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## **Communal land tenure: can policy planning for the future be improved?**

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### **Abstract**

*In developing Geomatics for Africa, communal land tenure must be among the most intractable of the issues faced. This paper seeks insights into likely communal land policy priorities in Southern Africa by contrasting issues in Zimbabwe with those of New Zealand, whose colonisation process unfolded approximately half a century earlier. Beginning with a background historical summary of the respective countries, the paper goes on to review their current communal tenure status and concludes that the comparison may be helpful at least in identifying issues to be aware of. In particular, fine-tuning of succession laws is likely to be an area that merits close attention, and whether state social security is ever able to deliver security comparable with kinship groups. As communal land declines in pre-eminence in the survival equation it will likely increase in symbolic importance, which could bring in its train issues such as higher accommodation densities on communal land to which people have connection. Clear thinking is needed on whether particular portions of communal land with special cultural significance (for example, graveyards and homesteads) could best be managed by a model that optimises cultural rather than productive use.*

### **1. Introduction**

One of the thorny issues facing Geomatics in Africa is the future of communal land, an area where more questions usually present themselves than answers. For example, should communal land be subdivided into marketable (and mortgageable) parcels? And does its value lie solely in the grazing and arable potential of its often exhausted or marginal acres, or does this land serve any hidden function, such as providing social cohesion or baseline identity and security? Do any policy decisions stand out that could be particularly influential to the future of communal land: for instance, introducing state social security for old age, sickness and unemployment, or perhaps pressing non-title registers into service as interim registers of land rights, or modifying inheritance laws?

Although never possible to predict the future with certainty, this article considers a comparative case study between an African country and one with a contrasting development history in an attempt to get a feel, at least, for factors likely to remain important over time. The cases considered are New Zealand (NZ) and Zimbabwe which, although they have distinct histories, and socioeconomic factors peculiar to themselves, are both former English colonies and both still possess a form of communal land (this term is qualified in section 3).

## **2. Background and land tenure histories**

In both New Zealand and Zimbabwe, European settlers found socially based land tenure with rights held by groups rather than exclusively by individuals. Using land and being its guardian gave rise to rights in that land, ancestors were consulted and placated, land was held in trust for the unborn, and extended family connections and wider than family groups were important to survival (for example, shared labour was important to the viability of cropping, hunting and fighting). Connection with specific land was reinforced on both continents by a range of practices including burial of the placenta (*whenua*, in Māori; the word also means land) or umbilical cord (*rukuvhute* in Shona, *inkaba* in Sindebele), a custom still selectively practiced in both countries. Even for some urbanites today, going “home” may still translate to going to where their birth cord is buried, and they may perceive themselves to be *mwana wevhu*, children of the soil, or *tangata whenua* (people of the land or of the placenta), and have authority stemming from this connection (*mana whenua*).

Broadly speaking, Zimbabwe’s history recapitulates New Zealand’s with a time lag of about half a century, with New Zealand’s founding treaty, the Treaty of Waitangi, being signed roughly fifty years before the Rudd and Lippert concessions in Zimbabwe. Of these, the Treaty of Waitangi has proved by far the most durable and far reaching, since in Zimbabwe the Matabele War in 1893 soon pushed aside the concessions and provided a slim pretext for Dr Jameson, as director of the British South Africa Company (BSAC), to dispense land with prodigal largesse. Although the BSAC grants were officially censured by Britain, it was clear from the outset that land would be difficult or impossible to wrest back again, nor did the Judicial Committee of the Privy Council take this contentious option in its rather ambiguous ruling of 1918 (Privy Council, 1918:235).

In New Zealand, even prior to the Treaty of Waitangi the ground was prepared by a declaration of independence in 1835. One view is that this declaration, and a flag of the united tribes of New Zealand

chosen at around the same time, were contrived by James Busby, the first British Resident appointed in New Zealand, merely to facilitate New Zealand shipping arrangements and to thwart a French adventurer who wanted to establish an independent state (King, 2003: 153-4). On the other hand, Māori oral history “suggests that the impetus for the declaration came not from Busby but from a confederation of tribes, Te Whakaminenga” (Durie, 1998:3). Whatever the reason, Busby called for a “flag of the Independent Tribes of New Zealand” to be chosen, and persuaded thirty four chiefs and subsequently another eighteen, to sign a declaration of independence. Even if this declaration was no more than a farce, with no constitutional status, it would have taken time for Whitehall to gauge its significance, especially in view of the extreme tardiness of communication with the antipodes (letters generally took eight months and sometimes up to fourteen months to make the passage one way). Initially, at least, the declaration probably had to be accepted at face value. Another consideration is that, no matter what Whitehall’s official view of the declaration, public opinion was quite another matter. The declaration was the sort of document capable of being turned against the British government had they infringed aboriginal rights, especially after the Aboriginal Protection Society was formed in 1838, comprising influential men with political lobbying power. Whatever the case, the British Colonial office officially acknowledged Māori sovereignty, albeit with certain qualifications, and other nations noted Britain’s official recognition of NZ independence (Orange, 1987:32), reinforcing that recognition and making it difficult to recant.

