Splitting the atom of communal land tenure, with specific reference to Maori freehold land

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SPLITTING THE ATOM OF COMMUNAL LAND TENURE, WITH SPECIFIC REFERENCE TO MAORI FREEHOLD LAND

Abstract This article begins by contextualising Māori Freehold Land (MFL) within a wider global debate about communal land that is in transition to more individualised forms of tenure. A comparison is made between Ngai Tahu MFL and a case of transitional communal land in Zimbabwe. It is concluded that for many Ngai Tahu Māori, general land and the State now cater for shelter, sustenance and other functions formerly supported by MFL, while remaining MFL now handles disproportionately more of the cultural functions and interpersonal ties that are generally divorced from ‘western’ tenure forms. This raises the question of whether MFL should now be managed with an emphasis on fulfilling those functions not met by formal, individualised tenure, and if so, how this should best be achieved in practice.

Keywords Communal land, individualised tenure, Māori Freehold Land.

INTRODUCTION

Communal land tenure, so called to reflect the socially embedded nature of its rights, still dominates right-holding in many parts of the world. This includes the Pacific, where the majority of land is held under customary land tenure systems (Ward and Kingdon 1995) and Africa, where between two and ten percent of land only is covered by formal tenure (Cotula 2006; Cousins 2007; Berry 1993). Much of this so-called customary land is in fact no longer held under pure custom, but is in transition as tribal authority structures give way to national systems of government and as familiarity is gained in dealing with registered and commoditised land under western tenure models in urban centres (Chauveau and Colin 2006).

Māori Freehold Land (MFL), amounting to about 6% of land in New Zealand (Grant 2000), also sits somewhere in the continuum between pure customary tenure and registered title, veering closer to the formal registered title end since completion of the Māori Freehold Land Registration Project (MFLRP) in 2010. ‘Unlocking’ Māori Freehold Land has been the subject of considerable debate in New Zealand (e.g. Hutchings 2006), and balancing productive and cultural uses of communal land in transition is also an issue of wider, global significance. Cultural uses of such land are often downplayed as countries take steps to bring customary land onto the formal register with the stated aim of increasing land rights security, increasing productivity, alleviating poverty and securing access to land for cultivation, industry and shelter (Deininger and Binswanger 1999; Williamson 2001). An agenda that is not always made explicit, however, is that of bringing more land onto the market, and this and other issues (Cotula et al. 2009) make individualising communal tenure a complex undertaking that all too often has ended tragically (Vanuatu land boom 2011). This underlines the need to better understand the cultural significance of land that is in transition between communal tenure and formal ‘Western’ tenure. This article begins by summarizing key points of a research project that used a case study approach to learn more about transitional land, and to situate Māori Freehold Land in a global context of communal land in transition. The focus is then narrowed to the particular case of Māori Freehold Land, especially the practical issues inherent in achieving a balance between productive and cultural uses of MFL.

A RESEARCH PROJECT TO LEARN MORE ABOUT COMMUNAL TENURE IN TRANSITION

The research for this article, undertaken in 2005 as part of a PhD study, drew on 88 semi-structured interviews roughly divided between two contrasting cases of customary land, namely Ngai Tahu Māori Freehold Land in New Zealand, and Shona and Ndebele Communal land in Zimbabwe. The object was to use a case study comparison to ascertain what
land tenure custom has persisted, and why. The interviews went some way towards updating the rich anthropological literature on land custom, which exists for both countries, to reflect current issues and imperatives. Early on it became apparent that strong points of similarity existed between the two African tribes on the one hand and Māori and Pacific land on the other. In both cases, persisting land tenure customs were found to include not only ceremonies linking people and land, but also ceremonies linking people to people. These links are exemplified below with reference to four attributes of communal tenure from the African case study:

- **Investment in a belonging group.** One mechanism for investing in a belonging group was by what might be called ‘rates and taxes’ parties. For Shona and Ndebele, this took the form of *chiutsi* (‘smoke’) or *mabiko* (‘cooking’) parties to formally launch new homesteads, and also *nhimbe* work parties. Such parties are often accompanied by a ceremonial variety of beer, which may be brewed in a special way and with place-specific ingredients (Goodwin 2008). These are not just housewarmings and ‘working bees’; the ceremonies are tantamount to paying rates/taxes, and are even comparable with long leases in giving rise to real (praedial) rights. In the words of one interviewee: ‘It is that ceremony which gives you ‘title deeds’, as it were, to that land, because a ceremony was held, and nobody can take it away from you. It’s the title deed.’ These ‘parties’, perhaps better than anything else, underline a central element of communal tenure, namely socially based security (including security of land rights). Parallels exist with the positive facet of *utu* in Māori custom; reciprocity that helps to build a web of ties between people (Metge 1976: 15, 16, 67, 68).

