the desire for self-advancement, although it is not clear that this translated into increasing budgets. In the United States we know that the effect of individualisation was to increase the budgets of the bureaucrats involved, but not whether this was their conscious intention.

In both contexts, the theory in under-determinative. It is consistent with what happened, but also with many things which did not happen. We must look elsewhere for why of all the budget-increasing possibilities, individualisation was pursued.

5.2 Exploitation

The Crown has been guilty of taking Maori land, notably (but not exclusively) in confiscations under the New Zealand Settlements Act 1863. Indian land was also expropriated, both by military action, and by statute following the 1903 Lone Wolf decision, which held that Congress was free to take Indian land even when it had been guaranteed by treaty.

Most writers view individualisation and its concomitants as essentially the same as confiscation.

Ballara[66] describes a Maori request to Government for an investment loan secured over land as 'bureaucratic looting', and similarly lambastes the Native Land Act provisions for payment in land of survey costs and other

fees.

This belief that all land alienation is exploitation has become dominant among policy advisers also. In its wholesale condemnation of the loss of Maori land, the Royal Commission on Social Policy stated,

> "Maori land has been alienated by confiscation, mortgage, lease, compulsory purchase, or sale." [April Report Vol.III p.196]

Ihi Consultants, in their brief on Maori economic development, put the Land Court under the heading "Expropriation", and write

> "Confiscation, title individualisation, direct purchase, targeted laws - all possible means were exploited in breaking the Maori control of these resources." [p.40-41]

This simplistic approach obscures the facts that alienations can be harmful or beneficial, depending on the circumstances and conditions, and that individualisation itself did not remove land from indigenous control.

It is true that the 'maelstrom of uncertainty' unleashed by the Native Land Court caused many Maori to sell. The break down in trust and increase in divisiveness caused by the Court was disastrous for Maori. But a theory based solely on government and settler desire to grasp indigenous resources as cheaply as possible does not explain why the government invested in the expensive machinery of the Court, or required settlers to pay Maori for their land.

Likewise, the premise that government action was designed to transfer

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66 "The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maoris, 1840-1890" pp 533-534.

land as quickly as possible from Maori to Pakeha cannot explain why Parliament passed the 1867 Act demanding that the Court ascertain all the owners of a block, and list their interest, or why when Fenton refused to apply it, the Government

> "sent hurriedly round to discover cases where the 17th Section had been overleaped by the Court and to obtain declarations of trust on the part of those Natives who had received grants for their tribes." [Richmond, Parliamentary Debates 1868 vol. VI p 231][67]

The exploitation theory explains why Fenton promoted the development of the Orakei block in 1898, but not why he had, as Chief Judge 20 years earlier, made the land inalienable.[68]

Similarly in the United States, it was the Lone Wolf decision, not the Dawes Act which allowed the government to take 'surplus' reservation land without tribal consent. Allotments could not be taken in this way, but "had there been no allotment policy, all Indian land would have been available for taking."[69]

Restrictions on alienability, particularly the 25 year trust period, were important features of the United States individualisation. This was a bar to economic farming by Indians. It prevented them from dividing or joining blocks to form more efficient units. It denied them access to loan capital, since they could not use their major asset as security. It prevented

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67 in Ward p.216.

68 Orakei p.39. It is true that the Court seldom exercised its power to make land inalienable, and when it did, the protection was far from permanent [Orakei p.39] These facts appear to support the exploitation hypothesis, but in fact the existence of the power to make land inalienable becomes a puzzle if the whole scheme was designed to facilitate the transfer of resources from Maori to Pakeha.

69 McChesney pp 12-13.

Indians benefiting from leasing land which was surplus to their own immediate needs. While quite possibly harmful to Indians, this restriction can not be explained by the exploitation theory, since it slowed white access to Indian lands.

Nor can the fragmentation of Indian and Maori land through inheritance be explained by the exploitation theory. Although this by-product of individualisation was harmful to indigenous interests, it did nothing to promote acquisition of land by settlers.

The exploitation theory is appealing since it fits the facts at the broadest level: that indigenous people used to own all the land, now they own little; and this loss of land has been associated with a worsening socio-economic position. It also fits a simple self-interest model of government, and the historical fact of land speculation and dishonest practices by settlers. The exploitation theory goes too far however, since it implies that all land should have been confiscated.

It must be supplemented by a theory which explains the limits to exploitation. It may be that European greed was tempered by the knowledge that too open a land grab would provoke conflict, the costs of which would outweigh the expected gains. It may be, as Douglas Hay and E. P. Thompson have argued,[70] that for the law to serve the rulers' interests, it must at times live up to its promises of fairness and justice, and constrain the actions of those it serves. Or it may be that the material aspirations of some settlers and government members were limited by genuine humanitarian altruism on the part of their colleagues.

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[70] Hay, D. "Property, Authority and the Criminal Law" in Albion's Fatal Tree: Crime and Society in Eighteenth-Century England Hay, D. Linebaugh, P. Rule J. G. Thompson, E. P. & Winslow, C. eds. 1975; Thompson, E. P. Whigs and Hunters: The Origins of the Black Act 1975.

