

Symposium on Law, Responsibility and Governance.

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“No Law is Just Law if it doesn’t Serve the Common Good”

Kapua Sproat

Photos courtesy of Galumalemana Tipene Percival



‘Let us turn a position of vulnerability into a strategy of value (Taholo Kami). Peoples of the Pacific, the Water Continent, are defined by resilience and resourcefulness, although views from the outside often cast the Pacific region as vulnerable and distant, and defined by isolation. Drawing from traditions of engaged governance, laws oriented to collective accountability, and capability of traversing and living from ocean environments we find here frontlines of sustainable societies because environment is integrated with economies, climate is at the forefront, and work with public trust law could pave the way for bringing responsibility back to corporates and systems of government.

You may wish to get on board for a moment and watch this:

<http://youtu.be/m6YaQFNkg80>



Transformative Law

The Symposium to develop law for Responsibility for water and climate brought fresh winds to the sails of a vision for responsibility in sustainable societies. The direction was set by former Chief Judge of the Waitangi Tribunal and High Court Judge, Sir Taihakerei Durie setting out the radical orientation of Responsibility for water governance developed through law of trusteeship. His proposal is developed in direct reference to the Charter for Responsibilities. Law of public trust in the US - and in Hawaii specifically, is the means by which waterways which were diverted for the sugar industry are being returned to their natural courses with flows which support original indigenous crops. Traditional agriculture was decimated by the industrial water regime. Hawaiian legal counsel, and now academic Kapua Sproat gave a strong lead on this experience to set out prospects of law for public goods, including water and climate. Another law that deserves attention is the US Clean Air Act (1970), a federal law to address emissions of hazardous air pollutants. It requires the Environment Protection Agency to give effect to the maximum achievable reduction of emissions with the use of technology. As Neetu Sharma said, law can be transformative as well as regulatory.





Responsibility was given fresh illumination by Pierre, traversing the philosophic, economic and policy dimensions of responsibility and the interest we have cultivated with our colleagues over many years. Pierre’s presentation began with a challenge to the well-guarded belief in sovereignty with the proposition that the integrity of the biosphere is beyond sovereignty. This is not only nationally challenging - in New Zealand sovereignty has been invoked by the Crown to stifle indigenous sovereign authority and used to further the unjust imposition of British style sovereignty. In an earlier article Sir Taihakurei said

“State responsibility, not the absolute power of that sovereignty implies, is more appropriate for the modern world. Indeed, if it is true that that Māori ceded sovereignty, then I think they did the best thing to give it away. It has simply been the cause of too much strife and war” (Durie 1996. *View Point: Taku Titiro*. He Pukenga Korero).



With attention to water and climate a starting point of policies to address pollution led into a critique of polluter pays policies as a premise for incentivizing business, including agriculture, to manage land and water in accordance with ecological health. In reality, polluter pays policies can simply be seen as a business cost that does not deter carbon emitting industry or other pollution producing systems. In other words, they serve as a right to pollute.

Pierre used the powerful idea that exchanging responsibility for money has to be replaced by recognition of carbon wells, or carbon sinks, which would be recognized as a global commons. As such all individuals and territories would have equal quotas for emissions. Quotas would define the maximum carbon limit and be tradeable.

Water as a Public Trust

The move from ownership to stewardship strikes at the heart of the transformative proposal for water governance. Although the New Zealand government has a theory that 'no-one owns water', here, as in other places, water is managed under regimes of rights through allocated consents. These 'use rights' are effectively a form of ownership, and they do not impose the responsibilities of stewardship. The Durie proposal for trusteeship of water, would be managed through a Commission of representative trustees. It inaugurates a governance regime with responsibility for ecosystem integrity, and works with collaboration and co-benefits. A price for commercial use of water would generate revenue to be directed to land management to reduce contamination generated from agriculture, to restoration and to water conserving infrastructure.

There is more magic to the Durie plan. Remarkably it is designed to reconcile Maori indigenous interests as well as general interests. We don't have borders in New Zealand, but this is a platform for cross-boundary agreement on shared responsibility for water. Māori have had their traditional water-based food sources and authority over water removed during the British takeover, and redress is still being sought. Although there are many proposals to set standards for water, manage allocation, to settle Māori interests, and systems of collaboration for environmental and corporate interests, none are designed to reconcile competing claims through stewardship and responsibility.



Sir Taihakerei Durie

Custodial Responsibilities and Contemporary Governance

A custodial voice is arising from the Pacific region with regards to common goods and climate justice. This is probing the traditions of the oceanic peoples which were founded on a 'sacred balance between humans and environment where the environment was believed to be kin'. This understanding of interdependence given by His Highness Tupua Tamasese, Head of State of Samoa, was further underlined by him: 'it is my contention that in sidelining our indigenous reference we have made it easier to walk the path of environmental destruction'. H.H. Tamasese spoke of bringing the values of forebears to the forefront of our minds, and re-energizing and re-casting them to suit the new global order. Tamasese drew on traditions of engaged citizen participation, the 'Tulafono' process for decision-making. New Zealand has examples of processes of dialogue, or collaboration about to be legalized for fresh water, and Co-Governance arrangements for rivers and National Parks. These can be documented as part of the Waikato Pacific Alliance 'think-tank'.