- **Forging land links at birth.** Burial of the umbilical cord (*rukuvhute* (Shona) *nkaba* SiNdebele) is still widely practised. For many it is still a requirement of ‘title’, ‘a need to have’ rather than a ‘nice to have’, probably to a greater degree than in New Zealand, although burial of the placenta (*whelua*) still occurs quite often among Māori today as individuals search for meaningful tradition to give due ceremony to the miracle of birth and place. The African ceremony is adapted pragmatically to suit contemporary life. For example, for clinic births, soil may be brought from rural homes (*kumusha/ekyaya*) and rubbed on a newborn baby’s navel to avoid the complexities inherent in taking a birth cord home for burial (although the latter does occur, and carries its own adaptive custom).

- **A combination of land links and interpersonal links on occupying a new homestead.** For Shona and Ndebele, the *kurova hoko* and *utshaya ihlahla* ceremonies are still important. The former is putting in a peg to indicate a homestead site, and the latter laying a branch, also to mark a homestead site. However, neither ceremony is merely about territorial markers. The ceremonies also serve to bind families, and are a declaration of commitment to help in trouble and an affirmation of authority (father, headman, chief) (Vijfhuizen 2002; Goodwin 2008).

- **A locus of belonging and of renewing family ties:** Just as the hearth for Europeans may be the symbol of home, the kitchen has special significance in African tradition. A wealth of symbolism and ceremony is bound up with kitchens, and in a polygamous marriage, each wife has her own kitchen. Within are low benches (*chiguva*) containing symbolic grave apertures in which ancestors are invited to come and live, and on which food beer and snuff are placed to ‘feed’ the ancestors. Kitchens also have low doorways so that people have to bow to gain access, birth cords are often buried in the floor or doorstep, the dead are often laid out in a kitchen and it is here that living members congregate to spend time together.

It is clear from the above points that at least two intertwined strands exist in communal land tenure. The first is the strand of interpersonal or ‘belonging’ links. Cousins et al. (1992) note that: ‘…individualised property rights are still hedged in by a wide-ranging set of social obligations in which the interests of the group are articulated. Individual ownership is embedded in a larger ‘communal’ tenure system in which rules governing access to and use of the commons are still important: The second strand, closely bound up with the first, is that of people-to-land links. By contrast, individualised (‘Western’) tenure plays down interpersonal links and emphasises land ‘holding’ (in the sense of ‘holding a fort’ to the exclusion of others). Words like ‘private’ property are employed, and ‘seisen’, which has the same root as ‘seize’. In fact, the English Common Law Ceremony of ‘feoffment with livery of seisen’ may have been used in the early European history of New Zealand (McRae and Baldwin 1997:16). In Western tenure there is a strong emphasis on land rights (e.g. rights to cultivate land, reside on land and bequeath land), and these rights are largely separated from interpersonal ties and from responsibilities towards a community.

The contrast between communal land holding and individualised tenure is shown diagrammatically for Māori Freehold Land in Figures 1 and 2.
Many issues connected with customary tenure can be traced to customary land being in transition, between a system where interpersonal links were inseparable from land links, and a system where land rights are treated in isolation. The following section considers in more detail some implications of separating the strands.

**IMPLICATIONS OF SEPARATING THE STRANDS**

This section focuses on some of the changes that may currently take place when ‘separating the strands’ of communal tenure.

**Table 1. Changes observed when land passes from communal to individual tenure.**

<table>
<thead>
<tr>
<th>Rights - Before separating the strands:</th>
<th>Land rights are only secure if people remain part of an integrated community. A survival incentive exists to cooperate for hunting, cultivation, fighting etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>After separating the strands:</td>
<td>Land rights are secure even to uncooperative and antisocial individuals, and welfare benefits are an automatic right of citizenship (i.e. State security is more important to survival than either whakapapa or teamwork).</td>
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<tr>
<th>Duties - Before:</th>
<th>Duties to family, community (including retrospective and prospective community: ancestors and children), and the spirit world are bound up with rights to land. Survival is also tied to sound relationships with the natural world. E.g. narrative accounts of the Māori world implied not only rights but environmental cautions: the Taieri taniwha winding down the central Otago hills and wriggling through the plain is not just a water right but a caution about a captive monster capable of breaking out in flood.</th>
</tr>
</thead>
<tbody>
<tr>
<td>After:</td>
<td>Duties to family, community, posterity and also to the natural world become voluntary, personal and, with the direct link to survival removed, and sometimes excluded from busy schedules.</td>
</tr>
</tbody>
</table>

**Authority -**

**Before:** Discipline is possible because excommunication from the group is a real (possibly even fatal) threat.

**After:** Being able to ‘opt out’ dilutes traditional authority. National and local political leaders have more authority than cultural heads, and discipline becomes problematic without either the incentives of kinship and being needed, or the controls of ostracism/excommunication.