It is in the theories about the limits to exploitation, as much as in exploitation theory itself, that the explanation for individualisation must be sought. For individualisation involved only limited exploitation.

Allotments in the United States provided protection against statutory takings legitimised by Lone Wolf. In New Zealand, the Land Court must be compared to the prevailing backdrop of land confiscation. Under the New Zealand Settlement Act 1863 the Crown was empowered to confiscate rebels' land. In fact, land was selected for confiscation more on the basis of its suitability for settlement than because of anything its owners had done.[71]

If one assumes fairness and justice as the norm, then individualisation's damaging effects need explanation, but if one takes exploitation and self-interest as given, then it is the relative restraint of individualisation policies which has to be explained.

5.3 Assimilation

Both the exploitation and bureaucratic expansion theories explain complex historical events with simple, universal motivators. Their simplicity makes them powerful but under-determinative explanations. Neither can explain why individualisation was chosen over other courses which could have boosted budgets further, or transferred lands faster. The missing variable in both theories is the prevailing intellectual climate.

Contemporary beliefs in progress, linear cultural evolution, the virtues of hard work, private property, and equality before the law, patterned the development of individualisation. This assimilation-patterning must be

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[71] Ward p.177, Asher and Naulls p.28.

explored to understand the ways in which altruism and self-interest could be expressed in the societies in question.

There are three broad possibilities for the relation between prevailing ideas of assimilation and the actual act of settlers, government, bureaucrats and judges:

1. altruistic humanitarianism: that the protagonists were motivated by a genuine desire to benefit indigenous peoples by bringing them into civilisation, in accordance with the theological and anthropological theories of the day

2. legitimating ideology: that, as J.K. Galbraith put it, 'the ruling ideas of any age are the ideas of the ruling classes' - the prevailing anthropological and theological theories were accepted precisely because they justified and legitimised acts which furthered the material interests of settlers, government and bureaucrats.

3. hypocrisy: that the rhetoric of progress and assimilation was simply a screen which the protagonists consciously constructed to hide their self-interest.

The reality was a mix of all three. Mantell, Native Minister 1864-5 and the man who appointed Fenton was (ironically) a genuine humanitarian, judging by his resignation as Native Minister over a colleague's about-face on the question of Maori rights to the Princes Street Reserve in Dunedin, and by his subsequent legislative devotion to the interests of South Island Maori.[72]

Fenton on the other hand was an outright hypocrite, at least at times. For example, Ward writes,

> "Fenton himself later claimed that that when he perceived that the ten nominated owners were alienating the patrimony of their hapu, he urged upon the Government the necessity of getting trust deeds executed. This was a bare faced lie." [Ward p.216]

In the United States too, both extremes of the spectrum were represented. McChesney concludes that the reform movement behind individualisation in the United States was,

> "driven by non-pecuniary motives (for example the propagation of religion)," and that "Historians find little support for the claim that 'western interests, greedy for Indian land' had any involvement in the Dawes Act." [McChesney p 318, citing Prucha, F.P. The Great Father, 1984, p.669].

On the other hand, Hoxie finds[73] that Senator Dawes himself had shown little interest in Indians affairs, until he realised that joining the assimilation bandwagon could revive his flagging political career.[74]

The balance between the three possibilities is unclear, but in all likelihood most of the protagonists spent most of the time in the shifting middle ground. Fenton himself, for example had a real intellectual and ideological commitment to the system which served himself and his colleagues so well. Richmond's disingenuous observation in Parliament that individualisation would ensure that those Maori

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72 Ward p 183

73 As McChesney acknowledges, p.321.

74 Hoxie p.29.

> "possessed of more real force of character would rise to a higher level, from the greater power of wealth which was put into their hands." [Parliamentary Debates 1864-6 p 349]

is in the same mould.

McChesney gives little evidence on the thoughts of Indian Office functionaries, but one may surmise that, in the nature of bureaucrats everywhere, they would generally find it easy to believe that spending just a bit more money, and providing just a little more bureaucratic control, would really make things better for everyone, as well as (coincidentally) increasing their own power and prestige.

6. CONCLUSION

Predictably, there are elements of truth in each theory, while none holds the complete answer.

In both countries, the advent of individualisation was a compromise between the desire for social reform, and the wish to open up the land for European settlement on advantageous terms. The relationship was complex and interdependent. Those who desired social reforms espoused views which were acceptable because they served the interests of their own group. Those who wanted to acquire good land cheaply nevertheless desired a cloak of legitimacy.

Once in place, the bureaucrats and judges administering the system gained a lasting interest in it, and influence over it. They significantly affected policy and institutions in furtherance of their own interests. Nevertheless, it is unlikely, at least in the New Zealand case, that the bureaucrats' self interest can be proxied solely by agency budgets.

Personal rivalries, competition between agencies, and prospects of later employment played a big part. In this area too, the influence of ideas was important. Prevailing social theory was a motivator for some, a mask for others, and the definer of what was possible for all.

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