The Treaty of Waitangi, five years later, was broad-based, being signed by representatives of a sovereign country and several hundred chiefs, imbuing the document and all subsequent proceedings with a patina of legality whose ethos permeates statute even today. The law in New Zealand sometimes, though not invariably, worked in favour of Māori even from early on, and the habit of solving disputes through legal process was consequently acquired early. For example, Māori on the Otago peninsula placed a caution in the New Zealand Gazette in 1853 to those interfering with their cattle: “For the people of Otago Heads, problems such as these also led to an early familiarisation with the European legal system, as a younger generation sought remedies through it” (Dacker, 1994:34). The objectivity of the law – that it would take the side of Māori against Pākehā (i.e. Europeans) if there was just cause – was a security for Māori. Furthermore, in New Zealand, Māori sold land rather than having it looted and, although there is much to question and criticise in the manner of sales and the surveying and registration process, all of which culminated in disaffection that helped ignite the Māori wars, the totality was still less open to reproach than the equivalent rather shabby interlude in Zimbabwe’s history.

The Rudd and Lippert concessions in Zimbabwe were much less substantial documents than the Treaty of Waitangi, being granted by Lobengula, king of the Matabele, to individuals or groups of individuals representing companies rather than to the British Crown. Furthermore, although the expedient acceptance of Lobengula's inflated claim of dominion over the Shona up to the Zambezi avoided the BSAC having to deal with a number of petty chiefs, it pervaded their early administration with a sense of insecurity and an absence of due legal process. The Matabele and Shona rebellions in 1896 proved to be just the first of several *chimurengas* that would erupt in unrest and armed struggle in the twentieth century and land invasions into the twenty first, and the unequivocal lessons for any reform of communal areas today seem to be: keep it legal, keep it honorable, and get broad "buy in" from all those who hold land rights.

### **3. Patterns of communal land, and sources of security**

An integral part of the background to the communal land picture in the two countries is what extent that land occupies, and what part it plays (and has played) in the security of indigenous groups. The term "communal land" also needs clarification, since in fact neither country has any true communal land. In NZ, Christopher William Richmond in the latter part of the nineteenth century set about destroying the "beastly communism" of Māori society by introducing private property (Te Ara), and remaining Māori land (apart from very small areas of customary land) is held in freehold – Māori freehold land (MFL). However, this land generally has strong kinship links that make it communal to a degree, and under Te Ture Whenua Māori Land Act of 1993 (TTWMLA) it can only be sold to kin. MFL, recognised as a handed down treasure (*taonga tuku iho*) "of special significance to Māori people", has been whittled away to about 6% of New Zealand (Grant, 2000: s9).

In Zimbabwe this figure is much higher, and it increased after Independence in 1980, when resettlement effectively expanded the area of the Communal Areas from about 42% of the land area of the country to about 66% today (Chimhowu & Woodhouse, 2010). Again, original communal tenure has been eroded and altered but strong kinship rights exist and for the purposes of this paper Zimbabwe's communal areas (CAs) are referred to as communal land. The CAs have their roots in a Land Commission set up by the British South Africa Company in 1894 to assign to the Ndebele sufficient land, including a fair share of springs and water, for them to live according to their custom (Yudelman, 1964: 62), beginning with the Gwaai and Shangani reserves, occupying roughly 2% of the country (Stigger, 1980).

Whereas African numbers in Zimbabwe boomed, Māori numbers reached an all time low towards the end of the nineteenth century (Sorrenson, 1956), and there seemed to be a strong possibility that Māori were a people under threat of extinction (Best, 2005). Anderson also notes that “the loss of women to Europeans was probably a more important cause of population decline by 1840 than any other” (Anderson, 1998:194), and therein lies one of the biggest differences between the two countries – intermarriage. Marriage between Māori and Pākehā was already long established in New Zealand by the time that Edward Tregear’s 1885 book, “The Aryan Māori” provided a tenuous argument for the two races to share a common Aryan origin. Trotter writes: “At a stroke, Tregear had removed one of the foremost Victorian obstacles to resolving the cultural stand-off between the two races: miscegenation ... if Pākehā and Māori were both members of the Aryan master race, where was the harm?” (Trotter, 2006). No such grand illusion (for Tregear’s thesis appears to be unadulterated by fact) smoothed integration of the Shona and Ndebele with Europeans. Mixed marriages were taboo, and sexual relations between black men and white women were actually illegal (Blake, 1977:158,159). The “classic group-linking mechanism of intermarriage” (Belich, 2009: 30), one of the surest ways of giving security in a multicultural society, is something only now slowly gaining momentum in Southern Africa, though it is likely to do so increasingly.