**Group Membership and Land Management -**

**Before:** Equitable benefits and group membership pass to all (i.e. no member of the group will ever be denied shelter and food) but management is passed either to individuals or families according to need, mana, ahi kā etc.

**After:** In the absence of a will, tenancy in common (established under the Maori Land Court) conveys not only joint land rights but management of that land. This often results in ‘large committee’ issues and inefficient utilisation. Bottom-line food and shelter benefits are tied to citizenship, not to the land.

**Group Cohesion -**

**Before:** Belonging groups share a common history and usually common ancestor/s, and comprise kinship units bound by love and affection.

**After:** Through treaty and naturalisation, nations are larger groups with more disparate members having diverse histories and experiences. Enhanced unity is sometimes brought about in times of war (and sometimes sporting contests), and conversely unity may be eroded by globalization. Strong cohesion is today found is typically associated with smaller groupings and blood lines (families) rather than tribes.

Collectively, these changes suggest that the breaking up of a communal mode of existence is not trivial. Holleman (a Southern African anthropologist) wrote the following lines about the breaking up of a communal mode of existence:

> If you have learnt to look upon a dunhu community not merely as a loose collection of individual people and families, but as something that grows and lives as a single organic body, you can understand why the headman cried that his country and people had ‘died’ when his villages were scattered over two or three different dunhus. It meant, indeed, that a living thing was snuffed out, or left helplessly bleeding to death (Holleman 1958:208).

This is echoed by a South African lawyer, who writes that:

> ... at the heart of the African socio-political order lay the family, a unit that was extended both vertically and horizontally to encompass a wide range of people who could be called ‘kin’. This large, accommodating group...
provided for all an individual's material, social, and emotional needs, and loyalty to it was a cardinal value (Bennett 1995).

To be cast out of such a group is perhaps unimaginably appalling to most Westerners. Rian Malan tells the story of the 'hammer murderer' in South Africa who, like Maxwell (of the silver hammer in the Beatles song), commenced a succession of gruesome murders using a hammer. When apprehended, psychologists attempting to get to the bottom of this individual's fixation concluded that he had been cast out of his belonging group for an unforgivable sin (the crime of incest; he married a first cousin, which was forbidden) and that, unwilling to take his own life but with life no longer worth living, he embarked on deliberate course to earn the death penalty (Malan 1990).

The strength of the belonging force was no different for Māori hapū (sub-tribes) in New Zealand, as shown by the following observation by a Maori interviewee:

When the land was sold, and reserves were created, what actually happened was that families were crammed on the land and they soon realised it was too small. And they had to move away and break up the customary ways, to eke out a living … I think an awful lot of issues that affect the people arose from that time. The adjustment to that reality. The loss of their whole fabric of society was starting to break down. I think a lot of our ills come from there (Interviewee M6:5 in Goodwin 2008).

Dr. James Knight of the Otago District Health board is attempting to counteract some of those ills by contriving quasi-communities that ‘reconnect antisocial individuals to wider society in more positive ways’. He writes that:

... anatomically modern humans have been around for 200,000 years, and for most of that time we have probably lived in tightly knit kinship groups. I think human nature is designed for living in village-sized groups, and in those sorts of groups we maintain personal relationships with perhaps several hundred individuals, and how we maintain personal relationships with those individuals determines our fate. ... human survival is more or less contingent upon the extent to which humans are interconnected (Knight, 2007 & 2002).

The above comments give us a picture of a potent force binding communal groups, a force that is unleashed, as land tenure becomes more individualised, in a way that is almost reminiscent of splitting the atom. When considering moves to unlock MFL, or to balance better the productive and cultural uses of that land, developers, social engineers, politicians and law-makers need to factor this in.

**MĀORI FREEHOLD LAND (MFL)**

The scope of this article is now narrowed down to MFL, beginning with a summary of some key issues both for Māori right holders and for administrators of that land.