Climate impacts on Island nations are forcing a re-evaluation of industrial preferences. In a move that turns vulnerability into value, the Small Islands Developing States Conference asserted the Pacific region as being on the frontlines of climate change - because it is clear that resilience can only be achieved where economic development is aligned with environmental protection.

The Pacific is becoming reknown for the blue economy - where we find oceans to be the main sources of food and sustenance and trade and connectivity across large water spaces. The navigational skills of ocean voyaging are being re-activated as a message of sustainability, and just before we met for the Symposium five traditional vessels sailed into Sydney harbour for the World Parks Congress.



Responsible Economic Development

Taholo Kami, Director of IUCN Oceania came to the Symposium after welcoming the vessels at Sydney, so he showed a film of the voyage. Try a few seconds on the Pacific ocean voyage here <http://youtu.be/m6YaQFNKg80> This week the five waka are in Auckland, New Zealand. Taholo travelled via Papua New Guinea where a new framework of Responsible Economic Development is being put in place.

The framework questions the system that has resulted in 'permanent and ongoing damage to the biosystems of planet earth'. 'Having valueable mineral and petroleum resources has meant our country has deferred learning hard lessons. We must redesign our policies around the strategic assets of fisheries, forestry and water, to provide a solution to sustainable food, and water, climate change (carbon sinks), energy and biodiversity

reservoir. This significant \$16 billion economy is embarking on a plan of turning away from short term goals for growth and developing long term growth, equity and sustainability. Responsible management means stemming excessive extraction of gold and copper by foreign companies and turning to responsible use of forests, fisheries coral reefs within critical biological re-generating capacities. PNG has the thrid largest tropical rainforest in the world, being logged by foreign companies, converted into agriculture and destroyed by fires. The turn around is to be achieved by investments to reduce carbon emissions, in resources, environment and people for equity, health, and education benefits. Responsible development is to be supported by governance, legislative and regulatory systems to facilitate transitioning to green development.



Losing and Finding Responsibility

We were treated to a remarkable review of the western legal tradition to discover the persistent thread of the concepts of duty and responsibility in law, and how these were overtaken by trade and capital interests, starting with the East India Company in 1600. The liberative movements which saw the development of private property, individual political representation, self-interest as the core of economic theory, accumulation of capital wealth, and even human rights, consistently privileged freedom over duty. Freedom, in this case meaning freedom from constraint as an incentive to market engagement. Professor Gay Morgan asked ‘ where has the West Gone Wrong’ ? As trade and corporate industry grew from the 1700’s, they gained civil and political rights, but not civil and political responsibilities. Notions of collective duties were dropped and free reign was given to the individualized concept of corporate market capitalism.

Ways Forward

A next step from this symposium, proposed by Taholo is to connect Pacific islands with those causing problems in the Pacific - that is with the Pacific Rim countries - all the way from Chile to China and Indonesia - and we must circle the rim to include Australia and New Zealand. Plans were sketched to host another Symposium in September 2015.

Participants are invited to form a core multi-stakeholder partner group and contribute to a think tank - as part of the International Alliance of Responsibility for Sustainable Societies.



Already Sir Taihakurie has produced two further papers to amplify the responsibility approach. A publication of the Symposium papers has been negotiated, and will be discussed next week.

In the short term we plan to prepare a concept proposal for the climate negotiations. The Pacific situation of extreme exposure to climate impacts must be turned from a position of vulnerability to a strategy of value. Pacific countries are in a position to bring their case of extreme risk to the table of nations to require responses of responsibility. This has the possibility of breaking the stalemate of ‘common and differentiated responsibilities according to capability’ and giving effect to leadership on responsibility.

The water proposal is already being circulated and discussed amongst key stakeholders. A strategy of one-to-one engagement with key stakeholders combined with a series of ‘round tables’ on the water proposal is most effective. For the ‘round-tables’ we will invite commentators from different sectors and political spectra and with varied economic interests. Both of these strategies need to proceed early in 2015 to prepare for a formal legal proposal to the government.



The experience of public trust law in Hawaii opened a way for legal development and regulation. These presentations offer resources for documenting case studies and developing other resources.

The symposium contributed to a Pacific articulation of responsibility in law to strengthen transitions to ‘oeconomy’, or economies of stewardship. The Durie Discussion Paper is a very important opportunity to bring a framework of responsibility into practical effect.

[H.H. Tupua Tamasese, Pierre](#)