Another difference between the countries turns on where people lived in relation to where they worked. The New Zealand Company, operating under instructions from the Colonial office, were obliged to reserve and hold in trust one tenth of all land purchased from Māori for the use of Māori (Dacker, 1994:20). Although this ruling was by no means consistently applied, it nonetheless created very different settlement opportunities compared with Zimbabwe, where title in urban areas was only offered to Africans from the 1950s, beginning with Bulawayo. Before that time Africans were squatters, tenants, occupiers of servants’ quarters on white urban parcels, or lived in farm compounds with rights tied prebendally to employment. The net result was that Communal Areas continued to provide practical baseline security if shaky land rights elsewhere were withdrawn, whereas Māori freehold land retained symbolic importance but over time was eclipsed by state security and secure land rights on general land as the baseline for survival. Some form of social security has been in place in New Zealand since the Liberal Party introduced non-universal old age pensions in 1898 for “the deserving poor”(King, 2003:269), with the biggest advances occurred after the Labour Party won a landslide victory in the 1935 election. Health, minimum wages and housing were all targeted by the Labour government, and over the next two decades Māori life expectancy rose from 44.7 for women and 46.6 for men (in 1925-27) to 59

and 57 by the mid 1950s (King, 2003:356-360). In this post-war era, for an increasing number of Māori, land was no longer intimately linked with survival, and social security could for the first time be found outside of a kinship group. Security in communal land and in belonging to a *hapū* community (i.e. sub-tribe), was gradually replaced by the security of an income not directly linked with land, and by a sense of belonging that was found in voluntary groupings such as workplaces, social and sports clubs, neighbourhoods and churches rather than groups determined by birth and location and necessitated by labour-sharing.

#### **4. New Zealand today**

TTWMLA calls for both the retention of that land in Māori hands and also for the occupation, development and utilisation of that land (TTWMLA, 1993: 6,7). These two objectives are sometimes in tension, and some Māori commentators have questioned whether the strong protections on Māori land are really necessary or whether the land has become dead capital (Hutchings, 2006). Exacerbating factors are that Māori freehold land is often in the poorest land use capability classes (80%), more likely than any other private land to be landlocked (up to one-third), and more likely to be unsurveyed (48%) (Grant, 2000: s9).

Two significant changes have occurred comparatively recently. First, in 1975, when the Waitangi Tribunal – Te Roopu Whakamana i te Tiriti of Waitangi – was created in ‘response to over 130 years of Māori protests about Crown breaches of the Treaty of Waitangi’ (Hayward and Wheen, 2004: xv). A settlement process ensued, resulting in some land and other resources being returned to Māori ownership or management, the returning of names to their original spellings or creating dual place names (e.g. Maungakiekie/One Tree Hill) as a form of cultural redress, in some instances monetary compensation being paid and, hugely significant in terms of healing, formal apologies to all Māori groups who settle with the Crown (Hayward and Wheen, 2004). Another significant change in the very recent past has been that most Māori freehold land has been registered. The Māori Freehold Land Registration Project (MFLRP) was established in 2005 to bring all MFL onto the formal register held by Land Information New Zealand (LINZ), and of a total of 27478 blocks of MFL (Tangaere, 2011), about 99% are now registered with LINZ (NZ Government, 2010), with a few remaining blocks still being processed. With inputs from Google and Terralink, it is thus now possible to search Māori Land Online and to link a graphical representation of land with owners and interests, excluding non-registerable information such

as Māori Land Court decisions, land use activities, some leases and encumbrances and histories of blocks (Tangaere, 2011).

A major factor threatening viability of Māori land is that tenancy in common is the default for succession, meaning that if a right holder of Māori freehold land dies intestate, their interests will be divided among their children in equal portions (TTWMLA, 1993: s109). This is a distortion of custom, which formerly recognized need, seniority (*mana*) and, through the *ahi kā* tradition (keeping the fires burning), allowed rights to lapse unless refreshed by continued occupation and investment. Largely owing to the tenancy in common default, in 2000 Māori freehold land had an average of 62 multiple owners per title, with the highest 10% of land parcels having an average of 425 owners each (Grant, 2000: s9). Multiple ownership comes with a raft of complications that Southern Africa would do well to avoid.