**Frustrations of right-holders:** The majority of MFL in New Zealand today is effectively managed by a large committee. Only 10% of titles have a single owner, the average is 62 owners per title and the highest 10% has an average of 425 owners each (Grant 2000). This leads to difficulties in gaining consensus, and can encourage ‘passengers’ seeking benefits but not prepared to work for these. This ‘committee’ management is at variance with original custom, where ornaments and heirlooms might be inherited but where ‘there was no system of succession to lands in general because of the communal nature of the title’ (McHugh 1980:12), and management went to individuals or families. The proliferation of multiple owners also cuts across the ahi kā principle whereby there was an expectation of continued investment in land links even by absentee owners to ‘keep the fire burning,’ and where failure to occupy would let that fire die out (McHugh 1980:6). In the opinion of some MFL right-holders, ahi kā has today been trumped by inclusivity, so that rights can now generally be retained passively. A common complaint was that of ‘born again Māori’ resurfacing when they perceived an advantage (Goodwin 2008). MFL right-holders also bemoaned the dilution of the mahi (work) principle in that today people can retain rights without work (or cash as symbolic of work). Another grievance is that of unsatisfactory access to MFL for many families who wish to maintain links with that land (e.g. planning regulations that permit no higher accommodation density than farmland), and the lack of income generating options from the land.

**Frustrations for administrators:** Regional authorities also voice frustrations over MFL, some of which appears unduly and poorly maintained and where there is frequently difficulty in contacting owners and gaining consensus. There is also significant defaulting on rate payments, with one reason being that the symbolic value of the land has endured while its practical potential for generating revenue has been eroded. The Local Government Act 2002 requires Local Authorities to adopt a policy on the remission and postponement of rates on Māori freehold land. Finally, with a possible connection to MFL, there is a disproportionately high level of Māori offenders and of welfare and health issues (Dumure 1998). Mason Dumure writes that ‘young Maori are facing a greater range of health and mental health problems than at any time in the past’ (Dumure 2003:144), which raises the question of whether links with MFL can be used more effectively to foster a sense of self-worth and identity.

In short, a number of issues connected with MFL have been singled out as needing change of some form. A strong consensus of those interviewed (Goodwin 2008) pointed towards the fact that many right-holders of MFL now have access to other land for shelter (for example in urban centres), and to sustenance from off-land employment and from social services. Together these meet needs formerly met by customary land, and remaining MFL is therefore regarded by many as
having a primary function of fulfilling cultural functions not met by formal, individualised tenure. However, a number of impediments stand in the way, including inadequate access opportunities for visits to renew links to MFL, and the inability of the land to generate adequate revenue to maintain it (e.g. fencing, and control of invasive plant species) and develop it (e.g. building papakainga housing, timeshares or camping grounds). This adds up to the conclusion that a key function of MFL today is to fulfill cultural functions not met by western tenure, and that revenue generation should, at least in some instances, not be a primary focus, merely play a secondary role of funding maintenance and development of the land (or part of the land) to better serve Māori right-holders. Three issues stem from this conclusion; first, technical issues, second, ways of optimising what formal tenure omits and third, funding. These are considered in order:

i) Technical issues (neutral) to do with improving management and decision making

The Māori Freehold Land Registration Project (MFLRP) was established in 2005 to meet registration requirements of Te Ture Whenua Māori Land Act and to bring all MFL onto the formal register held by Land Information New Zealand (LINZ). 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. This stands in contrast with the 2005/2006 position when 10139 blocks were unsurveyed (Tangaere 2011). 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).

ii) Ways of optimising what the formal tenure system omits

As outlined above, needs for sustenance and shelter are now largely met by general land, commerce, and the State, and MFL has special importance in retaining some functions of land before the ‘strands of communal tenure’ were separated. In particular, MFL is still viewed as a place to visit for defining occasions such as birth, death and marriage, ahi kā still carries weight, mahi is still viewed as important in retaining rights, tūrangawaewae is still significant and intergenerational ties continue to be revered. Conceptually at least, it seems possible to institute a deliberate policy of maximizing the cultural use of the taonga portions of MFL as the locus for tūrangawaewae, reaffirming interpersonal but land-rooted belonging links, engaging in work/mahi, mahinga kai etc. It could also be a place for regaining an appreciation of survival through mutual dependence, re-establishing contact with the natural world, and fostering creativity.

iii) Funding

In one sense, fallow land is productive, for example as a wildlife species reservoir or for carbon sequestration. Even gorse, though vilified, may be viewed as a colonizer that, in the very long term, provides a nursery for native plant species. However, in brittle environments fallow land does not invariably improve and may even regress (Savory 1988), and a common frustration voiced by Māori right holders in interviews was that the land was hamstrung and for a variety of reasons could not be used to generate funds for paying rates bills and for development. A pragmatic stance was evident among Māori right-holders, with certain (not all) commercial enterprises being viewed as necessary, acceptable and as opportunities to exercise kaitiakitanga and to provide funds to maintain and develop the land while protecting its cultural functions. This leads on to the question of what options might be desirable and also practicable for MFL.

A DISCUSSION OF OPTIONS

McHugh gets to the root of the problem when he argues that MFL ‘must be freed from the administrative disability caused by fragmentation yet the owners should still be able to retain their identification with the land’ (McHugh 1980:35). One suggestion for doing this, from a Māori interviewee, was to set aside a symbolic square metre for tūrangawaewae, transfer all ownership rights to this symbolic tūrangawaewae ‘patch’ and free the rest of the block for leasehold or freehold. This suggestion carries an elegant simplicity, but glosses over some important details. For example, Māori irked by insufficient access possibilities to taonga (treasured) land are unlikely to be satisfied with merely symbolic rights to an arbitrary square metre. A more realistic option mooted by Strack and Rosie is to set aside a whānau or hapū centre such as a marae for tūrangawaewae, and to hold the rest of the land in trust (Strack and Rosie 2001). Rankilor (2011) provides details of how wāhi tapu and wāhi taonga could be separated from non-taonga land (see figure 3).

Figure 3: Categorising blocks of Māori land: Category 1, Marae/ Pa, ārupa, tūāhu; Cat. 2, Historic Pa sites, historic places; Cat. 3, Special features, karaka trees, rock outcrops, mountain tops, beaches, streams, rivers etc.; Cat. 4, Areas potentially needed to expand or enhance categories 1-3; Cat. 5, Balance Māori land (surplus) (Rankilor 2011).
Clearly, to realise such a plan in practice, changes would need to be orchestrated on a wide front including alterations to regional plans to permit higher concentrations of housing than are normally permissible on rural land and taking a fresh look at rates rebates for heritage land and native bush areas (as species reservoirs and wildlife preserves, for instance). From a legal perspective, possibly tenancy-in-common could be retained for whole blocks but with access rights by co-owners limited to core taonga land. The most important requirement for the balance of the land would be to bring it under the management of fewer individuals. This might be achieved by the tried and tested devices of incorporations (Maori Land Court (Incorporations) (2002)) or else one of the trust options, in particular, ahu whenua and whānau trusts (ss214,215 Te Ture Whenua Maori, Maori Land Act; TTWMLA (1993); pp19-21 & 26,27, Māori Land Court (Trusts) 2002). Incorporations permit somewhat more flexibility than do trusts in respect of share redistribution. There is a legal requirement for an incorporation to keep a share register, but all that happens if shares are transferred is that the secretary for the incorporation makes a note of the change (Māori Land Court (Incorporations) 2002:17). In contrast, if shares in a trust are gifted or sold, an application for a share transfer needs to be submitted to the Māori Land Court, signed by both parties to the agreement.

One further alternative that would be interesting to try is a more traditional management model, perhaps selecting individuals or families for extended leases using criteria of mana, mahi, ahi kā, need and strength of business plan. This might also succeed in bringing the remainder of land (which would remain MFL) under the management of fewer people, with a primary objective of generating revenue for the taonga component. The greatest challenge might be to gain consensus on questions such as ‘who gets to use the land?’; ‘what for?’ (especially given that a majority of the land is remote from markets) and ‘where could working capital be sourced, if needed?’.

CONCLUSIONS

This paper suggests that, in separating the twin strands of communal tenure, shelter and sustenance have tended to be catered for by the individualised tenure sector, using General land, while MFL retains special importance for its embedded cultural functions. It therefore proposes a deliberate policy of maximising cultural functions of MFL as part of any moves to ‘unlock’ Maori Freehold Land, and suggests that this be achieved by separating out taonga areas of land and making provision for access, accommodation and future expansion. By one means or another, the less treasured parts of the land could then be brought under smaller management groups; either trustees, elected representatives of corporations or else individuals or families under a more traditional management model. It is seen as important that solutions be non-coercive, and further work is planned to gauge how acceptable this would be to Māori, through a variety of case studies.

Acknowledgements

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Knight, J. 2007. Personal communication following his address to the Ashburn Psychiatric Clinic on 12th November, 2007.


(Endnotes)

1  Cf. Shona custom where moveable possessions such as a knobkerrie or tsvimbo (walking stick) could be inherited, some having a symbolic burden, but where land rights remained vested in a tribal or sub-tribal group (Goodwin, 2008:355).

2  e.g. s17 and Part V, TTWMLA; Te Pouwhenua, 2005a, 2005b, 2007; NZ Government, 2010.

3  For example, Rapaki, on the Lyttleton harbour, has worked very successfully with Regional Authorities over papakainga housing.