The multiple challenges facing Māori freehold land have been addressed by a number of strategies, both legal and informal. Principally, where there are multiple co-owners, management is sometimes constrained to a practicable number of hands by means of trusts and incorporations, which have enjoyed mixed success in improving land productivity. Improved access to Māori freehold land for many right holders has sometimes been achieved by *papakāinga* zoning, by which it is sometimes possible to relax minimum subdivisible areas on rural land to permit more dwellings for beneficial owners. Raising development capital on land held in multiple ownership may present challenges since, although mortgage is theoretically possible, in practice it may not be viable as land can only be sold to a preferred class of alienee (blood then adopted children, followed by sub-tribe). One way around this is *papakāinga* lending, which secures loans over houses divorced from the land on which they stand. Certain restrictions have to be imposed on houses, which need to be modestly sized (hence more easily moved on flat-bed loaders); single-storied; constructed with pile foundations and timber flooring; and built where there is easy road access to facilitate removal.

Unofficial “workarounds” for giving more Māori occasional access to jointly owned land on which only one dwelling is permitted, include the use of temporary accommodation such as caravans and tents, especially during holiday periods. Also, creative time shares; for instance where a family member is given the go-ahead by *whanau* (extended family) to restore the family home and live there subject to an unwritten condition that he moves out at around Christmas time each year and allows the wider *whanau*

to use the home. What we are seeing is land that has been subtracted from the survival equation but to which many people have strong connections on account of its symbolic and cultural importance, and wish to visit for holidays and for significant milestones such as weddings and funerals. This is quite possibly something to plan for in Southern Africa.

Finally, New Zealand has recognised that Māori can, for some areas of expertise, draw on significant traditional knowledge coupled with long established cultural incentives for astute guardianship (*kaitiakitanga*). Indigenous groups today may therefore be charged with management and setting quotas under creative legislation such as *Mātaitai* zones and *Taiapure* areas, for the management of marine resources.

## 5. Zimbabwe today

The communal areas are administered under the Communal Land Act (Zimbabwe Government, 1996). CA land vests in the President (s4), and for such land to be sold it should strictly first be converted to State land (s6(3)). What happens on the ground avoids rigid circumscription by law via section 8(2)(b) of the Act, which states that Rural District Councils (RDCs) must ‘where appropriate ... have regard to customary law relating to the allocation, occupation and use of land.’ Thus, where custom has veered to permit a land market, for example, or has merely turned a blind eye to the existence of such a market, this has become *de facto* law. Sir Herbert John Tayor, first Chief Native Commissioner of Zimbabwe, as early as 1909 detected “a gradual breaking away from the tribal system” and felt that “it would be mistaken policy to attempt to arrest this individualistic tendency”. He advocated “avenues of emancipation from tribal rule to those who have raised themselves to a status of individualism” (Howman, 1977: 12, 13). Much more recently, a growing body of literature points to the buying and selling of communal land having become an established fact (e.g. Chimhowu & Woodhouse, 2006 & 2010; Cousins 1993: 35; Nyambara, 2001: 260, 265). Reasons for selling CA land include the untimely death of siblings (which may, for example, give a surviving son surplus fields, allowing him to sell one or more); right-holders moving permanently to urban centres; resettlement land becoming available; and daughters gaining land through marriage and selling off family homesteads (Goodwin, 2013). Traditional authorities are less involved with apportioning use rights to land today than in the past, and it is not uncommon for right-holders to present them with a *fait accompli*: they are moving away and have appointed a replacement. The only assurance needed by the headman (*sabhuku*) is that no money has changed hands other than for improvements.



Some adaptation of custom has inevitably occurred. For example, a degree of abstraction has crept in, and establishing a physical and symbolic link between a child and the soil can be satisfied even by smearing mud from a communal home on the cord when it is cut rather than burying a birth cord (Goodwin, 2008). Urban ceremonies to lay the first brick or break ground may adapt traditional ceremonies such as the *kurova hoko* ceremony; hammering in a wooden peg to link new occupants with land and to forge or reinforce a web of obligation (Vijfhuizen 2002). Millet may be brought from a rural home to brew beer for an urban land ceremony designed to cement the link with rural land, or beer may be brought into town ready brewed at a rural home (Goodwin, 2013), and certain ceremonies may also be Christianised to include prayer and the sprinkling of holy water. Clearly, land tradition is alive and is being pragmatically adapted to reflect new priorities and circumstances, and it seems likely that traditional practices, for which flexibility is axiomatic, will continue to be employed and modified to add security to land holding, both of communal area land and of urban land with CA links, until demonstrably better security is offered either by thoroughgoing title registration or else by some form of staged registration.

## 6. Discussion and Conclusions

It may be helpful to begin discussion by attempting to isolate principles underlying communal tenure that are likely to find expression even where formal mechanisms eclipse custom (e.g. where land is registered and commoditised). The following five principles are suggested as a starting point:

- A work principle. In communal societies, everyone is expected to work and a clear link exists between work and survival. Work ranges from food gathering – *mahinga kai* for Māori – through to going into battle, and to retire from active physical work is only to commence work in a less active but no less important capacity.
- Self worth. By contributing, every individual is aware how much they are needed and valued, which leads to opportunities for affirmation and self esteem.
- Land is not negotiable wealth. Land is a space to earn wealth by food gathering, planting or hunting but is not in itself wealth. Wealth applies to communities not individuals, and as a rule wealth does not in itself earn more wealth. Land is held in trust by the living, on behalf of those who have died, for the yet unborn. This principle is inseparable from an environmental ethic, since land should be passed on in good condition.

- The principle of individual rights being subordinated to group rights is strongly correlated with survival.
- The principle of specific places existing that are well known and to which individuals can always return and be themselves. Places where returnees will be accepted and can dress in a way and speak a language with which they are comfortable. Places from which individuals can move beyond in the knowledge of a secure place to return to. Bound up with this principle are mechanisms for passing on language and culture, such as songs, poems and stories (Goodwin, 2013a).

These principles could perhaps be summarized by the saying: “*Umntu ngumuntu ngabantu*: A person is a person because of other people” (Bulawayo, 2013). But while an integral part of communal tenure concerns person-to-person duties and responsibilities, western land tenure tends to capture mainly legal rights and restrictions, and perhaps this is one reason for the persistence of communal tenure in the two countries and elsewhere.

Moving from broad principles to specifics, the very high profile of Māori freehold land in New Zealand today suggests that although communal land in Zimbabwe (and by inference, other Southern African countries) may reduce in size, it will likely continue to form part of the identity of many in the country. Issues will probably arise increasingly that are connected with providing occasional access and accommodation for many to rural land, and with raising development capital without mortgaging land and risking foreclosure and sale. As explored earlier, it is likely that traditional practices will continue to be used and adapted to secure land rights to rural and urban land until better security is offered, and at that point investment in communal tenure will tend to become more rigid and less dynamic as “authentic custom” is sought and codified (O'Regan, 2001: 76), and communal land will assume greater symbolic and less practical importance.

Experiences in NZ underline the fact that high numbers of right holders of communal land may threaten its productivity. Succession laws should therefore be given prominence, and particular care paid to customary principles such as that of all kin inheriting an equitable right to food and shelter but not necessarily inheriting a land right unless there is appropriate need and commitment. If customary succession practices are codified in substantive law, close attention should be paid to nuances, and great care taken not to oversimplify custom.

Population growth is still probably a given in Southern Africa, and in its train is likely to be discussion about how communal land can be used more productively and who is eligible to make decisions over that land. Potentially, a major bearing on policy will be whether that land also continues to form part of the safety net of many (Törhönen & Goodwin, 1998) or whether alternative social security options are put reliably in place. If communal land continues to represent the most secure option for old age, sickness or unemployment, then this land is likely to remain fundamentally different from general land, and people will continue to invest in it by remittances and through ceremonies that link people to land and to kinship groups (including ancestors) in the expectation that if all else fails they will be received here. In this scenario, communal land will probably remain distinct from general land, and cultural and productive uses will probably be held in tension. Perhaps a pragmatic, function-based approach should be adopted – if the key function of communal land (or portions thereof) becomes cultural, then perhaps the best management model is one that optimises cultural access and opportunities while impacting productive capacity as little as possible (Berghan et al., 2013). It will also be important to look at initiatives that increase productivity without altering the land tenure balance, and in this New Zealand could offer valuable experiences.

In conclusion, perhaps all people crave a place where language, stories and songs are their own. For some, perhaps this ideal may be a suburban home within a supportive neighbourhood of like-minded souls. However, in NZ and very likely in Southern Africa, for many this place will probably remain in the form of communal land, and the surveying profession would do well to plan accordingly. New Zealand has by no means solved all of the complex issues involved, but there are certainly opportunities here for Southern African countries and New Zealand to learn from one another.

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